Implementing Disability Rights in Education in Ireland: An Impossible Task?

Sarah Arduin*

Abstract—Over the past two decades, Ireland has seen an increased public interest in thinking about disability rights in education and in determining how Irish schools could deliver, in an inclusive environment, a quality education appropriate to the needs of every child, including children with learning difficulties and disabilities. Nonetheless, despite the evidence of a shift in its policy and the signature of the UN Convention on the Rights of Persons with Disabilities, the Irish approach to disability rights in education remains far from satisfactory.

This article intends to understand the inappropriateness and inadequacy of the Irish approach to disability rights in education. It intends to provide a comprehensive insight into the debate and into the challenges that remain to be overcome in order to transform the Irish approach, in line with international human rights law, into a human rights-based approach to disability rights in education; guaranteeing inclusive, equitable and quality education for all in a respectful learning environment.

Introduction

Over the past two decades, Ireland has seen an increased public interest in thinking about disability rights in education and determining how its schools could deliver, in an inclusive environment, a quality education appropriate to the needs of every child, including children with learning difficulties and disabilities. The approach of the Irish government to disability rights in education has significantly changed not only in its attitude in recognising persons with learning difficulties and disabilities as valuable citizens of the Irish State, but also in establishing a legislative framework that encapsulates the ethos of an inclusive philosophy and paves the way towards vindicating a right to quality education for all in the best-suited learning environment.\(^3\) Now more than ever, educational...
provisions for children with learning difficulties and disabilities are identified as being part of the wider education community. Their right to education is well established under the Irish Constitution and has received official recognition through the enactment of a detailed legislative framework, culminating with the Education for Persons with Special Educational Needs Act (EPSEN Act). Nonetheless, despite the evidence of a shift in its policy and the signature of the UN Convention on the Rights of Persons with Disabilities (CRPD), the Irish approach to disability rights in education remains far from satisfactory, particularly in the light of international developments. As will be discussed in this article, the general trend in international human rights law is to advocate a human rights-based approach to disability rights in education, as exemplified by art 24 of the CRPD. This approach centres the debate not so much on the type of


6. See, for instance, the UN Declaration of Human Rights 1948; the UN International Covenant on Economic, Social and Cultural Rights, GA Res 2200 A (XXI), UN GAOR (1966); the Convention on the Rights of the Child, GA Res 44/25, UN GAOR, 44th Session (1989); and the UN Standard Rules on the Equalization of Opportunities for People with Disabilities, GA Res 48/96, UN GAOR, 48th Session (1993); and art 24 CRPD, which recognises the right of persons with disabilities to quality education in an inclusive environment.

8. art 24(1) CRPD reads as follows: ‘States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life long learning directed to (a) the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity; (b) the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; (c) enabling persons with disabilities to participate effectively in a free society.’
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rights to which persons with disabilities should be entitled, but rather on how society and, a fortiori, the law should accommodate human difference, diversity and plurality within its institutions. Advocating disability rights in education is precisely about ensuring an effective and equal enjoyment of educational rights for every child in the best-suited learning environment, regardless of ability or disability, talent or difficulty, physical or intellectual capacity.

This article intends to understand the inappropriateness and inadequacy of the Irish ‘special’ education law, policy and practice in light of international developments. It intends to provide a comprehensive insight into the debate and the challenges that remain to be overcome in order to transform the Irish approach, in line with international human rights law, into a human rights-based approach to disability rights in education, guaranteeing inclusive, equitable and quality education for all in a respectful learning environment.

This article is composed of four parts. The first part establishes the theoretical roots of the debate by analysing the content and purpose of a human rights-based approach to disability rights in education. The second part reviews the current Irish legislative framework, paying particular attention to the principles set down in the Education for Persons with Special Educational Needs Act. The third part outlines the theoretical inadequacies that directly stem from the legislative framework and the implications that these inadequacies have in practice for the education of children with learning difficulties and disabilities. The final part draws conclusions and suggests how the Irish legal framework could be improved in order to effectively guarantee the rights of children with learning difficulties and disabilities within education, and more precisely their right to quality education in an inclusive learning environment.

The Human Rights-Based Approach to Disability Rights in Education

The human rights-based approach to disability rights in education is a model that encompasses two progressive philosophies. First, it advocates a human rights-based approach to disability that emphasises the equal human dignity and equal human worth of persons with disabilities. Secondly, it incorporates an ethical and inclusive approach to education that emphasises the humanistic and idiosyncratic nature of learning. It suggests that education is about

9. For further details, see Quinn and Degener, Human Rights and Disability, 1.
10. The expression ‘special education’ and its inappropriate use will be further discussed below.
11. Quinn and Degener, Human Rights and Disability, 1.
humanising difference and human diversity.\textsuperscript{13} It is about valuing learners’ background, knowledge, abilities, interests and life experience. In essence, the human rights-based approach to disability rights in education highlights the fact that children with disabilities are first and foremost children, and thereafter children with disabilities.\textsuperscript{14} Respecting them as such and acknowledging their capacities to learn constitute the \textit{sine qua non} condition for moving forward and implementing effectively this humanistic and inclusive ethos.

The Human Rights-Based Approach to Disability

Emerging alongside the civil rights movement,\textsuperscript{15} the disability rights movement\textsuperscript{16} has hastened the debate about disability, raised awareness about human diversity,\textsuperscript{7} and emphasised the importance and benefits of a human rights-based approach to disability. In essence, this new perspective urges societies to move away from previous ontological assumptions and beliefs about disability, normality and difference towards adopting a more holistic understanding of disability as a sign of human diversity and as a human right.\textsuperscript{18} Emphasising the complexity of disability and its multidimensional nature,\textsuperscript{19} the

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  \item \textsuperscript{13} Lilia Bartolome, ‘Beyond the Methods Fetish: Toward a Humanizing Pedagogy’ (1994) 64(2) Harv Edu Rev 173.
  \item \textsuperscript{14} Vorhaus, ‘Respecting Profoundly Disabled Learners’, 315.
  \item \textsuperscript{15} See, for instance, Stein, who provides a comprehensive analysis of the emergence of the disability rights movement in the United States.
  \item \textsuperscript{16} The slogan, to which it is often referred in order to characterise the disability rights movement, is borrowed from the title of a book from James Charlton, \textit{Nothing About Us Without Us} (Charlton 1998). This slogan reflects the growing demand of persons with disabilities to be included in policy-making and disability research and become visible citizens with a voice that matters. For further details on the movement, see D Wasserman, LJ Davis, A Asch and RA Putnam, ‘Disability: Definitions, Models, Experience’, \textit{The Stanford Encyclopedia of Philosophy} (Summer 2013 edn).
  \item \textsuperscript{17} See art 8 CRPD, which provides a list of measures aimed at raising awareness, such as (a) initiating and maintaining effective public awareness campaigns designed to (i) nurture receptiveness to the rights of persons with disabilities; (ii) promote positive perceptions and greater social awareness towards persons with disabilities; and (iii) promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market; (b) fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities; (c) encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention; and (d) promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.
  \item \textsuperscript{18} See n 6.
  \item \textsuperscript{19} Pointing out the interactionist nature of disability, the International Classification of Functioning, Disability and Health suggests a biopsychosocial model, according to
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human rights model solicits governments to recognise persons with disabilities as subjects of rights, as opposed to charity objects.\textsuperscript{20}

This model came about in reaction to the individualist and medical approach to disability (a) and the limits of its poststructuralist social version (b).

\textit{The Medical Model of Disability}

The medical model of disability relies on ontological principles that distinguish the normal from the pathological.\textsuperscript{21} It suggests that there exists a hierarchical ontological dichotomy in which impairment – as equalised to disability – is associated with 'deficit' or a flawed existence.\textsuperscript{22} It posits that the essence of disability lies in the biomedical reality, which is determined by rational reflections and scientific methods used by physicians.\textsuperscript{23} Only one real explanation of this phenomenon is provided: it is a biophysical deficit or impairment that is an inherent disorder, deficiency, dysfunction or abnormality located exclusively and inevitably within the individual's biological characteristics.\textsuperscript{24} Disablement becomes a characteristic of a defective person – that is, someone who is 'functionally limited or anatomically abnormal, diseased, or pathoanatomical; someone who is neither whole nor healthy, fit nor flourishing, someone who is biologically inferior or subnormal'.\textsuperscript{25}

As the medical model solely emphasises the medical nature of disability, it belittles people with disabilities and focuses on their rehabilitation, medication and cure with the hope to restore their body to the average standard from which it had deviated. Put another way, the medical model completely overlooks the social and environmental features of disablement.

\textsuperscript{20} Rannveig Traustadottir, 'Disability Studies, the Social Model and Legal Developments' in Quinn and Arnardottir, \textit{UN Convention}, 3; and Quinn and Degener, \textit{Human Rights and Disability}, 1.


