

Atheist Ireland



To: Bernie McNally
Secretary General
Department of Education

9 April 2023

Dear Secretary General,

We refer to your letter dated 1st of March in relation to correspondence between Atheist Ireland and the Joint Committee on Education in relation to Section 62.7(n) of the Education (Admission to Schools) Act 2018.

We recognise the safeguards that the Oireachtas has put in place under Section 30-2(e) of the Education Act 1998 to protect the Constitutional right to not attend religious instruction under Article 44.2.4 of the Constitution. However, the issue is not about the failure of the Oireachtas to protect the right to not attend religious instruction, but the failure of your Department to administer that right.

Parents should not be expected to take a case to the courts in order to get practical application to a legal and Constitutional right, and especially one that is clear in its expression. Nor should they be expected to take a case to the Ombudsman for Children in relation to the failure of the BOM of a school to put in their Admission policies the arrangements for not attending religious instruction.

The Oireachtas has been clear in reflecting the Constitutional right to not attend religious instruction in legislation and in trying to safeguard it. They have also put a duty on the Minister in relation to it (S.30-2(e) Education Act 1998).

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1. Your paragraph on practical assistance and guidance

We will begin with your final paragraph, in which you wrote:

“While the provisions of the Education (Admissions to School) Act are relatively new to schools, the results from the Atheist Ireland survey will be helpful in informing the Department in relation to practical assistance and guidance that might be provided to schools so as to make their current arrangements more transparent in accordance with Section 62 of the Act.”

Your Department has already given guidance and practical assistance to schools in the form of Circular Letter 0007/20 and the attached Template. This has failed because Patron bodies gave additional guidance to schools, and that guidance has undermined our Constitutional and legal right for our children to not attend religious instruction. The Constitutional rights of parents and their children and the will of the Oireachtas have taken second place to guidance from Patron

bodies because of your Departments failure to protect our parental rights, a foundational pillar of the constitution.

2. Our recommendations on practical assistance and guidance

1. The Oireachtas should put in place statutory instruments regulating the right to not attend religious instruction, and your Department should ensure that these statutory instruments are enforced including through the school inspectorate.

2. Meanwhile, you should issue a further Circular Letter to clarify Section 17 of the template in Circular Letter 0007/2020 on the legal requirements in putting in place an Admission policy with the following wording:

“Arrangements regarding students not attending religious instruction.

Students have a constitutional right to attend this school without attending religious instruction in the school. The following are the school’s arrangements for when parents, or in the case of a student who has reached the age of 18 years, the student, inform the school that they are exercising this right. These arrangements will not result in a reduction in the school day of such students and will include either supervision or provision of an alternative subject while the student is not present in the religion class. The arrangements are:”

3. You should ensure that these arrangements are actually published in admission policies, so that parents can know before they apply to a school what the arrangements are.

4. You should ensure that the arrangements as published in admission policies comply with Article 44.2.4 of the Constitution and Section 30-2(e) of the Education Act 1998.

5. You should ensure that the arrangements as published in admission policies, that comply with the Constitution and law, are actually administered in practice, and you should ensure that they are enforced including through the school inspectorate.

We will now address the rest of your letter, in support of our recommendations above.

3. How to administer vs whether to administer

You wrote that:

“Typically the manner in which any school ensures that the right of a student to not attend religious instruction is a matter for the school concerned. The school must determine the particular arrangements which are most appropriate in its individual circumstances having regard to local issues such as available space, supervision requirements and how the school concerned organises classes etc. In practical terms the arrangements can differ from school to school depending on local circumstances.”

We do not expect your Department to micromanage how the right to not attend religious instruction is administered in each school. However, there is a difference between allowing schools decide how to administer a right, and allowing schools to decide whether to administer a right. In reality, most schools do not administer the right in any manner, as they do not allow students to leave the classroom, which is what not attend means.

Your department has a duty to ensure that, in administering the right, the essence of Article 44.2.4, (the right to not attend) is given practical application on the ground in schools. The practical arrangements that schools put in place should not undermine the essence of the right which is to not attend religious instruction.

