



Equality Authority
Submission to the Department of Education and Skills
on the Department's
Discussion Paper on a Regulatory Framework for School
Enrolment

Key points

(1) The Equality Authority welcomes the Department of Education and Skills' initiative to explore the establishment of a regulatory framework for school enrolment. The Equality Authority considers such an initiative to be timely.

(2) As the Department of Education and Skills is aware, while discrimination in access to education is prohibited by the Equal Status Acts, this issue has been a significant source of enforcement activity for the Equality Authority since that legislation first came into force. Significant issues continue to arise on the disability ground and the Traveller community ground, while problems also arise in relation to the race ground, the gender ground and the religion ground.

(3) Research commissioned by the Equality Authority on school admission policies shows that while the admissions policies of most schools did not contain explicit discriminatory provisions on most of the equality grounds, significant problems with the texts of school admission policies were identified in relation to the disability and race grounds. Furthermore, only a minority of schools acknowledged in their admission policy their duties under the equality legislation.

(4) Schools set out criteria concerning qualification for enrolment or requirements for a pupil's enrolment in ways that appeared to have either the purpose or the effect of excluding or limiting the intake of pupils on a number of grounds: religion, race, disability, and gender (other than in single-sex schools) grounds.

The Equality Authority makes the following recommendations:

- (5) Any changes to primary or secondary legislation governing school admissions should seek to ensure that *no* school can engage in discrimination or act in a way that contributes to inequality.**
- (6) The proposed new regulations must explicitly prohibit schools from issuing policies that have discriminatory or potentially discriminatory provisions.**
- (7) The definition of 'characteristic spirit' in the Education Act should be amended to prevent a school from defining its characteristic spirit in a way that enables it to exclude any student on any of the nine grounds.**
- (8) Amended legislation should provide that discriminatory decisions by Section 29 committees, the NEWB, the NCSE, and the VECs in exercising the functions concerning the admission of a student to a school are subject to the provisions of the Equal Status Acts, including the possibility of enforcement where a parent believes that the body concerned has made a decision that is discriminatory on any of the nine grounds.**
- (9) Any new regulation to establish when the Minister may remove control from a school board over admission on foot of concerns expressed by parents must ensure that the experience of parents of students in groups that experience inequality is given particular attention.**
- (10) Any regulation providing for consultation by a school with its local community on enrolment policies and practices must be drafted in a way that ensures that a school Board of Management meaningfully consults with parents across all of the nine grounds, and gives proper weight to the views of those parents.**
- (11) The Equality Authority believes that a provision to allow schools to impose on pupils a duty to respect the ethos of the school should not be introduced.**
- (12) Any provision on a process for determining the boundaries of catchment areas must be assessed against equality considerations. Catchment areas should not be permitted to exclude students from groups such as members of the Traveller community.**

(13) The Equality Authority is of the view that a policy requiring a certain linguistic competence for parents is likely to be in contravention of the Equal Status Acts and the Race Directive.

(14) Any new regulation, the application of the religious ethos exemption in the Equal Status Acts, and any proposed change to existing provisions, must be assessed to ensure

- that it cannot result in a breach of the Race Directive and**
- that it does not contribute to ethnic or racial segregation in schools.**

(15) A standard procedure should be put in place for providing information on enrolment. The Equality Authority believes that the specific details of what any such regulation might contain would need to be equality proofed to ensure that it does not have a disparate impact on any of the groups under the nine grounds.

(16) The Equality Authority recommends that any new regulations state that all of those charged with implementing them are required to ensure that there is no real or perceived bias against any applicant.

(17) The Equality Authority recommends that the drafting of amendments to the primary legislation and of any subsidiary regulations be equality proofed to prevent any adverse impact on any of the groups under the nine equality grounds that experience inequality.

