

Atheist Ireland

Letter and Briefing Document for TDs and Senators



21 July 2021

Re: Education (Student and Parent Charter) Bill 2019 and the Constitutional right to ‘not attend’ religious instruction in publicly-funded schools

Dear TD/Senator,

The Education (Student and Parent Charter) Bill 2019 is making its way through the Oireachtas. There are no guidelines in the Bill that would give practical application to the Fundamental Constitutional Right under Article 44.2.4 to ‘not attend’ religious instruction in publicly funded schools.

In the Campaign to Separate Church and State case 1998 (Supreme Court), Justice Barrington stated that:

“These references appear to me to establish two facts. First the Constitution does not contemplate that the payment of monies to a denominational school for educational purposes is an “endowment” of religion within the meaning of Article 44 S.2 s.s.2 of the Constitution. Secondly, the Constitution contemplated that if a school was in receipt of public funds any child, no matter what his religion, would be entitled to attend it. But such a child was to have the right not to attend any course of religious instruction at the school.”
(page 24 Supreme Court Campaign case 1998)

As the legal opinion which we have previously circulated makes clear, the Constitutional right to ‘not attend’ religious instruction means the right to physically not be present in the classroom. It also encompasses the right at a minimum to be supervised outside the classroom, with a decent legal argument on the grounds of non-discrimination to be given an alternative subject.

Atheist Ireland has presented the Minister with evidence that the right to 'not attend' religious instruction is not being implemented by schools (our legal opinion on the Constitutional Right and our analysis of Admission Policies).

The Minister refuses to address this issue because the Minister claims it is up to each school how they implement the right. This argument may have some validity if the right was being implemented, and there was a dispute over how it was being implemented. However the problem is not how it is implemented, but the fact that it is not being implemented.

The recent Court of Appeal judgment in the case *Burke v Minister for Education* (March 2021) has added more detail to the duty of the State to vindicate this right. In that case the Minister had argued for a limited view of the duties imposed on the State in Article 42 but the Court judgment concluded that:

“190. We consider that the structure of the Constitution, including the fact that Article 41 relating to the family is immediately followed by Article 42 relating to education, together with the express wording of those Articles, place the family at the heart of the provision of education. Parental duty to provide for education is paramount and parental choice in how that is provided is guaranteed. Furthermore, the right to education and the right of a child to realise his or her full potential, has been recognised as part of the natural rights guaranteed by Article 40.3. The State, pursuant to Article 41.1.2, also guarantees to protect the family in its constitution and authority.”

“191 This Court considers that the case law demonstrates that the relationship between parents, the State and the child as envisaged by Articles 40, 41 and 42, is a trifecta not just of the participants but of the rules under which constitutional engagement on education must take place; namely rights, duties and powers. It is only through understanding the interwoven nature of those relationships, that clarity can be brought to the complex constitutional provisions on education....”

The Supreme Court (Campaign to Separate Church and State 1998) has said that Article 42 (on education, which includes the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children) must be read in conjunction with Article 44.2.4 (the right to not attend religious instruction in publicly funded schools). There is no valid Constitutional reason for the Minister to refuse to vindicate the right to not attend religious instruction.

This is not an issue about balancing rights, as the Constitution envisages minorities not attending religious instruction without that interfering with the Constitutional rights of religious bodies, or parents and children with specific religious convictions. The purpose of Article 44.2.4 is to protect the rights of minorities in publicly funded schools.

Please amend this Bill, or another opportunity will be lost for the State to vindicate and protect the Constitutional right of minorities in publicly funded schools, and to stop discriminating against minorities on the grounds of religion.

Your sincerely,

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Part 1 – Overview of the Right to ‘Not Attend’

1.1 Article 44.2.4 of the Constitution

There is direct authority derived from the Constitution for the right to ‘not attend’ religious instruction in publicly funded schools. Article 44.2.4 states that:

“Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.”

This Article places three Constitutional Conditions to the funding of schools:

- (a) The State shall not discriminate between schools under the management of different religious denominations,
- (b) All children have a right to attend a school receiving public money, and
- (c) All children have a right to ‘not attend’ religious instruction.

