

# Reforming the Education for Persons with Special Educational Needs Act 2004 - AsIAM's Submission to the Joint Committee on Education

## Foreword

Dear Reader,

AsIAM welcomes the opportunity to engage with the Oireachtas Joint Committee on Education on reforming the Education of Persons with Special Educational Needs (EPSEN) Act, 2004. The right to an appropriate education is a fundamental one enshrined within *Bunreacht na hÉireann*<sup>1</sup>. In the context of international law, it is also an obligation of the State under the UN Convention on the Rights of the Child (Arts.28 – 29)<sup>2</sup> and the UN Convention on the Rights of Persons with Disabilities (Art.24)<sup>3</sup>. For the vast majority of children and families, access to an appropriate school place, with suitably qualified and trained staff, an accessible curriculum and all relevant supports is something which can be taken for granted.

For autistic pupils and our families, simply securing a suitable school place too often requires legal action or exhaustive advocacy work. Indeed, finding such a place is usually the first of many battles – securing required SNA or SET support, accessing appropriately qualified teachers, having your needs met – understood within the context of the school community, these are just some of the challenges which follow. At the root of these problems is so often under-resourcing, a lack of rights and appeals mechanisms and insufficient training and support for schools. The EPSEN Act was intended to address several of these issues. Its non-implementation has

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<sup>1</sup> *Bunreacht na hÉireann (Constitution of Ireland, enacted 1937)*. Article 42.2 (on Education).

<sup>2</sup> UN General Assembly. (1989). *Convention on the Rights of the Child: Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990, in accordance with article 49*. Online. Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>3</sup> UN General Assembly. (2007). *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, A/RES/61/106*. Online. Available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-24-education.html>

meant a total lack of consistency in the experience of autistic pupils in schools across the country.

Significant progress around integration has been made in recent years. It is not too long ago that the vast majority of autistic people were educated in special settings or had to take legal action to realise their right to an appropriate education. However, we cannot confuse integration with *inclusion*. We will not have achieved a truly inclusive education system until every child has, by right, access to an appropriate school place where they can access the support they need and meaningfully engage in learning. We remain a long way from that point.

AsIAM believes it is vital that the Department of Education takes a rights-based approach to educational supports' provision for autistic pupils and other young people with additional needs. It is clear that the non-statutory approach to providing supports, which the Department presently advocates, has left thousands without the support they need, and has forced their families into adversarial interactions with schools and SENOs. We therefore believe that it is crucial that the EPSEN Act, alongside the other relevant disability legislation<sup>4</sup>, is reviewed, updated and commenced without delay to ensure that every child receives the right support.

In 2019, AsIAM established a Working Group with a range of members from across the education system, including representatives of other disability organisations, teachers unions and academia. The aim of this process was to recognise that in the 16 year period since the passage of the EPSEN Act, our understanding of disability and the needs of students has grown and our systems have changed. We wanted to understand the legal, political and research based arguments for the commencement of the Act and how progress could be made towards an agreed understanding of how EPSEN could best be implemented today.

At the conclusion of this process, we remain convinced that the only way to ensure children have the support they need and that schools are appropriately resourced and supported is to put in place the statutory supports and mechanism promised by EPSEN. We acknowledge some aspects of the Act are not in keeping with the

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<sup>4</sup> Specifically, the Disability Act 2005 and the Education (Admission to Schools) Act 2018.

rights-based model of disability and need to be updated and also believe there are a number of powers and provisions which could be implemented without delay.

## Executive Summary

- **A full legislative review into the Education for Persons with Special Educational Needs Act 2004 must take place as a matter of urgency, with an expressed view to:**
  - Update the Act's provisions (those implemented and those not) to better reflect contemporary understandings of disability and best practices for inclusive education, as outlined in international human rights instruments such as the UNCRPD.
  - Investigate the underlying rationale as to why outstanding provisions have not yet been implemented.
  - Establish a working roadmap to fully implement and update the EPSEN Act, with appropriate resourcing and costings.

## The Political and Legal Context

Special education's reform has been promised by various political parties during consecutive general elections since 2007. Expressed pledges to fully implement the EPSEN Act have often constituted these plans, including promises to deliver the NCSE's Interim Report's recommendations<sup>5</sup> on a resourced and statutory basis. At no point, however, in the past fourteen years has any Programme for Government made an explicit commitment to implement or even review the EPSEN Act's fitness for purpose.

AsIAM appreciates that circumstances are subject to change and that priorities must be assessed and reassessed according to the day's most pressing needs. The Great Recession coincided in the wake of the Interim Report's publication; since Budget 2009, any plans to extend implementing EPSEN and the accompanying Disability

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<sup>5</sup> Specifically, AsIAM notes that Individual Education Plans, Special Appeals Board and adequate Initial Teacher Education on disability and inclusion are required to be placed at statutory level.

Act 2005 had been deferred indefinitely by the then Fianna Fáil–Green Party Government<sup>6</sup>. Despite changes in successive governments since then however, there has been little indication that the necessary political will exists to resume EPSEN's implementation amongst any of the larger Dáil parties.