\textsuperscript{23} For further discussion, see Steve Smith, 'Equality, Identity and the Disability Rights Movement: From Policy to Practice and from Kant to Nietzsche in More than One Uneasy Move' (2005) 25 Crit Soc Pol 554.

\textsuperscript{24} It is important to note that the medical model of disability relies on the Kantian essentialist assumption, according to which there is an existential reality fixed across time and societies. This reality is constituted of delimited biophysical features that are present within the human body and that are therefore essential and not incidental to its existence (see ibid 560).

\textsuperscript{25} Ibid.
The problem with this model is twofold. First, it sustains and further accentuates the myth according to which people with disabilities are sick and dependant individuals. Secondly, the solutions advocated by the model diminish persons with disabilities to objects of charity, which at best may be rehabilitated or at worst excluded. Interestingly, talking about rehabilitation necessarily raises the question of what it is to be human and how the human body should look. Rehabilitation conveys a sense of returning, bringing back or re-establishing a former situation or former state of being to the normal life by training or therapy. As the medical model suggests that persons with disabilities have lost a function or an organ or have an abnormal biological characteristic, it believes that these individuals have also lost their place in society. The only way for them to regain their place within society is to endure some form of reconstruction of their disabled body or rehabilitation. To this end, an array of corrective devices are often provided, with the ultimate hope that these devices will eventually transform disabled people – as the medical model names them – into normal individuals, worthy of being integrated within society. In essence, the medical solution of rehabilitation becomes the symbol of a culture that attempts to make identical individuals through the process of medicalisation and/or institutionalisation. It aims at eradicating the disabled body and, a fortiori, any human difference so that every member of a society is assimilated with the ‘greater and single social whole’

In reaction to the limits of this model, a more social constructionist approach to disability is often advocated, emphasising the sociological nature of

26. As suggested by Bickenbach, disablement becomes a characteristic of a defective person – that is, someone who is ‘functionally limited or anatomically abnormal, diseased, or pathoanatomical; someone who is neither whole nor healthy, fit nor flourishing, someone who is biologically inferior or subnormal’ (‘Biomedical Model of Disablement’).


28. ibid.

29. ibid 228.

30. ibid.

impairment and disability.\textsuperscript{32} This version adopts an anti-Cartesian perspective\textsuperscript{33} and posits that impairment, like disability, is more a sociological and societal problem than a biomedical problem.\textsuperscript{34} It suggests that disability, like impairment, is the idealist product of a society based on aesthetic and somatic values.\textsuperscript{35}

\textit{The Social Constructionist Approach to Disability}

Otherwise known as the poststructuralist model of disability, this approach posits that both concepts of disability and impairment are the product of cultural relativism – that is, of specific cultural conditions.\textsuperscript{36} It argues that, although impairment may be constituted of biophysical characteristics, this phenomenon may be also constructed by social, cultural and political discourses.\textsuperscript{37} In essence, the poststructuralist version argues that, whilst persons with disabilities have always been present in society, the degree to which they are included or excluded from mainstream activities varies depending on the predominant cultural interpretation of the concept of humane difference and therefore disability.\textsuperscript{38}

Two important cultural phenomena have been identified as participating in this social and cultural construction.\textsuperscript{39} They are the institutionalisation of linguistic and discursive practices on the one hand, and the aesthetic oppression of the non-disabled gaze in a somatic society based on the ‘myth of bodily perfection’ – also called the ‘tyranny of perfection’ – on the other hand. Both phenomena demonstrate that disability is experienced in, on and through the

\textsuperscript{32} It is important to note that the social model of disability is not a monolithic entity, but rather a plural entity that embodies a myriad of social-contextual approaches to disability. For the purpose of this article, only one type of social model of disability is analysed, namely the social constructionist approach.

\textsuperscript{33} An anti-Cartesian approach suggests that disability and impairment are not two separate entities. They both participate in a complex interpenetration of oppression and affliction. For further discussion on this topic, see Bill Hughes and Kevin Paterson, ‘The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment’ (1997) 12(3) Disability and Soc 325, 330.

\textsuperscript{34} Tom Shakespeare and Miriam Corker, ‘Mapping the Terrain’ in Disability/Postmodernity: Embodying Disability Theory (Continuum 2002) 3.


\textsuperscript{36} ibid.

\textsuperscript{37} Hughes and Paterson, ‘Social Model of Disability’.

\textsuperscript{38} Hughes, ‘Constitution of Impairment’.

\textsuperscript{39} For the purpose of this article, these cultural phenomena are only mentioned, as a study of their content and implications would be outside the scope of this paper.

\textsuperscript{40} For further details, see Hughes, ‘Medicine and the Aesthetic Invalidation of Disabled People’, 560.

\textsuperscript{41} Barry Glassner, Bodies: The Tyranny of Perfection (Lowell House 1992).
body and the gaze of people without disabilities. It is experienced from the perspective of impairment and from the social and aesthetic characteristics of a somatic society.

Under this version, the social environment of our society becomes the primary cause of disadvantage and discrimination against persons with disabilities. In response to these forms of exclusion, the social ontology favours the enactment of non-discriminatory measures that would remove social and environmental barriers and ultimately integrate persons with disabilities within society. In this context, equality of treatment becomes the ethos upon which the social constructionist model of disability relies. It posits that, by removing the environmental and structural barriers, people with disabilities can have access to the same societal services than people without disabilities and therefore participate within the mainstream society on an equal basis with others.

The problem with this formal conception of equality is that it does not challenge the traditional approach, according to which equality is assimilated to sameness and difference to otherness. It protects equally all human beings from direct discrimination, but does not protect them from indirect discrimination, therefore avoiding real differences. It fails to move beyond the ‘equality as neutrality philosophy’ and to take the additional step of providing equality of opportunity.

This additional step is precisely provided by the human rights-based approach to disability.

42. Hughes and Paterson, ‘Social Model of Disability’, 335.
43. See, for example, Barnes, Disabled People in Britain; Stein, ‘Beyond Disability Civil Rights’, 1209; Stein, ‘Disability Human Rights’, 91.
44. This model is built upon the Aristotelian maxim, according to which like cases are treated alike and unlike cases unalike. In this context, equality becomes synonymous of sameness. When individuals are seen to be the same, but are not treated the same, their treatment is considered unreasonable and arbitrary and is prohibited by law as unequal under the ‘likes alike’ principle. However, if people are initially seen to be different, they can be treated differently without their treatment being considered as unequal – because they are unlike, they can be treated unalike. See, Aristotle, J. L. Ackrill and J. O. Urmson (eds), David Ross (trans), Ethica Nicomachea (vol. 3 Oxford University Press 1980) 112–17, 1131a–b; and Aristotle, Benjamin Jowett (trans), The Politics (The Modern Library 1943) 307 (‘equality consists in the same treatment of similar persons’); Arnardóttir, ‘A Future of Multidimensional Disadvantage Equality?’ in Quinn and Arnardottir (eds), The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives (International Studies in Human Rights 2009) 41; and Catherine A MacKinnon, Sex Equality (West 2001).
46. ibid.
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Like the social constructionist model of disability, the human rights-based approach to disability highlights society’s role in constructing the concept of disability through cultural and political discourses, on the one hand, and social and institutional environmental barriers on the other. Unlike the social version, the human rights perspective does not solely associate the concept of disability with a formal approach to equality. It also recognises differences as an aspect of human diversity and argues for a substantive approach to equality that guarantees equality of opportunity, equity, social justice and respect for individual human rights.

The UN Convention on the Rights of Persons with Disabilities is the most prominent treaty embodying this humanistic philosophy. First, the Convention is an astounding example showing how to transcribe a positive and humanistic definition of disability. Although not defined expressly, it is now well accepted that disability arises from the ‘interaction with various barriers [that] may hinder [the] full and effective participation [of persons with disabilities] in society on an equal basis with others’. This definition is the first at the international level to expressly reject ontological arguments on the essence and existence of disability. Moving away from the classification provided by the International Classification on Functionings, Health and Disability, it transforms disability as a sign of ‘human diversity and humanity’ and recognises persons with disabilities as human beings, with equal dignity, equal human worth and equal rights.