The importance of the right to not attend religious instruction under Article 44.2.4 is reflected in the fact that the Constitution places a duty in relation to the right on the Oireachtas, not the executive. It is also a constitutional condition of schools receiving state aid.

In order to protect the right further, the Oireachtas has put in place legislation to ensure that schools put in their Admission Policies the arrangements for not attending religious instruction (Section 62-7(n) Education (Admission to Schools) Act 2018).

Therefore the essence of the issue is the failure of your Department to administer a legal and Constitutional right that is unambiguous in its expression.

4. Templates from the Department and from Patron Bodies

In administering the legal obligations under the Education (Admission to Schools) Act 2018, your Department issued Circular Letter 0007/2020 and also S.I. No. 17/2020 - Education (Admission to Schools) Act 2018 (Admission Policies and Admission of Students) Regulations 2020. ¹

The purpose of Circular letter 0007/2020 was: ²

“The Minister for Education and Skills wishes to bring to the attention of school authorities the commencement of a number of sections of the above act which will require changes to school admission policies and processes. The new arrangements will apply to school admissions for the 2021/22 school year and subsequent years. The new arrangements do not apply for admission to the 2020/21 school year.”

Part of Circular Letter 0007/2020 is a Template for the Board of Management of schools on the legal requirements in putting in place an Admission policy (attached). In relation to 62-7(n) of the Education (Admission to Schools) Act 2018, Section 17 of that Template tells schools:

“Arrangements regarding students not attending religious instruction

This section must be completed by schools that provide religious instruction to students. The following are the school’s arrangements for students, where the parents or in the case of a student who has reached the age of 18 years, the student, who has requested that the student attend the school without attending religious instruction in the school. These arrangements will not result in a reduction in the school day of such students:”

The Catholic Diocese of Dublin sent a further template to all schools under their patronage in 2020 with Section 2 and 17 already filled in (attached). This states the following:

“17. Arrangements regarding students not attending religious instruction

This section must be completed by schools that provide religious instruction to students. The following are the school’s arrangements for students, where the parents or in the case of a student who has reached the age of 18 years, the student, who has requested that the student attend the school without attending religious instruction in the school. These arrangements will not result in a reduction in the school day of such students:

A written request should be made to the Principal of the school. A meeting will then be arranged with Parent(s) or the student, as the case may be, to discuss how the request may be accommodated by the school.”

¹ <https://www.irishstatutebook.ie/eli/2020/si/17/made/en/print>

² <https://www.gov.ie/en/circular/7ffb88-commencement-of-certain-sections-of-the-education-admission-to-school/>

Nearly all denominational schools Admission policies have the same wording in relation to not attending religious instruction despite your Department issuing Circular Letter 0007/2020. That wording does not give the arrangements for students not attending religious instruction.

The Admission policies in Education and Training Board schools rely on a distinction with no legal basis between religious instruction and religious education. They typically state:

“It is important to understand that our school does not provide ‘religious instruction’ and therefore the legal requirement to advise of the option to opt-out of religious instruction does not arise in this school. There is an important distinction between ‘religious instruction’ and ‘religious education’:

- Religious instruction is a term used in Ireland to indicate instruction in accordance with the rites, practices and teaching of a particular religion or denomination for pupils of that religious tradition.
- Religious education is open to all pupils regardless of their commitment to any particular religion or worldview. It seeks to contribute to the spiritual and moral development of all students equally.”

This does not give the arrangements for students that do not attend religious instruction. The Constitution refers to ‘teagasc creidimh’ which translates directly into religious teaching. ETBs have no legal power to redefine a constitutional right and neither has your Department. The Supreme Court has always been clear about parental rights under the Constitution and have found that Article 42.1 must be read in the context of Article 44.2.4 (J. Barrington Campaign to Separate Church and State v Minister for Education 1998). Neither the ETBs nor your Department can decide for parents what is or is not suitable religious education for their children.

5. The purpose of Section 62.7(n) Education (Admission to Schools) Act 2018

Neither of these Patron Bodies satisfy the purpose of 62.7(n) of the Act. Here are some quotes about it from the then Minister for Education Richard Bruton during the Oireachtas debate:

“This is an important measure which will help ensure transparency from the outset as to how a school will uphold the rights of parents in this regard...”