In the Campaign to Separate Church and State case 1998 (Supreme Court), Justice Barrington stated that:

“These references appear to me to establish two facts. First the Constitution does not contemplate that the payment of monies to a denominational school for educational purposes is an “endowment” of religion within the meaning of Article 44 S.2 s.s.2 of the Constitution. Secondly, the Constitution contemplated that if a school was in receipt of public funds any child, no matter what his religion, would be entitled to attend it. But such a child was to have the right not to attend any course of religious instruction at the school.” (page 24 Supreme Court Campaign case 1998)

1.2 Relationship of Article 44.2.4 to other Articles

The right to ‘not attend’ religious instruction under Article 44.2.4 is a Fundamental/Personal Constitutional Right. It is a subsection of Article 44.2, which also includes 44.2.1 (the right to freedom of conscience), and 44.2.3 (the duty of the State to not discriminate on the ground of religious profession, belief or status.)

The Supreme Court (Campaign to Separate Church and State 1998) has linked Article 44.2.4 (the right to not attend religious instruction) with Article 42.1 (the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children). They stated that:

“In other words the Constitution contemplates children receiving religious education in schools recognised or established by the State but in accordance with the wishes of the parents. It is in this context that one must read Article 44.2.4 which prescribes that....” (pages 25, 26)

The Irish courts have recognised that philosophical convictions are protected by Article 44.2.1 (freedom of conscience) and Article 42.1 (the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.)

Article 44.2.4 (the right to not attend religious instruction) is not a standalone article to be viewed in isolation from other Fundamental Rights and the substance of Article 44.2.1 (freedom of conscience). The courts have also linked Article 44.2.4 to other Fundamental Rights such as Article 40 (personal rights), 41 (the family), and 42 (education), as well as 44 (religion).

In particular the courts have linked Article 42 (the rights of parents) to Article 40.3.1 (the duty of the state to respect, and, as far as practicable, by its laws to defend and vindicate the Personal rights of the citizen) and Article 41.1 (The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.)

1.3 The Duty of the State to Vindicate the Right

The Constitution envisages students attending publicly funded schools while having a right to 'not attend' religious instruction. Every word in the Constitution has meaning and Article 44.2.4 does not state that students need 'not participate' in religious instruction. It clearly states 'without attending religious instruction'.

The failure of the State to put in place statutory guidelines and vindicate this right has impacted upon Constitutional rights and put minorities at a significant disadvantage. The right to 'not attend' is given explicit constitutional recognition, but is a theoretical illusion as no practical application is given to it on the ground as schools will not provide supervision outside the religious instruction class or offer another subject.

It is the constitutional duty of the State to put in place legislation to ensure that students do not attend religious instruction if that is against the conscience of their parents (Article 44.2.4). This is a fundamental personal right and it is the duty of the state to vindicate that right.

The State recognises that this is a Constitutional duty because the right to not attend religious instruction is reflected in Section 30.2(e) of the Education Act 1998.

In addition, Section 62.7(n) of the Education (Admission to Schools) Act 2018 obliges schools to put in their Admission Policies the arrangements for those who exercise their right to not attend religious instruction. Schools have simply failed to do this and the Minister has done nothing about it.

1.4 Evidence that the State is not Vindicating the Right

Atheist Ireland has presented the Minister with evidence that the right to 'not attend' religious instruction is not being implemented by schools (our legal opinion on the Constitutional Right and our analysis of Admission Policies).

The Minister refuses to address this issue because the Minister claims it is up to each school how they implement the right. This argument may have some validity if the right was being implemented, and there was a dispute over how it was being implemented. However the problem is not how it is implemented, but the fact that it is not being implemented.

Some schools claim that they are not obliged to supervise students outside the religious instruction class, and also that they have not been given funds by the Department of Education to do so. Other schools simply refuse to recognise that there is a right to not attend or claim that the course is religious education not religious instruction. But it is a condition of these schools receiving any state funding that students have the right to 'not attend' religious instruction.

In order for the Minister to comply with her constitutional duty, she should issue statutory guidelines on how this right should be implemented. Those Guidelines should reflect the Constitutional position in relation to the rights of parents to ensure that their children do 'not attend' religious instruction in publicly funded schools.

The Education (Student and Parent Charter) Bill 2019 could be a vehicle for vindicating the Constitutional rights of minorities to 'not attend' religious instruction in publicly funded schools.

1.5 The Court of Appeal judgment in the Burke Case

In the recent *Burke v Minister for Education* case in March this year the Court of Appeal stated:

“We consider that the declaratory relief granted by the High Court in order to vindicate the respondents’ constitutional rights went no further than many past decisions of the courts which have had costs implications when orders have been given in order to protect constitutional rights.”

