

Atheist Ireland



To: Rossa Fanning
Attorney General

6 March 2023

Dear Mr Fanning,

We are writing to you in your Constitutional capacity as the adviser of the Government in matters of law and legal opinion. We are asking you to advise the government about the Constitutional implications of how it is dealing with the right to not attend religious instruction in publicly funded schools.

We refer to the Separation of powers under Article 15.2.1 of the Constitution. Article 15 has been in the media lately in relation to nursing home fees. We would like to raise with you Article 15 in relation to Article 44.2.4, the right to not attend Religious Instruction, as the separation of powers is not being observed by the Department of Education. Not attending Religious Instruction under Article 44.2.4 is not part of the executive power of the State under Article 28.2.

In administering the right, the Department of Education has redefined the meaning of Article 44.2.4 in a Circular Letter, and is interfering in the rights of parents under Article 42.1 when it has no legal power to do so. The Department then leaves it up to each school to put in place precise arrangements, and the schools in turn redefine and ignore Constitutional and legal rights in their Admission policies because there are no statutory guidelines in place.

We have been trying to get the Oireachtas to take responsibility for the right of students to not attend religious instruction under Article 44.2.4 of the Constitution. We made a complaint to the Oireachtas Public Accounts Committee regarding the misuse of public funds by the Department of Education for failing to administer this right when funding schools. We have also complained to the Comptroller and Auditor General.

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.”

It is clear from the text of Article 44.2.4 that it is the Oireachtas that is responsible for the right to not attend religious instruction, as the Article starts with the word “legislation”. This brings Article 44.2.4 within the remit of Article 15 of the Constitution, as only the Oireachtas can enact legislation.

The duty placed on the Oireachtas is to guarantee that state aid given to schools must not ‘affect prejudicially’ the right of students to not attend religious instruction.

In administering the right to not attend religious instruction the Minister has ignored what Justice Barrington has found in the Supreme Court in the Campaign case in relation to Article 42.1 and Religious Education. It must be in accordance with the wishes of parents and it is in this context that Article 44.2.4 must be read.

This right is reflected in Section 30-2(e) of the Education Act 1998 and Section 62-7(n) of the Education (Admission to Schools) Act 2018. It is also in Section 7 of the Intermediate Education Act 1878 which has not been repealed.

Because of Article 15, the Executive, the Department of Education, the NCCA, Patron bodies or schools cannot redefine Article 44.2.4. The text of the Article clearly says 'not attend', it doesn't say 'opt out', 'not participate' or 'withdraw'. In addition the Supreme Court has also upheld parental rights and the right of students to not attend religious instruction.

There are no statutory guidelines in place. The vast majority of students who seek to exercise this right are left sitting in the religion class and are not supervised outside the class. When parents complain about this to the Department of Education they are informed by the Department that it is up to each individual school how to implement the right.

If parents complain to the school they are informed that the Department of Education does not give them enough funding to supervise their child outside the religion class, or that it is not religious instruction but religious education and the right to opt out does not apply. They do not even refer to the right to not attend, which is what the constitution says.

Section 62-7(n) of the Education (Admission to schools) Act 2018 obliges schools to put in their Admission Policies the arrangements for students who do not attend religious instruction. Schools typically evade this by telling parents to meet with the principal.

In administrating Constitutional and legal rights the Department of Education has gone beyond what is permitted by Article 15.2.1 in relation to the separation of powers.

In the Burke case the Supreme court said that the extent to which any right is protected by the Constitution is defined by the Constitution itself. The fact that the duty on the Oireachtas is written into the text of the Constitution tells us that the Oireachtas cannot continue to ignore that state aid is affecting prejudicially the right of our children to attend a school and not attend religious instruction.

The executive has unilaterally redefined the constitutional right to not attend religious instruction, thus removing it from Article 44.2.4, and is also deciding for parents what is or is not suitable religious education for their children (Art42.1). But the purpose behind Article 44.2.4 in relation to the separation of powers is to put that duty on the Oireachtas. This is an unconstitutional interference with a constitutional right.

There are also issues in relation to religious discrimination under Article 44.2.3 and Article 40.1. The Minister for Education, Norma Foley has recently recognised and supported the rights of some religious parents to withdraw their children from sex education classes (Article 42.1).

The Minister has no issue with discriminating against some parents and interfering in their constitutionally protected rights. She is quoted in the Irish Times as stating that parents have a right to ensure that their children can withdraw from the updated sex education course on the basis of conscience. She has not put any obstacles in their way that the Department of Education puts in front of non-religious parents who want their child to not attend religious instruction. ¹

See appendix below for relevant supporting information.

Yours sincerely,

Jane Donnelly
Human Rights Officer

Michael Nugent
Chairperson

¹ <https://www.irishtimes.com/ireland/education/2023/02/22/parents-will-have-right-to-withdraw-kids-from-new-sex-education-classes/>

Appendix

1. Administration by the Department of the right to not attend religious instruction
2. Burke v Minister for Education
3. Campaign to Separate Church and State v Minister for Education

1. Administration by the Department of the right to not attend religious instruction

There are no statutory guidelines on the right to not attend religious instruction.