1. Introduction

1. The Equality Authority is an independent statutory body established under the Employment Equality Act 1998 and the Equal Status Act 2000. The Equal Status Acts 2000–2011 prohibit discrimination in service provision across nine equality grounds.
2. The Equal Status Acts contain provisions that apply specifically to educational establishments. The Equal Status Acts specify four areas in which a school must not discriminate:
 - the admission of a student, including the terms or conditions of the admission of a student,
 - the access of a student to a course, facility or benefit provided by the school,
 - any other term or condition of participation in the school, and
 - the expulsion of a student or any other sanction.
3. Discrimination occurs when a student is refused admission to a school
 - because of their membership of a group under any of the nine grounds,
 - because they are associated with somebody (for example, their parent) who is a member of such a group, or
 - because membership of such a group is imputed to them (or the associated person).

The discrimination may be direct or indirect. Indirect discrimination occurs where a provision puts members of a protected group at a particular disadvantage and the provision cannot be objectively justified by a legitimate aim. Where there is a legitimate aim, the means of achieving that aim must be appropriate and necessary. Illegal discrimination includes failing to make reasonable accommodation for a student with a disability. In light of equality case law, it may also consist, in certain contexts, of failing to ensure that a person understands their rights and is provided the opportunity to exercise them.

4. The Race Directive¹ also has relevance. The Directive applies “to all persons, as regards both the public and private sectors, including public bodies, in relation to [...] education”. The scope of the Directive is therefore wider than the scope of Section 7 of the Equal Status Acts, which applies to educational establishments. Discrimination on the ground of religion may constitute indirect race discrimination. It is important to note that the Race Directive does not provide for any exemptions relating to

¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. [Official Journal of the European Communities, Vol. 43, No. L 180, 19 July 2000, pages 22–26.]

religion. The operation of the exemption in the Equal Status Acts on the religion ground concerning the admission of a student to a school must not be done in a way that conflicts with the Race Directive.

2. Discrimination and inequality in school admissions

2.1 Discrimination

5. Educational establishments have been the subject of a high proportion of the Equality Authority's legal casework under the Equal Status Acts. For five of the ten years since the Equal Status Acts came into force, educational establishments have constituted the highest number of the Equality Authority's case files, and educational establishments were the second highest number of the case files for two further years. Although not all of those cases concerned discrimination in admission, the vast bulk of them arose because of problems with enrolment. The continuing high proportion of equality cases shows that there is a serious problem and that regulation of the system of school enrolment needs to be reformed.
6. Many cases that the Equality Authority has supported have been settled, and details of the issues involved have not been made public as part of the settlement. Where disclosure of some information is possible, it is included in the Equality Authority's annual report.
7. In the first year of the Equal Status Act coming into force, a school sought to refuse to admit a Muslim student through the application of a quota. The case was settled before proceeding to a hearing in the Tribunal, and the student was enrolled.
8. Also in the first year, and consistently since then, the Equality Authority was involved in the resolution of a number of disputes involving access by members of the Traveller community to schools. For example, in 2007, sixteen percent of the Equality Authority's case files under the Equal Status Acts concerning educational establishments concerned the Traveller community ground.
9. In 2003, access to a Catholic School was denied to a child who was non-Catholic. Advice was given by the Equality Authority and a successful appeal was made to the school. As a result the child was admitted to the school.
10. A further issue, also identified in the Equality Authority's annual report for 2003, concerns 'multiple discrimination' in access to education for

pupils from the Traveller community who have special educational needs. In that year, the parents of four Traveller children with disabilities contacted the Equality Authority to complain that they had been denied access to a secondary school on the basis of their disability and because of their membership of the Traveller Community. A similar case was taken to the Equality Tribunal which found in 2006 that a primary school had discriminated against and harassed a Traveller mother and victimised her son and failed to provide reasonable accommodation for her son in that he was not prioritised to see an educational psychologist so that educational supports could be put in place.

11. Two cases on which the Equality Authority reported in its annual reports for 2005 and 2007 concerned the way in which schools sought to deal with a student during the teaching of religion. In one case, the school required that the student be removed from the school during religion class. In the other case, the student was required to sit in the corridor while the religion class was being conducted. Both cases were settled following interventions by the Equality Authority.
12. Two cases dealt with by the Equality Authority concerned openly lesbian or gay second-level students who were told by a teacher that their sexual orientation was not acceptable in their school because of the school's religious denomination. (The students decided not to proceed with their cases in light of the likely delays and their desire to focus on their studies and leave the school.)