Secondly, the Convention is particularly noteworthy for adopting the double approach to equality in its provisions. Not only does the Convention guarantee non-discriminatory measures by reaffirming that all persons are equal before and under the law and are entitled without discrimination to the equal protection

50. art 1 CRPD.
51. The International Classification on Functioning adopts a ‘biopsychosocial’ model of disability by integrating both the medical and social models of disability. The problem with this approach is that it still operates a clear distinction between impairment, disability and handicap, whereby impairment refers to disease, disorders and disability to discrimination that persons with impairments face, and handicap to the inadequacy of the environmental structure. See, for further details, ICF, Towards a Common Language for Functioning, Disability and Health (World Health Organisation 2002, WHO/EIP/GPE/CAS/01.3).
52. art 3(d) CRPD.
53. arts 3, 5(1) and 12(1) CRPD.
and equal benefit of the law. The Convention also recognises the right of persons with disabilities to benefit from equality of opportunity, acknowledging a more substantial approach to equality. Article 24 of the CRPD is particularly patent for embodying these two approaches to equality. In guaranteeing the realisation of the right to education of persons with disabilities, s 1 of the Article specifies that this right must be implemented without discrimination and on the basis of equal opportunity. This double guarantee, combined with the inclusive educational ethos of the Convention, constitutes the sine qua non condition for vindicating effectively and successfully disability rights in education.

The Inclusive Educational Ethos of the Human Rights-Based Approach to Disability Rights in Education

The inclusive approach to education underlines the need to respect and recognise all individuals as persons and subjects of rights. It acknowledges the individuality of every child as a unique learner with unique characteristics, interests, abilities and learning capacity. In practice, this approach implies that schools, and in particular teachers, are required to go beyond the legal rule and act in accordance with their human duty. This human duty refers to the duty of respecting every individual as a human being and, a fortiori, as a person, subject of rights. A teacher who follows his or her human duty necessarily sees every child as a potential citizen and recognises children with learning difficulties and disabilities primarily as persons and subjects of rights, instead of expressions of human frailty or impairment.

Under this inclusive approach to education, the goals of education are understood in a more progressive and pragmatic way. They are directed at the development of the child’s talents, personality and creativity, together with the ‘respect for human rights, fundamental freedom and diversity’. In essence, inclusive education fosters a child-centred and learner-friendly educational policy that understands learning as idiosyncratic. It posits that every child, regardless of learning capacity, difficulty and/or disability, can learn meaningfully

54. art 5(1); see also arts 3(b), 4(1)(b) and (e) CRPD in relation to the right to equal treatment under the law.
55. arts 3(e) and 24(1).
56. art 24(1) CRPD.
59. ibid.
60. ibid.
61. art 24(1)(b) CRPD.
62. art 24(1)(a) CRPD.
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and successfully provided that this child benefits from equal educational opportunities to learn meaningfully and successfully and receives additional educational services appropriate to his or her individual educational needs in the best-suited learning environment.

The Convention on the Rights of Persons with Disabilities expressly embodies this humanistic and inclusive approach to education. As set down in art 24(1), with a view of being inclusive, education should aim inter alia at ‘the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity’ 64 Article 24 further refers to the idiosyncratic nature of learning by ensuring that ‘effective individualised’ educational measures be provided for children with disabilities in ‘environments which maximize academic and social development’ 65 It is noteworthy that, whilst the Convention refers to educational ‘environments which maximize academic and social development’, 66 it does not give any preference to the type of environment that would be better suited for educating children with disabilities. This omission is enlightening and unravels the ambiguity that is often brought on by the debate on inclusive education. The Salamanca principles affirm the right of every child to learn together, ‘wherever possible, regardless of any difficulties or differences they may have’ 67 Some countries have interpreted this principle of inclusive education as referring to the place where the child should be taught, 68 whilst others have interpreted this principle of inclusion as referring to the right of the child to learn meaningfully and successfully in a best-suited, respectful learning environment. 69 The philosophy of the Convention leans towards the latter

64. art 24(1)(a) CRPD.
65. art 24(2)(e) CRPD.
66. ibid.
69. Finland represents a manifest example in that regard. What matters in Finland is not where the child is being educated; rather what is at stake is how the child is being educated and therefore how a quality education may be provided for him or her. For further details on the Finnish approach to inclusive education, see Joel Kiviruoma and Kari Ruoho, ‘Excellence through Special Education? Lessons from
interpretation. Article 24(2)(d) and (e) focuses more on the support required for delivering a quality education than on the institutions that deliver it.\textsuperscript{70} This is particularly patent when one reviews the vocabulary used in this Article. Instead of referring to ‘mainstream education’ and ‘special education’, art 24 refers to one type of education: general education.\textsuperscript{71}

Very often, the place and the process of learning meaningfully coincide. Very often, a child will learn meaningfully and successfully alongside his or her peers. Nonetheless, in some cases, a child will learn more meaningfully and successfully in a separate setting, being a separate class or a separate school.\textsuperscript{72} Article 24(3)(c) leaves the door open to this possibility.\textsuperscript{73}

In essence, the Article conveys the idea that disability, inclusive education, difference and plurality all become synonymous with equity, social justice and respect for human rights. Inclusion becomes an outcome of a progressive, humanistic and ethical approach to disability rights in education. It suggests that establishing an inclusive educational policy requires more than just establishing non-discriminatory measures and ensuring equal participation in the learning environment. It requires a structure that ensures equality in learning.

As mentioned in the introduction of this paper, Ireland has signed the Convention on the Rights of Persons with Disabilities in 2007. Whilst it moves towards its ratification, one may query whether or not its legislative framework on disability rights in education is in compliance with the humanistic philosophy of the Convention and more precisely with the principles set down in art 24 of the CRPD.

The Irish Legislative Framework on Disability Rights in Education

The Irish legislative framework on disability rights in education is relatively recent. Its establishment is directly the product of two phenomena that became particularly patent in the 1990s: the surge of parental litigation against the State in relation to educational provisions for children with learning difficulties.

\textsuperscript{70} art 24(2) reads as follows: ‘(d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education; (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.’

\textsuperscript{71} See art 24(2)(d).

\textsuperscript{72} This observation is further suggested by the redaction of art 24(3)(c) CRPD, which refers to ‘environments which maximise academic and social development’.

\textsuperscript{73} ibid.
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and disabilities,74 and the growing demand of the international community to establish equitable educational systems that would guarantee quality education for all and provide educational services appropriate to every child's individual educational needs in the best-suited learning environment.75

The first legislation that provides some statutory guarantees for children with learning difficulties and disabilities is the Education Act 1998.76 The Act requires the Minister for Education to ensure that a level of quality education appropriate to meet the needs and abilities of each person residing in the State be available.77 Endorsing the position of the Judiciary with regard to the right to education of children with learning difficulties and disabilities,78 the Act reaffirms the State's duty to provide for79 educational services to every child, regardless of disability, difficulty and/or learning capacity.80

74. See, for instance, O'Donoghue v Minister for Health [1996] 2 IR 20 (HC); Comerford v Minister for Education [1997] 2 ILRM 134 in which McGuinness J expressly acknowledged the principles set down by O'Hanlon J in the O'Donoghue case (see n 89) and went on to state that 'the right to free primary education extends to every child, although the education provided must vary in accordance with the child's abilities and needs' [1997] 2 ILRM 134 (HC) 143; Sinnott v Minister for Education [2001] 2 IR 545 (SC); O'Carolan v Minister for Education [2005] IEHC 296; O'C v Minister for Education [2007] IEHC 170; McD v Minister for Education [2008] IEHC 265; McD v Minister for Education [2013] IEHC 175.


77. s 7(1)(a).

78. In O'Donoghue v Minister for Health [1996] 2 IR 20 (HC), O'Hanlon J affirmed, for the first time, the existence of a constitutional right to free primary education for every child, including children with the most severe and profound learning difficulties. For a history on the education of children with learning difficulties prior to this decision, see Dympna Glendenning, 'Educational Provision for Children with Disability' in Education and the Law (Butterworths 1999) 142; Conor O'Mahony, Educational Rights in Irish Law (Thomson Round Hall 2006) 146; Gerard Whyte, Social Inclusion and the Legal System: Public Interest Law in Ireland (Institute of Public Administration 2002).

79. In Crowley v Ireland [1980] IR 102 (SC), the Supreme Court held that the first clause of art 42.4 of the Constitution, according to which the ‘State shall provide for free primary education’, imposes a duty on the State to provide for free primary education, and that this duty shall be normally interpreted as an indirect duty.

80. See, inter alia, s 6 of the Act, which states that 'Every person concerned in the implementation of this Act shall have regard to the following objects in pursuance of which the Oireachtas has enacted this Act: (a) to give practical effect to the constitutional rights of children, including children who have a disability or who have other special educational needs, as they relate to education; (b) to provide that, as far as is practicable and having regard to the resources available, there is made available to people resident in the State a level and quality of education appropriate to meeting the needs and abilities of those people.'
Although the Education Act 1998 provides the genesis of a structure that could guarantee quality education for all, the most prominent legislation with regard to the education of children with learning difficulties and disabilities is the Education for Persons with Special Educational Needs Act 2004. This Act represents an important step in establishing a legislative framework that could guarantee an effective and inclusive education accessible, available and adaptable to every child residing in Ireland.