“We are strengthening the provision to meet the constitutional right of every child not to have to attend religious instruction. This will be enforced by requiring it to be explicitly stated in the admissions policy of religious schools as to how they propose to honour that...”

“In the case of multi-denominational ETB schools at second level, we will ensure that religion is treated as an option and not as a compulsory subject...”

“There is the matter of issuing directions and we have made a significant change in this Bill. Before a child enrolls in a school, the school would have to set out the policy it provides with respect to attending religious instruction...”

It is clear that the purpose of this legal requirement is to protect the inalienable constitutional rights of parents by providing transparency from the outset so that parents know these details before they choose a school for their children. However, it has failed to do this.

6. Covid-19 and Ukrainian refugees

You wrote that:

“As you will appreciate these past few years have been difficult for schools and the Department is mindful of the impact of significant challenges that schools have had to

manage in relation to Covid-19 and are managing on a daily basis in providing for Ukrainian refugees.”

As you will note from the timing of the responses to your Circular Letter, it was not a matter of Covid 19 or Ukrainian refugees that has led to the failure of schools to put in their Admission Policies the arrangements regarding students not attending religious instruction. Patron bodies issued guidance to schools on what to put in their Admission policies in relation to the arrangements for not attending religious instruction before Ukrainian refugees had arrived in the country.

7. The essence and purpose of clear rights are lost

Not only are the essence and purpose of the constitutional right in Article 44.2.4 and the statutory right under Section 30.2(e) of the Education Act lost in practice (which is the right not attend religious instruction), but so is the essence and the purpose of Section 62.7(n) of the Education (Admission to Schools) Act (which is the right to know the arrangements of the school for those who exercise the right to not attend)

The essence of the purpose of each of these three rights is lost because of the failure of your Department to administer the requirements of the constitution and the will of the Oireachtas as expressed in legislation.

The primary legislation is clear in its expression of policy; schools are obliged to put in their Admission Policies the arrangements regarding students not attending religious instruction. It is also clear that the Minister is responsible under Section 30-2(e) of the Education Act 1998 to ensure that students do not attend religious instruction.

The Constitution, the Oireachtas, Legislation, and policy have all failed to safeguard the right to not attend religious instruction because of the failure to actually administer the right. In relation to administration, Justice Charleton found in the Burke case at the Supreme Court in relation the Leaving Certificate during Covid that:

“...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.”

8. Commenting on legal opinions

You wrote:

“In previous correspondence to the Department, including correspondence to the Committee, a number of legal issues have been raised and it is important to reiterate that it would be inappropriate for the Department to comment on the legal opinion of Atheist Ireland.”

It is not a matter of the Department of Education commenting on the Legal opinion of Atheist Ireland and particularly as the recent Burke case at the Supreme Court has superseded our legal opinion.³

The Supreme Court found that the rights of parents were a foundational pillar of the constitutional and that under Article 42.1 the state cannot interfere in the right of parents in relation to the education of their children. The Supreme Court in 1998 found that Article 42.1 must be read in the context of Article 44.2.4.⁴ It is a matter of your Department administering a Constitutional and legal right that is clear and precise.

The Constitution and legislation is sufficiently clear in its expression of policy. The courts have been clear about the rights of parents in relation to the religious education of their children and their right to not attend any religious teaching that is against their conscience. Schools are legally obliged to put in their Admission Policies the arrangements regarding students not attending religious instruction. Your Department has a duty which it is failing to ensure that law and policy are administered in a way that respects constitutional rights.

Yours sincerely,

Jane Donnelly
Human Rights Officer

Michael Nugent
Chairperson

Chris Hind
Teachers Officer

Attached

1. Schools Admission Policy Template Dept of Education
2. Schools Admission Policy Template Dublin Diocese

³ <https://www.teachdontpreach.ie/2022/10/burke-v-minister-for-education/>

⁴ <https://www.teachdontpreach.ie/2019/10/campaign-to-separate-church-and-state-v-minister-for-education-1995/>