The above was in relation to an administrative decision of the Department of Education. The fact that the right to ‘not attend’ religious instruction has direct constitutional authority and is a condition of state funding would carry more weight in the courts.

Regardless of the fact that the State provides ‘for’ education under Article 42.4 (State shall provide for free primary education) instead of providing education directly, Article 44.2.4 (the right to not attend religious instruction) envisages children attending publicly funded schools under the management of religious authorities/bodies while ‘not attending’ religious instruction. The very purpose of Article 44.2.4 is to protect the rights of minorities, particularly in relation to freedom of conscience and religion and the rights of parents.

It simply does not stand up to scrutiny for the Minister to not put in place statutory guidelines to give practical application to the right to ‘not attend’ religious instruction on the ground. Boards of Management should not be permitted to misinterpret Constitutional rights and not give practical application to them. Statutory guidelines would rectify this problem.

The Court of Appeal also said in the *Burke* case:

“191 This Court considers that the case law demonstrates that the relationship between parents, the State and the child as envisaged by Articles 40, 41 and 42, is a tripartite not just of the participants but of the rules under which constitutional engagement on education must take place; namely rights, duties and powers. It is only through understanding the interwoven nature of those relationships, that clarity can be brought to the complex constitutional provisions on education....”

Part 2 – The Rights of Atheists and Secularists

2.1 Right to Freedom of Conscience (Article 44.2.1)

The Irish courts and the European courts have recognised the philosophical convictions of atheist and secular parents. Our philosophical convictions are protected by Article 42 (education, which includes the inalienable right and duty of parents) and Article 44.2.1 (freedom of conscience) , and by Article 9 and Article 11 of Protocol 1 of the European Convention (the Right to Education). We are also protected under various UN Treaties.

In the High Court in 2011, Justice Hogan stated that:

“35. There is thus no doubt at all but that parents have the constitutional right to raise their children by reference to their own religious and philosophical views.”

“27. Along with the guarantee of free speech in Article 40.6.1, Article 44.2.1 guarantees freedom of conscience and the free practice of religion. Taken together, these constitutional provisions ensure that, subject to limited exceptions, all citizens have complete freedom of philosophical and religious thought, along with the freedom to speak their mind and to say what they please in all such matters....” (*AB v Children’s Hospital Temple Street & CD & EF*, January 2011)

In the High Court case in 1996, Campaign to Separate Church and State v Minister for Education, Justice Costello cited the Rights guaranteed to parents under the European Convention and the United Nations. He said that the Constitution had developed the significance of these parental Rights and has imposed an obligation on the State in relation to them. He stated that:

“The parties to the First protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms agreed that States when assuming functions in relation to education “shall respect the rights of parents to ensure such education and teaching in accordance with their own religious and philosophical convictions (Article 2). The Irish Constitution has developed the significance of these parental Rights and in addition has imposed obligations on the State in relation to them.”

Atheist Ireland’s recent Legal Opinion on Article 44.2.4 states that:

“11. The guarantee of freedom of conscience extends to persons holding no religious beliefs. In McGee v Attorney General it was stated by Walsh J. that:

“The whole context in which the question of conscience appears in Article 44 is one dealing with the exercise of religion and the free profession and practice of religion. Within that context, the meaning of Article 44.2.1^o is that no person shall directly or indirectly be coerced or compelled to act contrary to his conscience in so far as the practice of religion is concerned and, subject to public order and morality, is free to profess and practise the religion of his choice in accordance with his conscience. Correlatively, he is free to have no religious beliefs or to abstain from the practice or profession of any religion.

Fitzgerald C.J. stated in the same case (in a dissenting judgment):

“Article 44 of the Constitution, which deals with religion and religious institutions, was recently amended by referendum. It confers no special status on any religion; every citizen is entitled to profess the religion of his choice, or no religion.”

Atheists and religious minorities who seek secular education for our children on the basis of conscience are protected under Article 44.2.1 (freedom of conscience), Article 42.1 (the inalienable rights of parents with regard to education of their children), and Articles 40 (personal rights) and 41 (the family) of the Constitution.

The courts have recognised our philosophical convictions, but unfortunately the Department of Education will not defend and vindicate them in publicly funded schools even though it is their duty to do so given the rights of families in the Constitution.

2.2 Right to Equality and Freedom from Discrimination

Article 40.1 states that:

“All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”

There is no Constitutional reason under Article 40.1 for the state to discriminate against Atheist and secular parents. The State is obliged and has a duty to respect and vindicate our philosophical convictions in relation to the education of our children in publicly funded schools.