Amongst its most important provisions, the Act sets out the principle according to which education of children with ‘special educational needs’ shall take place, as far as possible, in an inclusive environment. Whilst Ireland has been relatively slow, compared to other European countries, in moving from an integrative approach to an inclusive approach to education, this philosophical shift in the nature of the debate manifests this shift in the nature of the debate.

81. This article is mostly concerned with the education of children with learning difficulties and disabilities, as opposed to the education of adults with disabilities. For this reason, the article does not provide an in-depth analysis of the Disability Act 2005, which deals with the education of persons with disabilities over the age of 18.
83. Whilst the author of the article is reluctant to use this expression as will be further discussed below, this expression will be referred to when quoting the EPSEN Act.
84. s 2 of the 2004 Act.
85. For instance, England and Finland adopted the inclusive agenda in the 1990s. For England, see The Education Act 1996 and the Special Educational Needs Code of Practice 2001; for Finland, see the Basic Education Act 1998, which represents the unique legal authority in the Finnish education system.
86. According to the Special Education Review Committee Report, integration implies ‘the participation of pupils with disabilities in school activities with other pupils, to the maximum extent which is consistent with the broader overall interests of both the pupils with disabilities and the other pupils in the class/group’ (Government of Ireland 1993) 18. Put another way, integration refers to an educational system whereby individual additional supports to children with learning difficulties and disabilities are provided in order to enable these children to ‘fit in’ to mainstream society. In this sense, integration may be best understood as an assimilating model. It requires students to adapt or to assimilate to the existing educational structures. For further discussion, see Peter Farrell and Michael Ainscow, Making Special Education Inclusive: From Research to Practice (David Fulton Publishers 2002); Phádraig MacGiolla, ‘Towards Inclusion: The Development of Provision for Children with Special Educational Needs in Ireland from 1991 to 2004’ (2007) 26(3) Ir Edu Stud 289.
87. According to UNESCO, ‘inclusion is seen as a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education’. It is often referred to as embodying the four following features: ‘Inclusion is a process: it has to be seen as a never-ending search to find better ways of responding to diversity. It is about learning how to live with difference and learning how to learn from difference. In this way differences come to be seen more positively as a stimulus for fostering learning, amongst children and adults; Inclusion is concerned with
The Act further lays down a certain number of key provisions that ensure that children with learning difficulties have the same educational rights as their peers.\textsuperscript{88} For instance, s 10 of the Act provides that the National Council for Special Education (NCSE)\textsuperscript{89} shall designate a particular school to which a child should be admitted, taking into account the needs of the child, the wishes of the parents and the capacity of the school to accommodate the child’s needs.\textsuperscript{90} Interestingly, this collaboration between school, parents and children constitutes a crucial aspect of an inclusive culture.

Perhaps the most prominent provision of the Act is the establishment of a detailed framework necessary for the development and implementation of an Individual Education Plan (IEP).\textsuperscript{91} The Individual Education Plan is commonly understood as a tool that guarantees quality education appropriate to the individual needs of the child in an inclusive environment.\textsuperscript{92} As described by the National Council for Special Education, it aims at identifying where the student is, where he/she is going, how he/she will get there, and how to tell if the journey the identification and removal of barriers. Consequently, it involves collecting, collating and evaluating information from a wide variety of sources in order to plan for improvements in policy and practice. It is about using evidence of various kinds to stimulate creativity and problem solving; Inclusion is about the presence, participation and achievement of all students. Here “presence” is concerned with where children are educated, and how reliably and punctually they attend; “participation” relates to the quality of their experiences whilst they are there and, therefore, must incorporate the views of the learners themselves; and “achievement” is about the outcomes of learning across the curriculum, not merely test or examination results; and Inclusion involves a particular emphasis on those groups of learners who may be at risk of marginalization, exclusion or underachievement. This indicates the moral responsibility to ensure that those groups that are statistically most “at risk” are carefully monitored, and that, where necessary, steps are taken to ensure their presence, participation and achievement in the education system.’ UNESCO, 	extit{Policy Guidelines on Inclusion in Education} (2009) 13, 15–16.

\textsuperscript{88} It is noteworthy that the Act is solely concerned with the issue relating to quality education in an inclusive environment. The Act does not cover the obligation of the State to provide reasonable accommodation, this obligation being considered in the Equal Status Act 2000 No 8.\textsuperscript{89} As the present paper focuses on educational rights of children with disabilities within education, and more precisely their right to quality education in an inclusive environment, issues relating to reasonable accommodation are not considered in full length. For further discussion on these issues, see Cahill v Minister for Education and Science [2010] IEHC 227 (HC).

\textsuperscript{89} New body established under the EPSEN Act and regulated under s 19.


\textsuperscript{91} See section 9 onwards.

\textsuperscript{92} Sean Griffin and Michael Shevlin, 	extit{Responding to Special Educational Needs: An Irish Perspective} (Macmillan 2007).
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is successful. It is child-centred, inclusive, holistic, collaborative and accessible to everyone who works directly with the individual child. In essence, this individual programme helps children to realise their educational rights. It helps them to realise their right to learn effectively and successfully in the best-suited learning environment, on an equal basis with others. In this sense, one has to bear in mind that IEPs, inclusion and quality education embody the same philosophy, that of equity in education, equality of opportunity and respect for individual human rights.

It is undeniable that all of these provisions represent a positive and significant change towards the implementation of a more progressive and inclusive approach to disability rights in education in Ireland. In the past, the common belief was that children with learning difficulties and disabilities could not cope with the learning tasks involved in the traditional curriculum and hence had to be provided with special restricted curriculum in secluded institutions. The principles set down by the Education for Persons with Special Educational Needs Act expressly discredits this belief. The onus is now on national schools to revise their practice and structure in order to facilitate the delivery of quality education for every child, including children with learning difficulties and disabilities.

Nevertheless, beside these positive elements, the legislative framework remains insufficient in many respects. As pointed out by the Committee on the Rights of the Child, the Irish legal framework inadequately addresses the specific needs of children with disabilities and their access to educational facilities. It is to the current inadequacies of the Irish legal framework that this article turns now its attention.

The Inappropriateness of the Irish Legislative Framework

This paper identifies two main inadequacies that significantly hamper the development of a human rights-based approach to disability rights in education in Ireland. First, it argues that the current legislation relies on inadequate definitions, which convey inappropriate beliefs and assumptions about disability and education. Secondly, it posits that the legislation misunderstands the concept of inclusion and seems to assimilate it with the concept of integration. The combinations of these two inadequacies contributes to the development of segregative practices observed at the local level and certainly justifies the persistence of negative attitudes and beliefs about disability, difference and inclusion.

94. ibid 5; see also Griffin and Shevlin, Responding to Special Educational Needs, 133.
96. See, for instance, the State’s arguments in the O’Donoghue case, (1996) 2 IR 20 (HC) 25.
A Legislative Framework Based on Inappropriate Definitions

As it stands, the Irish legislative framework relies on inadequate definitions. It fails to define the concept of education and its aims (a) and provides a very narrow approach to disability (b). Consequently, it creates an unequal system, under which disability becomes the prerequisite determinant for the allocation of additional resources for children with certain types of learning difficulties and disabilities (c).

The Failure to Define Education

The current legislative framework fails to provide any definition of what education is, what its aims are and, a fortiori, what special education is. The Education Act 1998 and the EPSEN Act 2004, which together regulate the entire Irish education system, both fail to explain what they mean by education. Both acts define in ss 2 and 1 respectively terms such as ‘schools’, ‘student’, ‘child’, ‘principle’, ‘parents’, but fail to consider ‘education’ or ‘the aims of education’.98

This legislative lacuna has proved to be quite ‘disabling’ for the judiciary, which is left with the laborious duty of providing some elements of interpretation in relation to the aims of education and its content. A first interpretation was provided in Ryan v Attorney General, in which O’Dálaigh J referred to education as ‘essentially the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral’.99

Although this definition remained incomplete in light of international law, one could nevertheless applaud the attempt to provide some poststructuralist insights into the objectives of education. This interpretation would suggest that, by and large, education would have a double objective – an instructional objective, characterised by the ‘teaching’ or transfer of skills and knowledge; and a more humanistic objective, which would refer to the maximisation of the present and future learning capacity of the child through the ‘training’ of this child.