Section 30- Education Act 1998 states that:

“1 – (a) The Minister may, from time to time, following such consultation with patrons of schools, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, as the Minister considers appropriate, prescribe the curriculum for recognised schools, namely –

2 - Without prejudice to the generality of subsection (1), the Minister –
(e) 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.”

The Department of Education ‘administers’ the right by leaving it up to each individual school to make precise arrangements.

1.1 Primary Level

The Department of Education has in place Rule 69 of the Rules for National schools. This rule states that:-

“69-2(a) – No pupil shall receive, or be present at, any religious instruction which his parents or guardian disapprove of.”

The Rules for National schools are attached to the Deeds of Variation of National Schools.

Section 62-7(n) of the Education (Admission to schools) Act 2018 obliges all schools at primary and second level to put in their Admission Policies the arrangements for students not attending religious instruction. Schools just ignore this.

Admission policies inform parents that they must come to a meeting to discuss the issue and some policies ask for reasons for exercising the right to not attend religious instruction. School admission policies do not offer supervision outside the religious instruction class.

1.2 Second Level ETB Schools

In 2018 the Department of Education issued two Circular Letters in relation to Article 44.2.4 of the Constitution. These Circulars only apply to Education and Training Board Schools not denominational schools.

Circular Letter 0013/2018 states that: ²

“Religious instruction and worship in certain second level schools in the context of Article 44.2.4 of the Constitution of Ireland and Section 30 of the Education Act 1998”

² https://www.tui.ie/_fileupload/cl0013_2018.pdf

Circular Letter 0062/2018 is a clarification of Circular Letter 0013/2018. The clarification was put in place after lobbying by the Catholic Bishops, the ETBI, Religion Teachers Association and TUI.

Circular Letter 0062/2018 states that: ³

“The NCCA-developed Religious Education Junior and Senior Cycle syllabuses, and the Religious Education specification for Junior Cycle, to be introduced in 2019, are intended for students of all faith backgrounds and none.

The content prescribed in the syllabuses is intended to ensure that students are exposed to a broad range of religious traditions and to the non-religious interpretation of life. They do not provide religious instruction in any particular religious or faith tradition.”

“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.”

“Following on the clarification in Section 2 above in respect of the Religious Education syllabuses which may form part of the normal range of subject choice that may be provided by a school, the approach outlined in Section 4 of Circular 0013/2018 of parents seeking a withdrawal from the NCCA-developed Religious Education syllabus is no longer necessary.”

The Minister for Education at the time Richard Bruton issued a press release stating that: ⁴

“The Minister for Education and Skills, Richard Bruton TD, today (Friday the 5th of October) announced that his department has clarified the requirements set out in a circular 13/2018, which set out an approach to the arrangements that are made for religious instruction and worship in Education and Training Board (ETB) and Post Primary Community schools.”

“The department is today issuing a further circular to schools clarifying the requirements set out previously. The first key clarification is that where a school intends to provide religious instruction/faith formation, parents must give consent before admission to the class. This means that opt out does not arise because the parent has requested a place in the religious instruction class.

The other significant clarification is that classes following the NCCA Religious Education syllabuses cannot have any element of religious instruction or worship, which also means that opt out does not arise.”

These Circular Letters issued by the Department of Education in administering Constitutional Rights have undermined the Constitutional rights of parents and their children in both denominational and ETB schools. Schools are using these Circular Letters as a basis for their Admission policies in relation to the Constitutional rights of parents and their children.

It is this Administration of rights by the Department of Education that has led to School Admission policies unilaterally redefining the Constitutional right to not attend religious instruction as being confined to not attending instruction according to the rights of a particular religion, and to claim that the opt out does not arise for curriculum religious education because there is no element of religious instruction in it.

The Supreme Court has not found that Article 44.2.4 is confined to not attending religious instruction according to the rites of a particular religion. Neither has the Oireachtas. Nor is it consistent with the meaning of the text of the Constitution.

³ <https://www.gov.ie/pdf/?file=https://assets.gov.ie/12267/80cbbdf3000545acb430ec2e2bf2cf6e.pdf#page=null>

⁴ <https://www.gov.ie/en/press-release/b8e7c6-department-issues-a-new-circular-that-clarifies-opt-out-requirement/>

2. Burke v Minister for Education ⁵

In the recent Burke V Minister for Education case at the Supreme Court, administration is defined as follow:

“These distinctions focus on the nature of a governmental decision, of its essence a matter of policy and hence the pursuit of an ideal, in contrast to the precision which should be presented to an administrator who is left to apply the scheme to individual circumstances, thus:

administration assumes that there is already in existence a principle and that all the administrator has to do is to establish the facts and circumstances and then to apply the principle. It is of the essence of good administration that the principle must be fairly clear and precise so that, in any given situation, the result should be the same, whether it is administrator A or administrator B who has taken the decision.

For, in its purest form, administration requires only a knowledge of the pre-existing principle and an appreciation of the facts to which it is being applied; it is an intellectual process involving little discretion.

