

# Exceptional Ability and the Law

## The legal framework for gifted education in Ireland

This article examines the needs of students with exceptional ability in Ireland, and the legal rights and supports available to them.

### Introduction

The Irish Constitution promises that all children will receive a 'certain minimum education'.<sup>1</sup> This standard of education is not defined, and it remains unclear whether it is an objective standard or one tailored to a child's ability.

There has been significant judicial consideration of the meaning of the term in cases where parents of children with disabilities have sought to compel the State to provide an appropriate education for their child, but there is a dearth of comments where the learner has exceptional ability.

In *O'Donoghue v Minister for Health*, the Minister argued that a child was ineducable by reason of his disabilities.<sup>2</sup> O'Hanlon J opined that Article 42 constitutes an obligation to:

*provide for free, basic, elementary instruction of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capabilities, physical, mental and moral, however limited those capabilities may be.*

O'Hanlon J echoed the opinion of O'Dálaigh J in one of Ireland's most important constitutional cases, *Ryan v Attorney General*,<sup>3</sup> that the State's duty to provide for the education of children is broader than the academic basics. He stated that 'education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral'. This intimates that greater ability should also be nourished and encouraged.

### Differentiation, acceleration, and enrichment

The question remains how such ability should be nourished. Research shows that exceptionally able children may benefit from a number



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of educational approaches, including differentiation, acceleration, and enrichment.

Brennan (2017) describes differentiation as being difference in content, process, or product, depending on the child's readiness, learning profile, or interests. Ireland has no formal differentiation of learning for exceptionally able children in the Irish school system, and differentiation requires much planning by educators, with more support needed for teachers where differentiation is used (Travers et al., 2010). This can be an impossible task for teachers in primary schools, where the average class size is 25 students and one fifth of teachers teach more than 30 students (INTO, 2020).

*Acceleration* is a term used to describe the practice of grouping learners by ability rather than age (Benbow, 1998). It may take the form of subject acceleration, skipping of a school year, early entry, telescoping (where students complete two years of school in one year), or radical acceleration (skipping a number of school years) (Bailey et al., 2004).

Acceleration is not widely used in Ireland, and the Department of Education does not provide any framework for it. This may be explained by the view that placing a child in a class of older children may be socially or emotionally damaging where a child's emotional development is behind their intellectual development (LaChance, 2016). McGrath (2017) opines that acceleration could be used more widely in Ireland to allow primary children to advance their studies in particular subjects while having the socio-emotional benefits of being with their classmates for other subjects and break times.

Dublin City University (DCU) runs an Early University Entrance programme whereby Transition Year students attend university-level classes for one day per week. Studies show that it has led to more independence in learning and greater coping skills (Ledwith, 2013). This might not be regarded as true acceleration, though, as there are no means for continued study at university level after the students have completed the module.

In order to remain challenged, exceptionally able students must be given access to an appropriate volume of knowledge, the opportunity to exercise self-directed learning, and the chance to learn at a faster pace (Feldhusen & Sokol, 1982). Enrichment is one way to achieve this. Enrichment is defined as providing exploratory and in-depth activities for exceptionally able learners to encourage the development of higher-level thinking skills (Renzulli & Reis, 1997).

Enrichment can be achieved in after-school programmes, clubs, and the Centre for Talented Youth (CTYI) in DCU. CTYI provides enrichment classes to primary students in Saturday classes and to secondary students in summer camps. The students are given the opportunity to study non-curricular courses such as neuroscience, IT, zoology, and medicine. The outcomes are overwhelmingly positive for the young people who have attended (Cross, 2016).

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Enrichment is the focus of Transition Year, where schools develop curriculums of work experience, career shadowing, guest speakers, community service, volunteering, project-based learning, competitions, and introduction modules to non-examinable and vocational subjects (NCCA, 2017). This opportunity is of benefit to all students, and school competitions provide opportunities for able students to really excel.

While some supports exist and work very well for those who have access, adequate supports are not available on a formal footing and are not available to all. The judicial comments in Ryan and O'Donoghue may bolster a case that exceptionally able children are entitled to greater supports in the education system.