Interestingly, O’Hanlon J reiterated this poststructuralist definition in O’Donoghue v Minister for Education, although with a slight alteration.100 Nonetheless, despite these two positive interpretations of the concept of education and its aims,101 this issue did not reach a unanimous consensus in the Supreme Court in Sinnott v Minister for Education.102 Instead of clarifying this question of definition, the divergent views held by the Supreme Court brought more confusion and ambiguity into the debate relating to the meaning of education. Murphy J and Hardiman J firmly believed that education, and more

98. See s 2 Education Act 1998 and s 1 EPSEN Act.
100. [1996] 2 IR 20, 59.
102. [2001] 2 IR 540.
precisely primary education, should be confined to its traditional and therefore scholastic nature.\textsuperscript{103} To quote Murphy J,

primary education is provided by teachers in classrooms. It was and is a basic scholastic education in the sense that it is a first stepping stone on a career which may lead to secondary level and ideally graduate to the third level.\textsuperscript{104}

Disagreeing with this classical view, Murray J and Geoghegan J shared the view that, although the term education traditionally and historically referred to the classical education of scholastic nature provided in schools, this term should not be limited to this interpretation and should rather reflect the contemporary development, especially in relation to children with learning difficulties and disabilities.\textsuperscript{105} Rejecting both views, Keane CJ was the only Judge adopting the definition provided by O’Hanlon J and reiterated by Barr J in the High Court,\textsuperscript{106} Denham J and Fennelly J omitting to pronounce on the matter.

Accordingly, as it stands, the matter relating to the definition of education and its aims remains solely unclear. Some have argued that the approach taken by O’Hanlon J in O’Donoghue and subsequently reiterated by Barr J and Keane CJ in Sinnott should constitute the law on the issue.\textsuperscript{107} Even though this view was correct, the definition of education provided would still remain wholly unsatisfactory because it is incomplete in the light of recent international developments.\textsuperscript{108} One has to bear in mind that the concept of education is a multifaceted concept that has received many different types of interpretation. From the narrow-minded classical approach that emphasises scholastic matters\textsuperscript{109} to the more utilitarian approach, which relies on the concept of efficiency and posits that education should be provided to individuals who will benefit the most from it and produce optimal average benefits to society,\textsuperscript{110} the concept of education is not a unitary concept and, depending on the approach

\begin{itemize}
\item \textsuperscript{103} ibid 670 for Murphy J and 693 for Hardiman J.
\item \textsuperscript{104} ibid 675.
\item \textsuperscript{105} ibid 682, 724.
\item \textsuperscript{106} ibid 628.
\item \textsuperscript{107} See Conor O’Mahony, ‘The Right to Education and “Constitutionally Appropriate Provision”’ (2006) 13(1) DULJ 422.
\item \textsuperscript{108} See, for instance, the General Comment issued by the UN Committee on the Rights of the Child on Article 29(1): The Aims of Education, which Provides the Most Progressive Understanding of Education and its Aims (CRC General Comment 1, 08/02/2001).
\item \textsuperscript{109} See John Locke, Some Thoughts Concerning Education (1693); Immanuel Kant, Education (University of Michigan Press 1960); and, more generally, Amy M Schmitter, Nathan Tarcov and Wendy Donner, ‘Enlightenment Liberalism’ in A Companion to the Philosophy of Education (Blackwell 2003) 73.
\item \textsuperscript{110} Benjamin Bentham, Chrestomathia (Clarendon Press 1983); Elissa S Itzkin, ‘Bentham’s Chrestomathia: Utilitarian Legacy to English Education’ (1978) 39(2) J of the History of Ideas 303; FA Cavanagh, ‘Jeremy Bentham on Education’ (1933) 1 Int’l
adopted, its objectives and the attitude that it fosters towards children with learning difficulties and disabilities will differ significantly.

It is therefore disappointing that the Irish legislation does not provide any guideline in that regard, even more so considering that Ireland is a signatory of the UN Declaration of Human Rights\textsuperscript{111} and the UN Convention on the Rights of Persons with Disabilities,\textsuperscript{112} has ratified the International Covenant on Economic, Social and Cultural Rights\textsuperscript{113} and, more importantly, the Convention on the Rights of the Child.\textsuperscript{114} All these international documents provide a clear definition of education and its aims in a progressive and humanistic way.\textsuperscript{115}

Interestingly, the Irish \textit{Green Paper on Education} reaffirmed this human rights ethos and identified ten educational aims that should guide the Irish framework.\textsuperscript{116} It suggested that education should aim \textit{inter alia} at

(i) fostering an understanding and critical appreciation of the values of the home and society generally; (ii) promoting self-esteem and self-worth, combined with a respect for the rights and beliefs of others; (iii) fostering intellectual development and the attainment of one’s full educational potential; (iv) developing a spirit of inquiry; (v) developing expressive and creative abilities to the individual child’s full capacity; (vi) providing students with the necessary skills to equip them for work and to enable them to function effectively in society; and (vii) creating tolerant, caring and politically aware members of society.\textsuperscript{117}

\ldots an underlying educational aim is to assist or enable each individual to promote his or her development and personality and to achieve a sense of self-worth.\textsuperscript{118}

This concluding statement could not be more progressive and humanistic in nature. Not only does it highlight the constructive dimension of education as a means to foster individual growth, but it also emphasises the humanistic

\textsuperscript{111} Ireland signed the Declaration in 1948.
\textsuperscript{112} Ireland signed the Convention in 2007, but has not yet ratified it.
\textsuperscript{113} Ireland ratified the Covenant in December 1989.
\textsuperscript{114} Ireland ratified the Convention in September 1992.
\textsuperscript{115} For instance, art 29 of the Convention on the Rights of the Child (General Assembly resolution 44/25 of 20 November 1989) states that education should aim, \textit{inter alia}, at: \textquoteleft(a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;\textquoteright
\textsuperscript{117} Education should also aim at \textquoteleft(viii) fostering a spirit of self-reliance, of innovation and of enterprise; (ix) achieving standards of educational performance comparable to the highest internationally; and (x) ensuring that people are appropriately educated and trained to support the country’s economic development\textquoteright (33).
\textsuperscript{118} ibid 35.
dimension of education as an end in itself. One may wonder why the subsequent legislation has not reaffirmed this definition of education, considering that a clear and unambiguous approach was already provided and complied with international standard.

The result of not providing any definition of education is that the Irish government has a constitutional duty to provide for educational services for children with learning difficulties and disabilities without clear guidance on what education is, what its goals are and therefore what special education is. In this context, it is fair to query how a government can provide quality education, especially for children with learning difficulties and disabilities, without knowing the true meaning of education and its objectives and without understanding why special education is identified as being special.

The second concept that raises concern relates to the definition and interpretation of the concept of disability.

The Narrow Approach to Disability

As discussed in the first part of this paper, the language someone uses to name a phenomenon reflects his or her understanding of, and attitude toward, this phenomenon. It is commonly accepted that the process of defining disability is a difficult task. This is mainly so because of the complex and multifaceted nature of this concept.

This article advocates a human rights-based approach to disability. It suggests that disability should be recognised as an aspect of human diversity rather than an individual problem, located exclusively within the individual per se. Unfortunately, this approach is not the one that has been retained by the Irish legislation. The predominant imagery of disability as perceived in Ireland is the negative and stereotyped one of disability as a problem, a disease and a tragedy.

The Irish legislative framework embodies the medical model of disability, focusing solely upon the medical conditions and inabilities of the individual. It underlines the biomedical aspect of disability, which is often associated with impairment. For instance, the Education Act 1998 defines disability as follows:

(a) The total or partial loss of a person’s bodily or mental functions, including the loss of a part of the person’s body, or
(b) The presence in the body of organisms causing, or likely to cause, chronic disease or illness, or
(c) The malfunction, malformation or disfigurement of a part of a person’s body, or
(d) A condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
(e) A condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour.\(^\text{119}\)

\(^{119}\) s 2 Education Act 1998.
Interestingly, this definition is very similar, not to say identical, to the one provided in the Employment Equality Act 1998 and in the Equal Status Act 2000, which regulate the non-discriminatory framework in Ireland. All three acts enumerate a list of potential medical factors or incapacities that may constitute impairment and, a fortiori, disability. Applied within the educational framework, learning difficulties become solely seen as the manifestation of the child’s disability or impairment. Special educational needs are disability-related and do not relate to external factors, such as the environmental structure, the inadequacy of the teaching staff or the lack of adequate additional educational supports. The definition of disability adopted in the Disability Act 2005 differs slightly from the one provided in the three previous Acts. Instead of establishing a list of medical factors, s 2(1) of the Act 2005 defines disability as:

a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.

If one may welcome the absence of any list of potential medical factors, one may still identify the presence of the medical philosophy in this definition. Section 2(1) of the Disability Act still highlights the personal condition or impairment of the individual as being the unique factor in the process of disablement. Like the previous definitions, it completely fails to recognise the predominant role society plays in further constructing the concept of disability and in further disabling this category of persons through social and environmental barriers and political and cultural discourses.

Interestingly, the Education for Persons with Special Educational Needs Act 2004 does not provide a definition of the concept of disability. Instead, the Act provides a definition of the expression ‘special educational needs’. This definition is surprisingly similar to the definition of disability, as discussed above. Section 1 of the Act reads as follows:

Special educational needs means, in relation to a person, 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 and cognate words shall be construed accordingly.