2.2 Inequality

13. Irish schools are marked by high levels of segregation across a number of the grounds named in the equality legislation, notably gender, disability, ethnicity (including membership of the Traveller community), and religion. The Department of Education and Science's *Audit of School Enrolment Policies by Regional Offices* in 2007 found strong patterns of segregation. For example, 43 of 48 of the geographical clusters contained one or more primary schools in which the percentage of "newcomer" pupils was more than 1.5 times the average enrolment of that group in the relevant cluster. This occurred in all of the 26 clusters for which data is given on the Traveller enrolment, and 45 of the 50 clusters for special educational needs.
14. There have also been situations where the operation of the exemption in the equality legislation concerning the giving of a preference to certain students on the religion ground has led to racial segregation in the schools in some localities. In 2007, the Equality Authority expressed concern at the

developments in Balbriggan and Diswellstown, both in Dublin, where the application of the exemption in the Equal Status Acts by schools led to racial segregation in enrolments in primary schools.

2.3 Research on school admission policies

2.3.1 Outline of the research

15. Because of its continuing concerns regarding instances of discrimination in school enrolment, the Equality Authority commissioned research in 2007 on how well school enrolment policies at second-level reflect the requirements and ambition of the equality legislation. The successful bidder was the Education Department, NUI Maynooth, and the research team was led by Dr Anne Lodge. Participating schools were guaranteed anonymity.
16. A sample of 156 second-level schools participated in the study. The sample was broadly representative of the sector across a number of dimensions of school type, including: management type; single-sex *v.* co-educational; and school size.
17. Each of the nine grounds named in the equality legislation was considered separately for each policy. For each of those grounds, policies were classified into one of three categories:
 - (a) silence on, or absence of any reference to, the particular ground,
 - (b) evidence of an uninclusive approach to an applicant for admission on the particular ground, or
 - (c) evidence of an inclusive approach to an applicant for admission on the particular ground.This classification was used to analyse separately the stated *conditions of admission* in each policy and the *conditions of participation* (i.e. participation in the school after a student is admitted), where these were stated in the admission policies. A school was classified as uninclusive if the researchers' assessment was that one of the following three conditions applied to (that aspect of) the school's published enrolment policy:
 - (a) the enrolment policy appeared not to be compatible with the spirit of the equality legislation, namely was not conducive to the development of an inclusive school; or
 - (b) the enrolment policy appeared to breach the requirements of the equality legislation or other pertinent legislation [i.e., Education Act, Education for Persons with Special Educational Needs Act, or Education (Welfare) Act]; or
 - (c) the enrolment policy appeared not to comply with recommendations contained in any of the policy or support documents issued by the Department of Education and Science or the Equality Authority.

2.3.2 *Main findings*

18. Only one third of school policies made some reference to the equality legislation in their admissions policy. Five percent of the schools were explicitly inclusive of groups across all of the nine grounds in the conditions that they set out for admission to the school.
19. The admissions policies were assessed as being uninclusive in significant numbers on the disability and race grounds. Issues also arose on the gender and religion grounds.
20. A large number of schools made no mention of the race and the sexual orientation grounds, including those schools that did name some of the other grounds under the equality legislation.

2.3.3 *Particular issues in some of the policies*

Religion

21. The researchers classified a small proportion as ‘uninclusive’ on the religion ground – that is, in a way that appeared to discourage or exclude those not of the school’s religion from applying. Criteria that were deemed ‘uninclusive’ on the religion ground included:
 1. stating that there was a requirement to attend religion class;
 2. requiring parents to state if they were not of that religion when making an application;
 3. stating that attendance at religious services was compulsory;
 4. setting a quota for the enrolment of children of the particular denomination of the school; and
 5. requiring parents to apply in writing if they wished their son or daughter not to participate in religious retreats, liturgies, etc., and stating that any alternative arrangements would be at the discretion of the principal.

Race

22. The study found that 13 percent of the schools in the sample had text in their admission policy that excluded potential students on the race ground.
23. Some schools placed conditions on applicants who are from other countries that were not placed on applicants from Ireland. These included
 1. the existence of a guardian or an ‘acceptable person’ in the absence of a person to act *in loco parentis*;
 2. requiring written reports or references from previous schools;

3. the availability of resources to “facilitate” any needs that might arise where the student is not a speaker of English.