Education featured as a core component of AsIAM's #HealthierHappierLonger campaign for the 2020 General Election. We lobbied right across the political divide to secure solid commitments to fully implement EPSEN, *inter alia*, in every party's manifestos. Disappointingly, only one party of the nine elected to the 33rd Dáil made a direct promise to that effect as part of their platform<sup>7</sup>, whereas others made use of aspirational language to ensure special educational supports were put in place; or in some cases, no mention of the Act featured anywhere at all in their respective manifestos<sup>8</sup>. There is no need to labour the point on how poor a signal this sent to autistic schoolchildren, their families, and to the broader disability community around Ireland. AsIAM would nevertheless be remiss if we did not note how significant a setback it was that not even a legislative review into the Act was included in the agreed Programme for Government - a Cabinet, we further note, is composed of no fewer than four former teachers, including the Taoiseach himself.

As COVID-19's outbreak has unfolded, few sectors have been hit as hard as our education system. We are conscious of the pressure that the Department of Education has suddenly found itself under, and we applaud the herculean efforts individual schools and teachers have made to continue supporting their autistic pupils. These children's experiences have unfortunately tended to be the exception rather than the rule. Significant communication lapses between the Department and schools across the country have occurred since the abrupt decision was made to close schools last March, isolating thousands of autistic pupils and their families without support. Even upon returning to school, many schoolchildren from our community experienced substantial challenges transitioning back into regular

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<sup>6</sup> National Council on Special Education. (2015). *A Study on the Prevalence of Special Educational Needs*. Pg.25.

<sup>7</sup> Social Democrats. (2020). *Invest in Better: General Election Manifesto 2020*. Pg.28.

<sup>8</sup> AsIAM. (2020). 'General Election Manifesto Review.' Online. Available at: <https://asiam.ie/general-election-manifestos-review/>

routines<sup>9</sup>. This lack of coordinated planning speaks to further areas of difficulty, several of which are directly tied to expressed provisions included within the EPSEN Act, namely:

- Lack of statutory footing around Individual Education Plans (s.), complicating their resumption and review between families and teachers.
- Absence of a legal entitlement to a full educational assessment for all school pupils with additional needs (s.).
- Inaction over establishing an independent and resourced Special Appeals Board to arbitrate disputes over IEPs (s.).

AsIAM believes we have a unique opportunity before us to restart the conversations around providing inclusive education in our education system. It is our ambition that the Education Committee will initiate a full legislative review of the EPSEN Act, taking into particular account of the sections not yet enacted, and how the Act's broader ethos corresponds to contemporary human rights instruments, namely the United Nations Convention on the Rights of Persons with Disabilities.

## The International Context

Understandings of the rights of children and persons with disabilities has deepened over the past twenty years. Inclusion has assumed an increasingly greater focus as these rights' practical dividend, particularly in the educational sphere. As such, this spirit of inclusivity, to proactively facilitate the meaningful participation of society's most vulnerable and marginalised cohorts has been translated into robust statutory frameworks at both a national and international level. Chief among these, for our analysis' purpose, include the United Nations Convention on the Rights of the Child (UNCRC) and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In the context of autistic schoolchildren in Ireland, these two instruments play a seminal role in informing their rights to accessing an inclusive education; with Article 24 of the UNCRPD explicitly obligating State parties to provide supports to that end within a mainstream setting and to facilitate an

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<sup>9</sup> AsIAM, Down Syndrome Ireland and Inclusion Ireland. (2020). *Educational Supports and the Re-Opening of Schools: A Report by AsIAM, Down Syndrome Ireland and Inclusion Ireland on Educational Supports on the Return to Schools during COVID-19*. Pgs.12-13

“effective education” at that. Indeed, as Quinlivan observes (2020, pg.6), Article 24 represents the strongest commitment to inclusive education in international law.

The EPSEN Act is a landmark legislative piece which expressly recognises the need to educate children within additional needs insofar as possible alongside their neurotypical peers (s.2-3). Its long-standing non-implementation across several key grounds however is a source of acute conflict with the CRPD’s provisions. In her analysis of the existing framework around international disability and education law, Dr Shivaun Quinlivan outlines three areas of note in this regard:

- **The right to an education understood as the right to an inclusive education system.**
- **A general prohibition on excluding people on the “basis of disability” from an inclusive education system, both primary and secondary.**
- **A general requirement to provide reasonable accommodation.**

AsIAM believes that special schools and special classes have a crucial role to play to these effects in Ireland’s education system. We have articulated as much in a detailed submission to both the NCSE and the Department of Education<sup>10</sup>. Going forward, AsIAM would urge that this be considered during any legislative review undertaken to update and fully implement the EPSEN Act as a fit-for-purpose statutory instrument.

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<sup>10</sup> AsIAM. (2020). *Inclusion in our Special Classes and Special Schools: A Submission to the National Council of Special Education*.

## **AsIAM Policy Advisory Group on Reforming the EPSEN Act 2004 Membership**

Colette Kelleher - Chair and Co-Facilitator

### **AsIAM**

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Hannah O'Dwyer - Education and Training Officer

Adrian Carroll - Accessibility and Training Officer

### **Joint Managerial Body of Secondary Schools Ireland (JMB)**

Michael Hall - Principal of Sligo Grammar School

### **Inclusion Ireland**

Mark O'Connor - Community Engagement Manager

### **Irish National Teachers' Organisation**

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### **Teachers' Union of Ireland**

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