By reading this definition, one may be struck by the same references to ‘restriction in the capacity of the person’ or by reasons ‘enduring physical, sensory, mental health or learning disability (or intellectual impairment)’. These

121. s 1, EPSEN Act.
122. Disability Act 2005, s 2(1).
123. EPSEN Act 2004, s 1.
references are undeniably references to the individual medical conditions that restrict the child from learning effectively and ‘normally’ in a mainstream environment. They ignore the environmental influences on learning and overlook the complexity of ‘special educational needs’.

The problem with using the expression ‘special education’ is twofold. First, the expression itself embodies the seeds of the medical model of disability. The adjective ‘special’ implies that those identified with special needs are different from those who do not have any and therefore should be separated from them. Put another way, this adjective is a clear and direct reference to the hierarchical ontological dichotomy of the medical model between what is normal and what is pathological – that is, special. It embodies a within-child model and conveys the idea that there exists a hierarchy between children’s capacities to learn – those having special educational needs being necessarily at the bottom of such hierarchy. In this context, it introduces a new overarching, vague and impractical category, that of special needs.

The second problem that emerges from this expression is its definition itself. The Irish legislative framework confuses the three concepts of special educational needs, disability and impairment. This similitude between special educational needs and disability suggests that a child’s special educational need is determined by his or her disability. It suggests that it is because he or she has a disability that he or she has special educational needs. Unfortunately, this correlation at best oversimplifies the complexity of the problem, at worst denies it. It omits the fact that some children may have some learning difficulties without having disabilities\textsuperscript{124} and vice versa.\textsuperscript{125}

As it stands, these definitions of disability and special educational needs under the Irish legislative framework are untenable. They are incongruous, slippery and should be replaced. They support the pessimistic view according to which having a disability is an inevitable and inherent characteristic of impairment possession and does not relate to any cultural or social phenomena, which are variable and contingent characteristics of this process of disablement. They associate disability with fixed essential characteristics, seen via the perspective of persons without disabilities, who generally interpret disability as being the exclusive cause of a life of personal loss or tragedy. In this context, they convey the message that persons with learning difficulties and disabilities have to adapt to society and its existing structures. The net effect is to segregate these persons more than include them within the community.\textsuperscript{126}

\textsuperscript{124} For instance, dyslexia and dyscalculia are learning difficulties that do not result from an initial disability.

\textsuperscript{125} A physical disability, such as chronic fatigue syndrome, does not alter the learning capacity of the person, for instance.

\textsuperscript{126} Quinn and Degener, \textit{Human Rights and Disability}, 1.
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This legislative structure represents a clear step back from the more holistic view on disability as advocated in international human rights law. Interestingly, the Report of the Special Education Review Committee provided a more comprehensive definition of the expression special educational needs. Like the EPSEN Act, the report did not refer to the concept of disability. Unlike the EPSEN Act, the report did acknowledge the difficulty of defining the expression 'special educational needs,' namely because of the wide scope this expression embodies. Accordingly, the report opted for a broader approach to special educational needs, defining it as:

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\text{disabilities and/or circumstances [that] prevent or hinder [children] from benefiting adequately from the education which is normally provided for pupils of the same age, or for whom the education which can generally be provided in the ordinary classroom is not sufficiently challenging.}
\]

One will note that, by referring to the expression 'and/or circumstances,' the report acknowledged the important role external factors, such as environmental, social, cultural and societal barriers, further play in disabling persons with learning difficulties and disabilities. It did identify special educational needs as being the result of the interaction between medical inabilities and inadequate educational structures. It is therefore regrettable that this definition has not been reaffirmed in the recent legislation as it would have clearly constituted a significant step in establishing a more progressive and humanistic approach to the issue.

Besides these definitional inadequacies stands another theoretical inappropriateness that is merely the direct consequence of adopting a medical approach to disability: the creation of a categorical system of assessment.

The Inadequacy of the Categorical System of Assessment

The practical consequence of adopting the medical model within the Irish legislation is twofold. First, it triggers the establishment of a system of assessment of special educational needs that is solely based on a categorical medical approach. Special educational needs are currently categorised according to

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127. Namely in the light of the CRPD.
129. As pointed out by Griffin and Shevlin, this concept covers a broad range of educational difficulties, ranging from those children who have mild and moderate learning difficulties and who require limited educational intervention, to those children, who, because of their severe or profound learning difficulties, require multi-disciplinary approaches (Responding to Special Educational Needs, 51).
131. See s 4 of the EPSEN Act, which defines an assessment and establishes its proceedings.
the severity of their nature\footnote{See circulars 09/04 (2004) and 02/05 (2005) of the Department for Education, which have established two categories of special educational needs depending on the level of their incidence on school’s activities.} and their identification is most of the time conducted by professionals belonging to the medical sector.\footnote{According to s 5 of the EPSEN Act, persons involved in the assessment of a child’s special educational needs belong essentially to the medical sector. There are psychologists, medical practitioners and/or therapists who are suitably qualified to provide support services in respect of the special educational needs of the child. Parents may also participate, but only if appropriate.} Despite the fact that the EPSEN Act mentions the participation of other professionals in assessing the special needs of a child,\footnote{Mainly, the principal of the school concerned and an appropriate qualified social worker (see s 5(1)(c) and (d) EPSEN Act).} in reality psychologists are the most frequently mentioned professionals when assessing the special needs of certain children with intellectual disabilities.\footnote{Martin Desforges and Geoff Lindsay, \textit{Procedures Used to Diagnose a Disability and to Assess Special Educational Needs: An International Review} (NCSE Report 2010) 127.}

The second problem with the Irish medical model of disability is that it has somehow established a link between the diagnosis of a disability and the allocation of additional resources.\footnote{See Paul Cooper and Barbara Jacobs, \textit{Evidence of Best Practice Models and Outcomes in the Education of Children with Emotional Disturbance: An International Review} (NCSE report 2011) 11.} In two circulars, the Department of Education and Science has established a categorical system, whereby children with special educational needs are divided into two groups, those with high-incidence special educational needs and those with low-incidence special educational needs.\footnote{Department for Education and Science, circulars 09/04 (2004) and 02/05 (2005).} On the one hand, children with high-incidence special educational needs are supported through a general allocation model (GAM)\footnote{Ibid; see also Desforges and Lindsay, \textit{Procedures Used to Diagnose a Disability}, 120.} – which provides schools with additional teaching resources on the basis of several factors.\footnote{Those factors refer to school enrolment numbers, gender breakdown and disadvantaged status (circulars 09/04 (2004) and 02/05 (2005).} Under this model, children do not need to apply individually. On the other hand, children with low-incidence special educational needs have to apply individually and be diagnosed with a certain type of disability in order to qualify for additional educational resources.\footnote{See Desforges and Lindsay, \textit{Procedures Used to Diagnose a Disability}, 120.}

The net effect of this categorical weighted system is that children with low-incidence special educational needs have to earn their right to receive an education by demonstrating that they belong to a certain category of special educational needs.\footnote{Circulars 09/04 (2004) and 02/05 (2005).} Special educational supports become a service that...
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needs to be earned by those who fit under the correct category more than a tool to guarantee quality education for all.

It is patent that this causal relationship is inappropriate, wrong and certainly at odds with the principles set down in art 24 of the CRPD. It identifies assessment as an end in itself, rather than a tool to an end – that of an inclusive and equitable education. It reduces special education to an exceptional service that may be awarded in a special setting because of exceptional circumstances. As recently pointed out in the new report of the National Council for Special Education, the current allocation model does not provide all children with equitable access to educational supports. It has become a high-stakes test to obtain additional resources for schools rather than to inform teaching and learning.

In essence, the Irish approach reveals two things. First, it reveals its adoption of a ‘special education paradigm’ rather than an ‘inclusive education paradigm’. Instead of establishing a unitary legal and educational framework, the Irish system relies on two separate educational frameworks: one special for children with disabilities and one mainstream for children without disabilities. The most patent example illustrating this dichotomy resides in the legislation itself. Two acts govern the education system: the Education Act 1998 for mainstream education, and the EPSEN Act 2004 for the education of children with ‘special’ needs. By relying on a separate and distinctive Act that deals exclusively with the education of children with learning difficulties and disabilities, the government fosters the idea that general education and special education are still two different types of education, each one of them requiring a different legal structure with different principles and different educational settings.

Secondly, the Irish approach reveals that providing educational services for children with learning difficulties and disabilities is more a societal issue than a legal issue. Through the definition of legal concepts, the law embodies the values and beliefs upon which a society relies. As discussed in the first part, disability and education are two human rights. They are interconnected and complement each other. Accordingly, when a government adopts a medical approach to disability, it is necessarily bound to adopt the traditional, scholastic and segregational approach to education.