One school in the sample appeared to set a quota for the number of overseas students that it was prepared to admit, stating that “a limited number of students” from overseas could be enrolled.

24. More than a third of the schools in the study gave preference to applicants from relatives of past pupils. The researchers identified this as having the potential to act to exclude students on the race ground.

25. The researchers also identified the use of catchment areas as a potential problem for migrants.

Disability

26. On the disability ground, three main types of approach in the admission policies were found to operate to exclude students:

1. resources,
2. student–school mismatch, and
3. health and safety.

27. A large proportion of schools – 42 percent – stated that in their admission policy that they might defer enrolment of a student with a disability until necessary resources had been provided by the Department. A number of schools stated that enrolment would be refused (that is, not just deferred) if the resources of the school did not meet the needs of the student. One school went further and stated that an *application* for enrolment would not be accepted unless the school had the necessary resources. In some cases, deferral was stated to be pending medical or psychological assessment or receipt of a medical or psychological report.

28. A total of 17 percent of schools indicated in their admissions policy that they would consider refusing to enrol a student with a disability because of a mismatch between the educational service delivered by the school and the needs of the student. Some of these schools referred to the aptitude of the student, or stated that the curriculum offered is “quite traditional”, or said that it would be unfair to a student with a disability to enrol them in that school. In some cases, the exclusionary language appeared to be designed to give the school a “fall-back clause” for limited cases where the severity of the disability might be particularly demanding, and was included in the schools’ policies alongside other provisions that indicated a welcome for students with disabilities that were likely to place fewer demands on the school.

Gender

29. A small number of policies stated conditions of participation in school after enrolment that may be discriminatory on the gender ground. This consisted of restrictions, in co-educational schools, of wearing of uniform trousers to certain times of the year and a requirement for female students to wear skirts outside that period.
30. A small number of co-educational schools stated that they had procedures to ensure a particular gender ratio in their enrolment in any year. These consisted of applying a quota (in one case, the quota consisted of setting an upper limit of one-third girls). The researchers evaluated wording of the policies as indicating that these quotas were in place in an effort to ensure equality. However, there is concern that this approach is neither appropriate nor legal. There is no provision in the Equal Status Acts allowing for gender balance in co-educational schools.

Presentation and accessibility of enrolment policies

31. In addition to examining the criteria that apply to a potential student *per se*, the researchers also examined the potential effect of the procedures for enrolling in a school, where these were stated in the enrolment policy supplied to them for the study. Detail on such procedures was found to vary greatly.
32. A little over one-third of the school policies (36 percent) indicated that the school uses feeder schools as the primary conduit of information on enrolment. This can limit access to information on enrolment for some families.
33. A small number of schools charge a fee in order to obtain a copy of the enrolment policy.
34. A small number of schools provide the enrolment policy only in Irish.
35. A small number of schools in the VEC and community sector stated in their enrolment policy that the enrolment of refugees or asylum seekers would be in accordance with IVEA policy and advice, but did not set out what that policy is. Further, none of these policies gave information on where that IVEA policy could be obtained or consulted.
36. A number of school admission policies contained text that set out legal exemptions that the school may be allowed to invoke, using legalistic language, without explaining how or when the school would apply this exemption.

37. It is the view of the Equality Authority that the research on admissions policies that it commissioned has confirmed the existence of potentially discriminatory practices and attitudes in schools, particularly for members of the Traveller community, migrant communities, and children with disabilities. It confirms the timeliness of action by the Department of Education and Skills to address this issue.

3. Issues Identified in the Discussion Paper

38. The discussion paper states in a number of places that there is a particular concern where a pupil does not secure any place, and the paper indicates that this is of greater concern than situations where a pupil does not get access to their (parents') school of first choice. While understanding constraints on resources, the Equality Authority considers that the Department of Education and Skills' regulatory framework should maintain the standard that pupils should be enabled to have access to their school of first choice unless there are explicit non-discriminatory reasons why this is not possible.