Article 44.2.3 states that:

“The State shall not impose any disability or make any discrimination on the ground of religious profession, belief or status.”

Article 44.2.3 also protects those with no religious belief/philosophical convictions from discrimination. We have an absolute right not to be discriminated against on the grounds of religion. Article 44.2.4 (the right to not attend religious instruction in publicly funded schools) is also part of this Article.

There is no Constitutionally valid reason to discriminate against Atheists and Secularists by refusing to vindicate the Constitutional right for our children to 'not attend' religious instruction in publicly funded schools on the basis of our conscience.

Refusing to offer students another curriculum subject at second level because those taking religion would feel disadvantaged is not a valid Constitutional reason to discriminate, it doesn't undermine the freedom of religion of those that take the course.

Atheist Ireland's Legal Opinion on the right to not attend Religious Instruction under Article 44.2.4 of the Constitution states the following:

"As appears from the text of Article 44.2.3, it prohibits discrimination based on "religious profession, belief or status, in that the plaintiff had a religious status qua a priest. In dealing with the issue of status, Walsh J. stated in the Supreme Court:

"The present case concerns the disposition of public funds on a basis which, if sustainable, enables a person who is not a religious to obtain greater financial regard than a person who is a religious and is otherwise doing the same work and is of equal status and of length of service, or recognised service in the case of a teacher. If that were constitutionally possible it would enable the State to prefer religious to lay people, or vice-versa, in a matter which is in no way concerned with the safeguarding or maintenance of the constitutional right to free practice of religion or freedom of conscience or of profession of religion.

In my view, the State is not permitted by the Constitution to do this. The reference to religious status, in both the Irish text and the English text of the Constitution, relates clearly to the position or rank of a person in terms of religion in relation to others either of the same religion or of another religion or to those of no religion at all.

Thus it ensure that, no matter what is one's religious profession or belief or status, the State shall not impose any disabilities upon or make ay discrimination between persons because one happens to be a clergyman or a nun or a brother or a person holding rank or position in some religion which distinguishes him from other persons whether or not they hold corresponding ranks in other religions or whether or not they profess any religion or have any religious belief, save where it is necessary to do so to implement the guarantee of freedom of religion and conscience already mentioned."

"As Article 44.2.3 protects persons who are of no religious belief from discrimination on status ground (as per Mulloy), it must equally protect those same persons from discrimination on the grounds of profession or belief.

The above passage also makes reference to a principle established in earlier case law the religious discrimination is in fact permissible where it is concerned with the safeguarding or maintenance of the constitutional right to free practice of religion or freedom of conscience."

(James Kane Barrister-at-law) 2020. (Opinion on specific questions on the right to opt out of religious instruction under Article 44.2.4 of the Constitution- Atheist Ireland)

Since we obtained this legal opinion, the judgment in the Burke case has clarified these rights further, and strengthens the arguments that we are making.

2.3 Public Sector Duty under the IHREC Act

The Department of Education has a public sector duty under Section 42 of the Irish Human Rights & Equality Commission Act to eliminate discrimination and protect human rights. The Minister has never matched her stance on the right to not attend religious instruction with her obligations to eliminate discrimination and protect human rights.

The European court has recognised secularism as a philosophical conviction protected by Article 9 of the European Convention. Atheist and secular parents are protected by Article 9 of the Convention and also Article 11 of Protocol 1 (the right to education). The European court has said that secularism is a belief protected by Article 9 of the Convention.

Lautsi v Italy, European Court 2011:

“58. Secondly, the Court emphasises that the supporters of secularism are able to lay claim to views attaining the “level of cogency, seriousness, cohesion and importance” required for them to be considered “convictions” within the meaning of Articles 9 of the Convention and 2 of Protocol No. 1 (see *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 36, Series A no. 48). More precisely, their views must be regarded as “philosophical convictions”, within the meaning of the second sentence of Article 2 of Protocol No. 1, given that they are worthy of “respect 'in a democratic society'”, are not incompatible with human dignity and do not conflict with the fundamental right of the child to education (*ibid.*)”
<http://hudoc.echr.coe.int/eng?i=001-104040>