Within that framework, the Education for Persons with Special Educational Needs Act has introduced a new concept, that of inclusive education. Due to the previous inadequacies, it seems nevertheless that the concept of inclusion is being currently misinterpreted as the right to a mainstream placement rather than as the right to learn effectively and successfully in a respectful environment.

142. Desforges and Lindsay, Procedures Used to Diagnose a Disability, 120.
143. NCSE, Supporting Students with Special Educational Needs in Schools (Paper No 4, May 2013) 5.
144. ibid 50.
An Attempt to Move Towards an Inclusive Approach to Education?

Over a relatively short period of time, inclusive education has become the priority policy objective of liberal democracies. Several international documents and reports manifest this strong ethos towards guaranteeing quality education for all in an inclusive environment, regardless of difficulties, disabilities and learning capacities.

This international trend has not been ignored by the Irish government. From the 1980s onwards, government-initiative reports introduced the concept of integration and discussed its merits. For instance, the Special Education Review Committee Report called for ‘as much integration as is appropriate and feasible, and as little segregation as necessary’ whilst the Green Paper on Education advocated the ‘valuable role of special schools’ and advocated the development of an integrative system. The novelty of the Education for Persons with Special Educational Needs Act is that it moves away from the integrative system

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147. See art 23 of the Convention on the Rights of the Child (1989), which called for the child to be receive an education that would achieve the ‘fullest possible social integration and individual development’; and art 24 of the Convention on the Rights of Persons with Disabilities (2006), which states that ‘States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life long learning directed to: (a) the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity; (b) the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; (c) enabling persons with disabilities to participate effectively in a free society.’
148. See, namely, UNESCO, Guidelines for Inclusion (2005); Policy Guidelines on Inclusion in Education (2009); and UNESCO, The Salamanca World Conference on Special Needs Education: Access and Quality (1994), which is the most significant international document in special education, arguing that schools with an inclusive orientation are ‘the most effective means of combating discriminatory attitudes building an inclusive society and achieving education for all’.
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of the 1980s and suggests a more inclusive education system, as discussed in the second part of this paper. The problem that emerges from the EPSEN Act framework is that it is contradictory at its core. On the one hand, the Act emphasises the humanistic and inclusive nature of education through its reference to the individual educational plan. On the other hand, the Act seems to confuse the philosophy of inclusion with that of integration. When one reviews s 2 of the EPSEN Act, one may be surprised by the sole emphasis on the place or ‘environment’ where the child shall receive his or her education. The Section does not refer to the quality of education the child is entitled to receive in a respectful environment. Put another way, s 2 frames the question of inclusion in the following terms: Should a child be educated in a mainstream school or should he or she receive education in a special class or special school? This question summarises perfectly how inclusion is understood in Ireland. It is understood as the right to a placement in a mainstream school, unless this placement is inconsistent with (a) the best interests of the child, or (b) the effective provision of education for children with whom the child is to be educated.

The right to be placed in a mainstream school is the aim of an integrative system. Integration aims at fitting children with learning difficulties and disabilities within mainstream activities. It does not aim at guaranteeing the same educational opportunities on the same basis as to others. It embodies a formal approach to equality, but ignores its substantive component. It ignores the substantive right to learn effectively and successfully in the best-suited learning environment and the right to have one’s dignity respected in a humanistic way.

As it stands, inclusion in Ireland constitutes a major concern for parents, teachers and academics. It is misunderstood as referring to the place where the child is being educated. It is identified as a placement issue, rather than an equitable issue. This misinterpretation is unsatisfactory and creates significant practical difficulties at the local level. In a study of 578 primary schools in

153. According to the first part of s 2 of the EPSEN Act, ‘a child with special educational needs shall be educated in an inclusive environment with children who do not have such needs.’
154. ss 8 onwards EPSEN Act.
155. s 2 EPSEN Act.
156. s 2(a) and (b) EPSEN Act.
157. See n 86.
Dublin and Kildare conducted by Shevlin, Kenny and Loxley, it was found that 34 per cent of primary schools had actually denied or deferred placements for children with learning difficulties. They observed that these schools believed they could not cater for the needs of this category of children, because they did not have sufficient additional resources and appropriate qualified personnel, who would take ‘care’ of the needs these children may require and/or behaviour difficulties. The authors concluded that, whilst schools seem to support the philosophy of developing an inclusive environment, the reality for parents of children with learning difficulties is that access to mainstream schooling is still fraught with many structural and attitudinal barriers – the ultimate decision relating to the admission of their child is exclusively conditional and dependent on the attitudes and beliefs of schools’ principals, for instance. As pointed out by one parent: ‘You were always cap-in-hand, as in “I’m not entitled” or she wasn’t entitled to the same treatment and it’s the same thing about approaching schools. We did it but for a lot of parents it’s a very difficult thing [...] and you’re very vulnerable, if anyone says a wrong word you bring it to the grave with you.’

This last comment highlights another practical difficulty, which arises once the first initial access issue to a mainstream placement has been overcome. Once a child with learning difficulties has been admitted to a mainstream school, it is not guaranteed that this child will actually receive a quality and effective education appropriate to his or her individual educational needs. In a study examining the inclusion of a child with a general learning difficulty in a multi-grade class of 30 pupils in a four-teacher mainstream primary school, located in rural Ireland, Ring and Travers observed that substantial challenges remained to the achievement of successful inclusion. They observed in particular that the school lacked the necessary knowledge, skills and competence about the child’s learning difficulties and had limited supports to accommodate the diverse individual educational needs of its students. They concluded

161. ibid 142.
162. ibid.
166. ibid.
that, whilst the child with severe learning difficulties seemed reasonably happy in the mainstream school, it was manifest that this child was not fully included socially and that several barriers prevented him from benefiting effectively from a quality education appropriate to his individual educational needs.\textsuperscript{167}

These concerns have been recently expressed in the last report of the National Council for Special Education.\textsuperscript{168} Parents and advocacy groups manifest their unease regarding current school enrolment policies and practices that are manifestly less than fully inclusive.\textsuperscript{169} Some policies were reported as containing caveats suggesting that students with special educational needs will be enrolled only if resources are in place or if their behaviour does not adversely affect other students.\textsuperscript{170} Others were reported as placing ‘soft’ barriers to enrolment by advising parents that a different school may be more suitable for their child or would have more resources for supporting him or her.\textsuperscript{171} This is so despite the fact that all schools are resourced in the same manner.\textsuperscript{172}

Interestingly, this reference to the availability of resources as an excuse for a school to reject the application of a child with learning difficulty and/or disability stems directly from the EPSEN Act. In s 13, the Act sets down the availability of resources principle.\textsuperscript{173} This Section requires the Minister for Education to provide the necessary resources to implement special educational services ‘with the consent of the Minister for Finance’ and ‘out of moneys provided by the Oireachtas’.\textsuperscript{174} This suggests that, in the event of insufficient funds being voted through by the Oireachtas to meet the needs of children with learning difficulties or the Minister for Finance refusing to give his approval to a particular allocation of resources, the Minister of Education is unable to provide for the implementation of additional educational supports, at the disadvantage of children with learning difficulties and disabilities.\textsuperscript{175} One may query the

\begin{enumerate}
\item[167.\textsuperscript{1}]{For instance, there was unanimous agreement among the teachers that common curricular goals presented serious difficulty for the child concerned, especially in the context of large pupil-teacher ratios and multi-grade classes. Similarly, they observed that the teachers were concerned about the lack of specialist teaching materials available to them (ibid).}
\item[168.\textsuperscript{1}]{NCSE, \textit{Supporting Students with Special Educational Needs}, 90.}
\item[169.\textsuperscript{1}]{ibid.}
\item[170.\textsuperscript{1}]{ibid.}
\item[171.\textsuperscript{1}]{ibid.}
\item[172.\textsuperscript{1}]{ibid; see also circulars 09/04 (2004) and 02/05 (2005) of the Department for Education.}
\item[173.\textsuperscript{1}]{s 13(1) reads as follows: ‘The Minister and the Minister for Health and Children shall each, with the consent of the Minister for Finance, out of moneys provided by the Oireachtas, provide such moneys and other resources as are determined by him or her for the purposes of the preparation and implementation of education plans prepared in respect of children with special educational needs.’}
\item[174.\textsuperscript{1}]{O’Mahony, ‘Right to Education’, 108.}
\item[175.\textsuperscript{1}]{ibid.}
\end{enumerate}
compatibility of this principle with the international obligation of Ireland to ensure that adequate resources be available for the full realisation of educational rights. \(^{176}\) As it stands, many families and associations believe that additional educational services are allocated on the basis of the structural state of the Irish economy rather than on the individual educational needs of the children concerned. \(^{177}\)