### Allocation of resources

Ireland's separation-of-powers doctrine prevents the courts from making a mandatory order directing the executive on how to allocate finances. This was confirmed in an appeal to the Supreme Court of a High Court order which had directed resources to be allocated to provide for the education of a child with a disability.<sup>4</sup> Keane CJ held that:

*I am satisfied that the granting of an order of this nature is inconsistent with the distribution of powers between the legislative, executive and judicial arms of government mandated by the Constitution. It follows that, as a matter of principle, it should not have been granted by the trial judge, however much one may sympathise with his obvious concern and exasperation at the manner in which this problem had been addressed at the legislative and executive level. It is of fundamental importance that each of the organs of government should not only carry out the duties imposed on it by the Constitution but should recognise . . . the boundaries within which they are confined in carrying out their functions.<sup>5</sup>*

While the courts may declare a right in respect of the education of particular children, the powers do not stretch to the allocation of resources to enable that right for all children.

Irish legislation takes an interesting approach to gifted children, as does the execution of the legislation. The Education Act 1998, as amended, says that the first function of schools is to 'provide education to students which is appropriate to their abilities and needs and [to identify and provide for] the educational needs of all students, including those with a disability or other special educational needs'.<sup>6</sup> The 1998 Act defines special educational needs as 'the educational needs of students who have a disability and the educational needs of exceptionally able students'.<sup>7</sup> Section 7 says there must be made available 'a level and quality of education appropriate to meeting the needs and abilities' of each student.<sup>8</sup>

These legislative provisions at first glance appear to provide hope to parents who wish to ensure their child is supported in their ability. However, no substantial rights are set on in respect of identification of exceptional

ability, additional supports and resources (in particular in cases of dual exceptionality), or differing education frameworks.

Resources are limited in the education sector, and a view prevails that those resources are more fairly allocated to children who cannot achieve the basics without support than to those with exceptional abilities (Cross et al., 2018). It appears that this view has influenced the decision to specialise educational needs differently in the Education for Persons with Special Educational Needs Act 2004, which is the legislation that creates the substantive rights. It defines special educational needs as:

*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.<sup>9</sup>*

The definition excludes children with exceptional abilities. It fails to recognise that giftedness is neurodiversity requiring additional support.

## Outcomes

The National Council for Special Education recognises that exceptionally able children may be insufficiently challenged by the schoolwork provided in a regular classroom, which can cause boredom and frustration at school. It notes that prolonged boredom may lead to disengagement, behavioural issues, and underachievement (NCSE, 2009). Without an appropriate education, some children may never learn the higher-order skills required for mastery of more challenging topics (Adams, 2015). These children may not only fail to achieve their potential but may also underperform compared to their peers.

The Constitution, the Courts, and the legislation recognise that all children should be offered an education to meet their ability and challenge them to meet their potential. The main challenge for parents and educators to support higher-ability children is the lack of substantive rights for these children and consequently finding the necessary resources in an already stretched education system.

 **The Centre for Talented Youth (CTYI) provides enrichment classes to primary students in Saturday classes and to secondary students in summer camps.**

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## ENDNOTES

1. Constitution of Ireland, Article 42.2.
  2. *O'Donoghue v Minister for Health* [1996] IR 20.
  3. *Ryan v Attorney General* [1965] IR 294.
  4. *TD (a minor suing by his mother and next friend M.D.) and others v the Minister for Education, Ireland, The Attorney General and the Eastern Health Board, and by order, The Minister for Health and Children* [2001] 4 IR 259.
  5. *TD (a minor suing by his mother and next friend M.D.) and others v the Minister for Education, Ireland, The Attorney General and the Eastern Health Board, and by order, The Minister for Health and Children* [2001] 4 IR 259 at 287.
  6. Section 9(a), Education Act 1998, as amended.
  7. Section 2, Education Act 1998, as amended.
  8. Section 7, Education Act 1998, as amended.
  9. Section 1, Education for Persons with Special Educational Needs Act 2004.
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