Hamidovic v. Bosnia and Herzegovina European Court 2018

“35. The applicant took the view that the interference with the exercise of his freedom to manifest his religion did not correspond to any of the aims listed in Article 9 § 2. The Government maintained, for their part, that the impugned measure pursued two legitimate aims: to protect the rights and freedoms of others; and to maintain the authority and impartiality of the judiciary. The Court notes that the second paragraph of Article 9 does not refer expressly to the second of those aims. As regards the first of the aims invoked – to ensure the protection of the rights and freedoms of others – the Government referred to the principle of secularism and the need to promote tolerance in a post-conflict society. The Court has already held that secularism is a belief protected by Article 9 of the Convention (see *Lautsi and Others v. Italy* [GC], no. 30814/06, § 58, ECHR 2011) and that an aim to uphold secular and democratic values can be linked to the legitimate aim of the “protection of the rights and freedoms of others” within the meaning of Article 9 § 2 (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 99, ECHR 2005XI, and *Ahmet Arslan and Others v. Turkey*, no. 41135/98, § 43, 23 February 2010). There is no reason to decide otherwise in the present case.”
<http://hudoc.echr.coe.int/eng?i=001-179219>

Part 3 – Arguments Made Against Vindicating the Right to Not Attend Religious Instruction

3.1 The ‘Freedom of Religion’ argument

Some people have argued that the purpose of not giving practical application to the right to ‘not attend’ religious instruction under Article 44.2.4 is to protect the freedom of religion of the majority in the school.

This argument does not stand up to scrutiny. The purpose of the right to ‘not attend’ religious instruction is to protect the right to freedom of conscience and religion of minorities, who have no

option but to attend publicly funded schools that violate their conscience. In many cases it is the only publicly funded school in their area.

Home schooling is not a valid option for many parents. Article 42.3.1 states that:

“the State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State”.

The Constitution has not left minorities with a choice of:-

- (a) attending schools against their conscience or
- (b) home schooling and especially when most parents have not got the skills to home school their children as this would deny children an education.

Article 44.2.4 is part of Article 44.2 (which includes freedom of conscience), and the courts in Ireland have already recognised that Article 42.1 (the inalienable rights of parents with regard to the education of their children) and Article 44.2.1 (freedom of conscience) protect the philosophical convictions of parents, and are not confined to religious convictions.

The Constitution contemplates minorities attending publicly funded denominational schools and it puts a duty on the State to defend and vindicate their rights.

3.2 The ‘Schools Managing Their Own Affairs’ Argument

Some people have argued that the purpose of not giving practical application to the right to not attend religious instruction under Article 44.2.4 is because, under Article 44.2.5, every religious denomination shall have the right to manage its own affairs and the State only ‘provides for’ education under Article 42.4.

This argument does not stand up to scrutiny. The right to ‘not attend’ religious instruction is not the Constitutional affair of the religious denomination or body that owns or manages the school. According to the wording of the Constitution, the right to ‘not attend’ religious instruction is the duty of the State and a condition of the state funding of schools.

Schools accept state funding with this Constitutional condition already in place, and it is the duty of the state to defend and vindicate the personal rights of the citizen.

The Supreme Court (Campaign to Separate Church and State 1998) has already found that Article 42 (education) must be read in conjunction with Article 44.2.4 (the right to not attend religious instruction in publicly funded schools).

The Court of Appeal in the recent Burke case has found that Article 42.1 (the inalienable rights of parents with regard to the education of their children) must be read in conjunction with Article 41.1.2 (the rights of the family which the State guarantees to protect.)

The Court of Appeal also stated that the judgment in the Campaign case at the Supreme Court is binding authority.

The Court of Appeal in the Burke case stated that:

“187. The Constitution stresses the family’s role in education. In Article 42.1, the State acknowledges that the primary and natural educator of the child is the family. Under Article 41.1, the State recognises that the family is the primary and fundamental unit group of Society. Article 41.1.1° describes the family as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. Under Article 41.1.2° the State guarantees to protect the family, in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

As we have seen, the relevance of the family provisions was recognised by the Supreme Court in the case of *In re Article 26 and School Attendance Bill, 1942*. In *DPP v. Best*, Denham J. in her judgment, one of five delivered, stated that “[t]he distinct place of the family in Irish society is a factor to be weighed in all relevant decisions.” Two other judges of the Supreme Court either expressly agreed with her judgment or held that the relevant provisions of Article 42 must be read in the context of the special recognition granted to the family in Article 41.1.1”

“190 We consider that the structure of the Constitution, including the fact that Article 41 relating to the family is immediately followed by Article 42 relating to education, together with the express wording of those Articles, place the family at the heart of the provision of education. Parental duty to provide for education is paramount and parental choice in how that is provided is guaranteed. Furthermore, the right to education and the right of a child to realise his or her full potential, has been recognised as part of the natural rights guaranteed by Article 40.3. The State, pursuant to article 41.1.2, also guarantees to protect the family in its constitution and authority.”