Accordingly, it is manifest that the Irish approach to inclusion is significantly at odds with the human rights-based approach to disability rights in education and more precisely with art 24 of the CRPD. Too many schools, teachers, and other educational staffs still ignore the meaning of disability and inclusion. \(^{178}\) As a result, teachers have low expectations for these children and feel powerless when it comes to their education in an inclusive environment. \(^{179}\) They hold pessimistic beliefs and assumptions about disability, learning capacity and difference and therefore experience significant anxiety and stress when faced with the prospect of including children with learning difficulties and disabilities in their classroom. \(^{180}\)

Although the EPSEN Act provides some provisions that may be in line with a progressive, inclusive and humanistic approach to disability rights in education, its key provisions are yet to be commenced and implemented. The Irish government had initially committed to a five-year implementation phase of the provisions of the Act to be completed by 1 October 2010. \(^{181}\) In November 2008, the government announced an indefinite deferral of this implementation. \(^{182}\) Given the current economic situation in Ireland, it is very likely that the provisions of the Act will be delayed for a number of additional years, \(^{183}\) this deferral being at odds with the obligation of the State to progressively implement the educational rights of children with disabilities. \(^{184}\)

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\(^{176}\) See, for instance, art 4(2) CRPD, which reads as follows: ‘With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

\(^{177}\) For further details, see NCSE, *Supporting Students with Special Educational Needs*, 87–88.


\(^{179}\) ibid.


\(^{181}\) Department of Education, Circular 00/51 (2007).


\(^{183}\) ibid.

\(^{184}\) This obligation is expressly set down in art 4(2) CRPD.
How Can Ireland Implement a Human Rights-Based Approach to Disability Rights in Education?

This article has sought to demonstrate that, in spite of the good intentions of the Irish government to develop the infrastructures necessary for establishing an inclusive learning environment accessible, available and adaptable to everyone, this remains insufficient. Too many barriers remain at the national level and consequently at the local level.

Two changes may be considered in order to overcome these inadequacies and establish, in compliance with human rights law, an inclusive legal framework guaranteeing quality education for every child in the best-suited learning environment. The first change is concerned with the definitions provided in the legislation. One has to bear in mind that definitions embody epistemological beliefs about disability, normality and education, which subsequently shape the values of one's society and influence the structure of its education system, its legal framework and the attitude of its teaching workforce. Refining these assumptions through new definitions is a *sine qua non* condition for transforming attitudes and beliefs about disability and education. Accordingly, it is desirable that a definition of education and its aims be provided in the legislation. It is further suggested that this definition be in compliance with the human rights-based philosophy and more precisely with art 24(1) of the CRPD.

The second concept that would require some clarification in the legislation is the concept of inclusion. It should be clarified that an inclusive education does not refer to the place where the child receives his or her education. Nor should an inclusive education be understood as jeopardising the existence and role of special schools. Instead, inclusion should be interpreted as referring to the quality of education that a child receives in the best-suited learning environment, be it in a mainstream school, a special class or a special school. In this sense, the legislation should specify that inclusion and special schools are not at opposite poles, but rather converge toward the same goal – that of a quality education for all. Both concepts should be identified as tools for guaranteeing and implementing equity in education, as suggested by art 24(3)(c) of the CRPD.

The last concept that would need to be refined in the current Irish legislation is the concept of disability. The medical definition provided in the Irish

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185. It is noteworthy that the State is under an international obligation to raise awareness and to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life (art 8(1)(b) CRPD).

186. In relation to children with hearing and sight difficulties, the Convention requires the State to deliver educational services in the 'most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development' (art 24(3)(c) CRPD).
legislation is wholly inadequate and significantly at odds with the CRPD\textsuperscript{187} and the current European trend initiated by the European Court of Justice. In the recent case of \textit{Ring and Skouboe Werge},\textsuperscript{188} the second Chamber of the European Court of Justice was asked to provide a preliminary ruling regarding the correct interpretation of the concept of disability in the context of the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.\textsuperscript{189} Referring to the definition provided in the UN Convention, which was approved on behalf of the European Council in 2010,\textsuperscript{190} the Court held that

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the concept of disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.\textsuperscript{191}
\end{quote}

This ruling, which departs from the previous definition provided in \textit{Chacón Navas},\textsuperscript{192} constitutes a landmark decision in the area of disability rights. Adopting the humanistic approach to disability embodied in the UN Convention, the Court manifests its clear attention to participate in and materialise the current attitudinal shift that is taking place at the international level. In this context, it is desirable that the Irish legislation align its policy, politics and practice with the current international trend and change its current definition so as to be in compliance with the UN Convention and with the recent decision of the European Court of Justice. In particular, it is recommended that a clear distinction be made between having an impairment and being disabled. Whilst the former refers to biophysical factors that modify the physical structure of one’s body and its organic function, the latter is the result of the interaction between these biophysical characteristics and the presence of external societal, environmental and social barriers that further disable the individual concerned. Legislating for this distinction would be a first significant step towards adopting a more human rights-based approach to disability in Ireland.

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\item\textsuperscript{187} See preamble, paragraph (e) of the Convention, which recognises disability as being the interaction between having an impairment and attitudinal and environmental barriers that hinder the full and effective participation of persons with disabilities in society on an equal basis with others.
\item\textsuperscript{188} Joined cases against DAB, in which two women were dismissed from employment when they returned to work following a period of sick leave (2nd Chamber, 11/04/2013).
\item\textsuperscript{189} OJ L303, 02/12/2000 P 0016–0022.
\item\textsuperscript{191} para 38.
\item\textsuperscript{192} European Court of Justice, Grand Chamber, 11/07/2006, in which the court held that ‘the concept of disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’ para 43.
\end{enumerate}
In line with the latter point, it is further recommended that a distinction be established between disability and special educational needs. As demonstrated in this paper, the assimilation of the two concepts in the legislation is incongruous. It underestimates the complexity of most learning difficulties and does not reflect the reality that children with individual educational needs experience on a daily basis. In this context, it is advised that the expression 'special educational needs' be replaced by a more pedagogical expression such as 'individual educational needs'. As mentioned in this paper, the reference to the term 'special' implies that there still exists a hierarchy between those who are special and those who are normal. This expression is stigmatising, demeaning and at odds with the philosophy of a human rights-based approach. Changing expressions would have significant positive impacts on the way society understands diversity, plurality and differentiation. Special education would become a tool, rather than a service, aimed at enhancing early, rightly timed and planned proactive support for the learning and growth of every child. It would highlight the idiosyncratic nature of learning and the pedagogical nature of additional supports. It is believed that this change would eventually contribute to the eradication of medical terms such as 'normal' and 'special' education and lead to the unification of the education system.

The second change is solely directed at the teaching workforce. The UN Special Rapporteur on the Right to Education and art 24(4) of the CRPD emphasise the importance of developing programmes that would inform and challenge misconceptions about disability amongst the teaching workforce. It is suggested that teaching students with learning difficulties does not require additional knowledge or skills, nor does it require a special education system on the margin of the general education system. It only requires a shift in attitude about human difference, a shift in belief about learning capacity and a shift in teaching methods.

**Conclusion**

Reforms of the Irish educational system have hitherto proved insufficient for the purpose of guaranteeing a quality education for all, including children with learning difficulties and disabilities. A commitment to education for all matters, as does the belief that every student can improve his or her learning capacity, regardless of his or her socio-economic background, disability or learning difficulty. The legal framework has to reflect and enact this belief if it wants to

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193. This expression is used in international reports, such as the *Report of the Special Rapporteur on the Right to Education of Persons with Disabilities*, para 41.
194. ibid para 25.
195. The second provision requires States Parties to incorporate within the training of teachers ‘disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities’. 
ensure that every student benefits from equal opportunities to learn meaningfully and successfully. As correctly pointed out by the OECD, placing a high value on education can only get a country so far if teachers, parents and the government of that country believe that only a minority of students can reach a high educational standard.\footnote{OECD, *PISA 2009 Results: What Makes a School Successful? Resources, Policies and Practices* (vol IV, OECD 2010) 104.}

With the current economic and financial crisis, the Irish government is at a crossroads. Either it continues to foster its traditional approach to education with the risk of undermining the educational rights of children with learning difficulties and disabilities; or it uses this crisis as an opportunity to radically change everything and create a sustainable legal structure that would promote disability rights in education, equity, inclusion and social justice.\footnote{See the comments of Irina Bokova in *Education for All Global Monitoring Report 2010 – Reaching the Marginalised* (UNESCO, Oxford University Press 2010) i.} This article advocates the second option and believes that the time has now come to change attitudes, recognise and accept differences and make available to everyone what is accessible for some, at the exclusion of the others. Irish law should be an instrument to reach this ideal and effectively vindicate disability rights in education.