39. **Any changes to primary or secondary legislation governing school admissions should seek to ensure that *no* school can engage in discrimination or act in a way that contributes to inequality**, including a set of practices across a number of schools that results in segregation.

40. In particular, if a statutory instrument containing regulations is introduced, those **new regulations must explicitly prohibit schools from issuing policies that have discriminatory or potentially discriminatory provisions**.

41. The definition of 'characteristic spirit' in section 15(2)(b) of the Education Act refers to the "cultural, educational, moral, religious, social, linguistic and spiritual values and tradition" of the patron. Although the precise definition is rarely explicitly examined, most of the public debate about the implications of a school's characteristic spirit has in practice centred on the religious and spiritual dimensions of the definition. However, the evidence from the Equality Authority's research on admissions policies suggests that some schools draw on the reference to the "educational ... tradition" as a basis for excluding pupils with learning disabilities. **The definition of 'characteristic spirit' in the Education Act should be amended to prevent a school from defining its characteristic spirit in a way that enables it to exclude any student on any of the nine grounds.**

42. The discussion paper identifies a number of state bodies that have roles in how students come to be enrolled in particular schools, although this arises for only a very small percentage of students who enrol each year. These include the Section 29 committees, the NEWB, the NCSE, and the VECs. The proposed amendment to the education legislation should be used to place on all of those bodies, and any new institutions established or assigned a role, an obligation to implement their role in a way that does not discriminate under any of the nine grounds. **Amended legislation should provide that discriminatory decisions by Section 29 committees, the NEWB, the NCSE, and the VECs in exercising the functions concerning the admission of a student to a school are subject to the provisions of the Equal Status Acts, including the possibility of enforcement where a parent believes that the body concerned has made a decision that is discriminatory on any of the nine grounds.**
43. The Discussion Paper, in section 2.1.4, suggests that a possible “trigger” for activating the ministerial power of removing enrolment from a Board’s control where there is evidence of “significant levels of parental concern”. **Any new regulation to establish when the Minister may remove control from a school board over admission on foot of concerns expressed by parents must ensure that the experience of parents of students in groups that experience inequality is given particular attention.** For example, the number of parents in a school’s catchment area who are Travellers may be a small minority of the total set of parents, but if a proportion of them identify a problem with that school, then the regulation should provide that their concerns can activate the trigger.
44. The Discussion Paper, in section 3.2.1, identifies as an option that school Boards of Management be required to undertake consultation with their local school community when drafting or changing their admissions policy. The Equality Authority welcomes the principle underlying this option. However, **any regulation providing for consultation by a school with its local community on enrolment policies and practices must be drafted in a way that ensures that a school Board of Management meaningfully consults with parents across all of the nine grounds, and gives proper weight to the views of those parents.** In particular, consultation must not consist of selected parents or families, and must not be restricted to a “convenience sample” of groups across the nine grounds.
45. In section 3.2.2 of the Discussion Paper, the possibility is raised that regulations might enable a school to require a pupil to “respect the ethos of the school”, and the distinction is drawn between this concept and requiring a pupil to “actively support” the ethos of the school. The

Equality Authority has a number of concerns with this aspect of the Discussion Paper. Under the Employment Equality Acts (section 37), a school may take “action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos”.

- The standard of preventing a person from undermining the ethos of a school is less demanding than a new standard of “respecting the ethos” would be. The former entails a negative duty while the second would consist of a positive duty.
- It would be inappropriate to demand of students – most of whom have little or no choice about which school they attend – a higher standard *vis-à-vis* the school’s ethos than is demanded of the adults who constitute the staff.
- The proposed new ethos standard for students would apply to all aspects of the ethos or characteristic spirit of the school, but the standard for staff under the Employment Equality Acts addresses only one component, the religious component.

46. By way of illustration, three practical examples of where the suggested provision could lead to difficulties would include concerns that some schools might try to use such a provision

- to require a student to attend religious ceremonies that are not in keeping with their own beliefs, on the basis that not doing so would be disrespectful to the ethos of the school,
- to prevent a student not of the faith of the school from explaining the differences between their beliefs and those of denomination of the school (in that context, it is important to note that some religions view it as wrong and disrespectful for people to change their faith), or
- to prevent or discipline a student for coming out as lesbian, gay or bisexual or to have a same-sex boyfriend or girlfriend on the basis that homosexuality is not acceptable to the faith of the school.