“191 This Court considers that the case law demonstrates that the relationship between parents, the State and the child as envisaged by Articles 40, 41 and 42, is a trifecta not just of the participants but of the rules under which constitutional engagement on education must take place; namely rights, duties and powers. It is only through understanding the interwoven nature of those relationships, that clarity can be brought to the complex constitutional provisions on education....”

3.3 The ‘Fairness to Other Students’ Argument

Some people have argued that it is unfair to students who take religion to offer those who choose to ‘not attend’ religion take another curriculum subject.

This argument does not stand up to scrutiny. In the *Burke* case the Minister had argued that it was unfair to students in school to offer home schooled students calculated grades for the Leaving Certificate. In response to this argument the Court of Appeal stated that:

“267. We are conscious that, in assessing the question of fairness as between groups of students, the Government is much better placed to assess a wide range of factors, including some which are of a non-legal nature such as issues relating to maintenance of public confidence in the system. However, the Court cannot abdicate its role to protect and vindicate the respondents’ constitutional rights nor allow constitutional rights of a minority to be dealt a significant and real blow simply because others in society would be aggrieved by a mechanism which is designed to take account of the minority’s (constitutionally protected) special circumstances.”

The Minister’s argument over fairness did not stand up in the *Burke* case at the Court of Appeal, and that was about a right that was not explicitly in the constitution. The right to ‘not attend’ religious instruction has explicit constitutional authority. We cannot see how the courts would agree that denying students that exercise their right to not attend religious instruction another subject was unfair to students that took religion classes.

In a letter dated 11th March 2018 to the then Minister for Education, Richard Bruton, the Catholic Bishops had argued the ‘fairness argument’. This response by the Bishops was in relation to the Department of Education’s decision in Circular Letter 0013/2018 to oblige ETB schools at second level to offer students another subject if they exercise their right to ‘not attend’ religious instruction. The Minister amended the Circular Letter, and the ETBs are not now obliged to offer another subject to students who exercise their Constitutional right to not attend religion classes on the basis of conscience.

The Circular Letter only applied to ETB schools. Over half of second level schools are under religious patronage. They did not come within the remit of the Circular Letter.

3.4 The 'Religious Education not Religious Instruction' Argument

Some people have argued that students cannot opt out or 'not attend' under Article 44.2.4 because the curriculum religion subject is not 'religious instruction' but 'religious education,' and the right under Article 44.2.4 to 'not attend' only applies to 'religious instruction.'

This does not stand up to scrutiny for several reasons, especially given the findings in relation to the rights of parents in the recent Burke Case at the Court of Appeal.

The Department of Education and the Minister claim that curriculum Religious Education is suitable for all religions and none. They refer to Religious instruction in Circular Letter 0062/2018 as instruction in line with the requirements of a particular individual religious denomination and go on to say that:

“This clear separation of religious instruction from the NCCA Religious Education syllabus has the effect of ensuring that withdrawal does not arise for students studying the NCCA Religious Education syllabus where the school provides the subject as part of its normal range of subjects.”

The courts have recognised that parents have absolute rights under Article 42 of the Constitution in relation to the religious and moral, intellectual, physical and social education of their children. The courts have linked Article 42 (education) with Article 41 (the rights of the family.) The courts have also linked Article 40 (personal rights), Article 41 (the family) and Article 42 (education) with Article 44.2.1 (freedom of conscience) and Article 44.2.4 (the right to not attend religious instruction in publicly funded schools).

Under Section 30(e) of the Education Act, the Minister shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student. This is because of the Constitutional right to freedom of conscience, which goes beyond the Constitutional right to not attend religious instruction and extends to any subject which is contrary to conscience.

Despite the rights of parents under the Constitution, the Department of Education has decided for Atheist and Secular parents that curriculum religious education is suitable for their children and not against their conscience so that withdrawal from the subject does not arise. This is despite the fact that the purpose of the curriculum religious education course is to develop values in students to enable them to see the relevance of religion to their lives.