By contrast, policy-making is largely discretionary; the policy-maker must decide, as between two alternatives, the one which he or she considers best in the interest of the community ... [taking into] account all of the relevant factors and which factors are relevant is, to a considerable extent, left to him or her.”

Justice Charleton said about parental rights in the Burke case:

“4. It is clear that a right inures to the family under Article 42.1 of the Constitution to be the “primary and natural educator of the child” and the State is required “to respect the inalienable right and duty of parents to provide ... for the religious and moral, intellectual, physical and social education of their children.”

Hence, under Article 42.2, the mother and father of Elijah Burke and Naomi Power were “free to provide this education in their homes or in private schools or in schools recognised or established by the State.”

But, while under Article 42.3 the State may require, “as guardian of the common good”, that “children receive a certain minimum education, moral, intellectual and social” (physical is not mentioned, and the minimum standard required is currently set at school leaver-standard for a 16 year old), the State cannot “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.”

Article 42.4, in requiring the State to provide for “free primary education”, also places an endeavour, but only that, before the State “to supplement and give reasonable aid to private and corporate educational initiative” and “when the public good requires it” towards “other educational facilities or institutions”.

An overall saver in the constitutional text is that the State, in providing for free primary education and in endeavouring to assist post-primary education in various forms, have “due regard ... for the rights of parents, especially in the matter of religious and moral formation.”

This provision reflects a concern for upholding parental authority; a foundational pillar of the Constitution that accords with Article 41 recognising the family as “the natural primary and fundamental unit group of” Irish society. Hence, society is built around the family”

⁵ <https://www.teachdontpreach.ie/2022/10/burke-v-minister-for-education/>

The Oireachtas has failed in its duty to ensure that state aid does not affect prejudicially the right of students to not attend religious instruction. The Department of Education in administering a Constitutional right has unilaterally redefined Constitutional rights and interfered in the rights of parents in relation to the Religious Education of their children under Article 42.1 read in conjunction with Article 44.2.4. They have both rendered Article 44.2.4 meaningless.

3. Campaign to Separate Church and State v Minister for Education ⁶

In relation to Article 44.2.4 the Supreme Court has never defined it as not attending instruction according to the rites of a particular religion. They have said that any Religious Education must be in accordance with the wishes of parents and that Article 42.1 must be read in the context of Article 44.2.4.

Justice Barrington in the Campaign case at the Supreme Court in 1998 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)

“But the matter does not end there. Article 42 of the Constitution acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of the parents of provide for the religious and moral, intellectual, physical and social education of their children.

Article 42 S.2 prescribes that the parents shall be free to provide “this education” (i.e religious moral intellectual physical and social education) in their homes or in private schools or “in schools recognized or established by the State”. In other words the Constitution contemplates children receiving religious education in schools recognized or established by the State but in accordance with the wishes of the parents. (page 25)

It is in this context that one must read Article 44 S.2s.s.4 which prescribes that:-....”

In addition to the above Justice O’Donnell in the Burke case at the Supreme Court in 2022 found that the purpose behind Article 42.1 was non-interference by the state.

“73. There is no doubt, therefore, that the Constitution recognises and protects the freedom of parents to provide education for their children in the home. Article 42.1 has already stated that it is the duty of parents to provide according to their means for the education of their children, which is described in very broad terms as religious, moral, intellectual, physical and social. It follows that parents have a duty to provide for that education, and Article 42.2 expressly provides that such education can be provided in the home.

It must also follow that, in any case, where there is no conflict between the members of the family that children have a constitutional interest in receiving the education provided for them by their parents.

It will be necessary to consider later what is comprehended by the concept of freedom in this sub-paragraph, but it seems apparent that the freedom to provide or receive education in the home is protected by the Constitution, so that the family or individual cannot be deprived of it by the State, other than in accordance with the Constitution.

⁶ <https://www.teachdontpreach.ie/2019/10/campaign-to-separate-church-and-state-v-minister-for-education-1995/>

It is, in any event, part of the right and duty of parents to provide (and therefore the right of their children to receive) education under Article 42.1, which right the State has guaranteed to respect.

The Irish text of Article 42.1 provides an important flavour in this regard:- “... ráthaíonn [An Stát] gan cur isteach ar cheart doshannta ná ar dhualgas doshannta tuistí chun oideachas ... a chur ar fáil dá gclainn” which conveys the sense that the State cannot interfere with (cur isteach ar) the right of parents subject to the Constitution to provide education under Article 42.1, a right which Article 42.2 contemplates may take place at home.”

The Supreme Court found that Religious Education under Article 42.1 must be read in the context of Article 44.2.4 the right to not attend religious instruction. Religious Instruction under Article 44.2.4 ‘teagasc creidimh’ translates directly into religious teaching.

Given parental rights under the Constitution and the findings of the Supreme Court, it is not up to the Department of Education, the NCCA, Patron bodies or schools to decide for parents what is or is not suitable Religious Education for their children. Yet, in administering the Constitutional right under Article 44.2.4 the Department of Education has redefined the right to not attend Religious Instruction, with no lawful authority and contrary to the separation of powers, and claims that curriculum religious education is suitable for all students. This is also interfering in the rights of Parents under Article 42.1.