The Equality Authority believes that a provision to allow schools to impose on pupils a duty to respect the ethos of the school should not be introduced.

47. One of the issues considered in section 3.2.5 of the Discussion Paper is the question of geographical boundaries. One of the options identified is to “out-source” the drawing of boundaries for schools to church authorities. **Any provision on a process for determining the boundaries of catchment areas must be assessed against equality considerations. Catchment areas should not be permitted to exclude students from groups such as members of the Traveller community.** For example, a boundary can – inadvertently or with that purpose in mind – be drawn in a way that

places an estate with a high proportion of Travellers outside the catchment area of a school.

48. A further issue that is referred to in section 3.2.5 of the Discussion Paper is “language policy”. The Discussion Paper states that a policy which uses the linguistic competence of the parents puts applicants at a disadvantage. **The Equality Authority is of the view that a policy requiring a certain linguistic competence for parents is likely to be in contravention of the Equal Status Acts and the Race Directive.**

49. The same section of the Discussion Paper, under the heading “Faith”, says that it is not intended to change the existing provision where a denominational school may give priority to children of a particular faith. In recent years there have been cases where the application of this rule resulted in segregation of pupils on racial grounds. Although cases were not taken at that time, it is likely that the application of such a rule would be in breach of the Race Directive, and the provision needs to be re-examined. **Any new regulation, the application of the religious ethos exemption in the Equal Status Acts, and any proposed change to existing provisions, must be assessed to ensure**

- **that it cannot result in a breach of the Race Directive and**
- **that it does not contribute to ethnic or racial segregation in schools.**

50. The Equality Authority welcomes the proposal in section 3.2.5 of the Discussion Paper that a pupil’s ability should not be part of deciding whether an applicant will be offered a place.

51. The Equality Authority welcomes the suggestion in section 3.2.5 that regulations would prohibit the exclusion of applicants who did not attend an interview or school open day.

52. The Equality Authority believes that the use of random selection which is identified in section 3.2.5 of the Discussion Paper could be a useful mechanism for reducing inequality in school enrolments.

53. The Discussion Paper in section 3.3.1 briefly discusses the possibility of regulating the times at which a school may open or begin to accept applications. The Equality Authority recommends that this be given serious consideration, because setting an early deadline for receipt of applications can have the effect of or be used to prevent recent migrants to an area from having equal access to the application process.

54. A second issue identified in section 3.3.1 of the Discussion Paper is the possibility of regulating the way in which schools notify potential applicants of the school's enrolment process. As is noted above, the research commissioned by the Equality Authority on enrolment policies found that the mechanism for publishing the enrolment policy and for making the application materials available could itself disadvantage some groups under the nine equality grounds. Therefore, **a standard procedure should be put in place for providing the information on enrolment. The Equality Authority believes that the specific details of what any such regulation might contain would need to be equality proofed to ensure that it does not have a disparate impact on any of the groups under the nine grounds.**
55. The Equality Authority welcomes the objective set out in Section 3.3.3 of the Discussion paper of ensuring that there is no real or perceived bias against any applicant. **The Equality Authority recommends that any new regulations state that all of those charged with implementing them are required to ensure that there is no real or perceived bias against any applicant.**
56. The Equality Authority notes that Section 3.3.5 of the Discussion Paper states that the only external appeals process is based on Section 29 of the Education Act. This is incorrect, as a decision to refuse admission to a school can be appealed under the Equal Status Acts.
57. **The Equality Authority recommends that the drafting of amendments to the primary legislation and of any subsidiary regulations be equality proofed to prevent any adverse impact on any of the groups under the nine equality grounds that experience inequality.** If it is to be useful, equality proofing must be started early in the drafting process. The Equality Authority stands ready to assist the Department with equality proofing both amendments to the primary legislation and any proposed regulations.

The Equality Authority
3 November 2011