In their letter to the then Minister for Education, Richard Bruton, the Catholic Bishops had argued that it is critical that students are exposed to the religious interpretation of life and that the curriculum religious education course was not indoctrination.

The word indoctrination is not mentioned in the Constitution, but the inalienable rights of parents and the rights of families in relation to the religious and moral education of their children are absolute rights under Article 42.1 (the inalienable rights of parents with regard to the education of their children) and Article 41 (the family). Article 42.4 (provision of education with due regard for the rights of parents, especially in the matter of religious and moral formation) refers to religious formation not indoctrination.

In the Campaign case in the Supreme Court in 1998, Justice Keane said that the funding of Chaplains in Community Schools was sanctioned by Article 42.4 (provision of education with due regard for the rights of parents, especially in the matter of religious and moral formation), because the State was helping parents with the religious *formation* of their Children. That State help (€10 million per year) is still in place and it takes place in the 'general atmosphere' of the school (ethos)

as per Justice Barrington in the same case and not in the religious instruction course that students have a right to not attend.

This cannot mean that the State can teach morals through religious education to children from atheist and secular backgrounds and claim that the constitutional right under Article 44.2.4 (the right to not attend religious instruction in publicly funded schools) and Article 42.1 (the inalienable rights of parents with regard to the education of their children) are not engaged.

Justice Barrington went on to say that the role of the Chaplain is to provide this extra dimension to the religious education of the children. He also said that it would be constitutionally impermissible for a Chaplain to instruct a child in a religion other than its own without the knowledge and consent of its parents.

The Catholic Bishops, the Department of Education, the NCCA or the Teachers Union of Ireland have no right to decide for atheist and secular parents that particular religion courses are suitable for their children, or to interpret the right to 'not attend' as meaning 'not attend indoctrination.' They have no constitutional authority to do so.

The Court of Appeal in the Burke case stated that:

“190 We consider that the structure of the Constitution, including the fact that Article 41 relating to the family is immediately followed by Article 42 relating to education, together with the express wording of those Articles, place the family at the heart of the provision of education. Parental duty to provide for education is paramount and parental choice in how that is provided is guaranteed. Furthermore, the right to education and the right of a child to realise his or her full potential, has been recognised as part of the natural rights guaranteed by Article 40.3. The State, pursuant to article 41.1.2, also guarantees to protect the family in its constitution and authority.”

“191 This Court considers that the case law demonstrates that the relationship between parents, the State and the child as envisaged by Articles 40, 41 and 42, is a trifecta not just of the participants but of the rules under which constitutional engagement on education must take place; namely rights, duties and powers. It is only through understanding the interwoven nature of those relationships, that clarity can be brought to the complex constitutional provisions on education....”

In the Campaign to Separate Church and State case in 1998, Justice Barrington said that:

“The Constitution therefore distinguishes between religious “*education*” and religious “*instruction*” - the former being the much wider term. A child who attends a school run by a religious denomination different from his own may have a constitutional right not to attend religious instruction at that school but the Constitution cannot protect him from being influenced, to some degree, by the religious “*ethos*” of the school. A religious denominational is not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend that school.”
(page 26)

The above quote from the Supreme Court is used to support the claim that religious education is not religious instruction and the need to not attend does not therefore arise.

The Supreme Court referred to religious education in the **general atmosphere** of the school and was not referring to a specific class in religion. Because of the Burke case at the Court of Appeal further clarity has now been brought to the issue, parents can exercise their right to ensure that their children not attend any religious instruction class that is against their conscience. The Court of Appeal said that:

“It is only through understanding the interwoven nature of those relationships, that clarity can be brought to the complex constitutional provisions on education....”

The Supreme Court in the Campaign case also stated that a religious ethos in the **general atmosphere** of the school could influence children 'to some degree'. This leads to the view that the State could put in place legislation to define what 'to some degree' in the general atmosphere of the school means, especially when the Department of Education now claims that ETB schools and colleges are the alternative to denominational schools. Many parents have not got any option where they sent their children to school.

The European Court found in the Louise O'Keeffe case that the:

“government appeared to suggest that the State was released from its Convention obligations since the applicant chose to go to Dunderrow National School. However, the Court considers that the application had no “realistic and acceptable alternative” other than attendance, along with the vast majority of children of primary-school-going age, at her local national school”.

Home schooling is not a valid option for the vast majority of parents and the rights of minorities should not be dealt a significant blow because they have no choice but to sent their child to the local publicly funded school.