TD V MINISTER FOR EDUCATION: A CHILLING EFFECT ON WOULD-BE LITIGANTS?

Abstract: Given that litigation is the last resort for those in need of education, and that there are ongoing challenges for those with disabilities in particular accessing appropriate education, there is a surprising paucity of contemporary cases seeking to enforce the right to education under the Irish Constitution. This article considers the causes of this, and the underexplored possibility that the TD case had a serious chilling effect on litigation on this constitutional right.

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Introduction

This article suggests that the decision in *TD v Minister for Education*[1] has a chilling effect on would-be litigants of the right to education. The focus of this paper is on the right to education of children with disabilities, as protected by Article 42 of the Constitution. It is argued here that the time-bound nature of the right to education, the failure to provide effective legislative tools, the failure of adequate educational provision coupled with the impact of the decision in *TD v Minister for Education* has the effect of compromising the right to education for children with disabilities. It is suggested here that the most appropriate way to enforce the right to education would be through the introduction of legislation with effective and timely enforcement mechanisms. However, in the absence of such legislative intervention, and the absence of adequate, appropriate or any educational provision, constitutional litigation is often the only option or remedy available. This article highlights the ongoing issues faced by children with disabilities in accessing and maintaining a full school place and the surprising lack of attendant cases to enforce the right to education. It then posits that there are two reasons for the paucity of current cases: increased educational provision and the impact of *TD v Minister for Education,* which has discouraged litigation to enforce an express right in the Constitution.

Constitutional Context

Article 42.4 obliges the state to provide free primary education for all children. In the context of disability, *O'Donoghue v Minister for Health,*[2] perhaps the preeminent case on the right to education, established that all children with disabilities are educable, that they have a right to education, and that limited provision does not necessarily fulfil that obligation.

To determine whether all children were educable, O'Hanlon J provided a constitutional understanding of the term education. In so doing, he referred to Ó Dálaigh CJ's definition of education in *Ryan v Attorney General,*[3] where he stated that the purpose of education was to 'make the best possible use of his [or her] inherent and potential capacities, physical, mental and moral,'[4] adding the words, 'however limited those capacities may be.'[5] The term education as used in the Constitution is therefore broader than purely scholastic education and ensures that all children are encapsulated by the definition. O'Hanlon J held that Article

[1] *TD v Minister for Education* [2001] 4 IR 259.
[2] *O'Donoghue v Minister for Health* [1993] 2 IR 20.
[3] *Ryan v Attorney General* [1965] 1 IR 294 [37].
[4] *Ryan* (n 3) 350.
[5] *O'Donoghue* (n 2) 65.

42.4 imposed a constitutional obligation on the State to provide for free basic elementary education for all children and that this included children with profound disabilities. The importance of the decision in *O'Donoghue* cannot be over-estimated as it established that all children had a right to education, not one granted based on 'grace and concession.'[6] Of note, evidence adduced during the trial suggested that the extent of the education provision in this instance was not sufficient to meet the threshold of the right to education. It was highlighted that the pupils in the plaintiff's class were in receipt of reduced educational provision, and it was suggested that this reduced provision fulfilled the applicant's right to education. O'Hanlon J held that the respondents were:

> misled in their belief that the arrangements already made to provide a place for the applicant at the Cope Foundation are sufficient of themselves to satisfy any claim that may arise in his favour under the provisions of the Constitution to have free primary education provided for his benefit.[7]

The *O'Donoghue* case thus established that children with severe or profound learning difficulties were constitutionally entitled to free primary education, and importantly that access to some level of education is not necessarily sufficient to satisfy the constitutional right to education. This point is of interest when we consider the wide use of reduced timetables later in this paper. O'Hanlon J held that the State had an obligation: 'to respond to such findings by providing for free primary education for this group of children in as full and positive a manner as it has done for all other children in the community.'[8]

The Supreme Court, however, substituted the High Court declaration with an arguably less onerous obligation, stating that 'the infant applicant is entitled to free primary education in accordance with Article 42, s4 of the Constitution and the State is under an obligation to provide for such education.'[9]

In the aftermath of *O'Donoghue*, numerous cases were taken attempting to enforce the right to education for children with disabilities. These cases primarily sought specialised or specific educational interventions. The cases were notable due to the absence of legislation providing redress mechanisms; the level of acrimony between the parties;[10] and the difficulties children with disabilities and their parents faced in getting adequate, timely, local educational provision for their children, as evidenced by the sheer number of cases. [11]

Among those cases was *Sinnott v Minister for Education*.[12] One issue before the court was the extent of free primary education under Article 42.4 of the Constitution, and whether it was based on 'need' or 'age.' On this point, the Supreme Court held that the duty to provide for free primary education was owed to children and not to adults. This ensured that the right to education is a time-constrained right, only exercisable by a person with a disability up to the age of eighteen. In practice, this means that the right to education is only applicable for

[6] ibid 68.
[7] ibid 71.
[8] ibid 67.
[9] *O'Donoghue* (n 2).
[10] See *Cronin v Minister for Education* [2004] IEHC 255; [2004] 3 IR 205; *O'Carolan v Minister for Education* [2005] IEHC 296.
[11] See for example 'Department of Education besieged by 272 law cases' *Irish Independent* (March 10, 1998).
[12] *Sinnott v Minister for Education* [2001] 2 IR 545.

a short period of time; hence, delays and failures to provide education impact significantly on a person's ability to avail of that right. Timely interventions are therefore vital in this context, adding to the need for effective and prompt legislative redress mechanisms.

A second issue before the Supreme Court in *Sinnott*, was whether the Court had the power to grant mandatory injunctions, having regard to the doctrine of the separation of powers. The Court suggested that mandatory orders should only be granted when the State ignores or defies a court declaration, but did maintain the jurisdiction to grant mandatory orders in a 'rare and exceptional case,'[13] or where a constitutional right had been flouted 'without justification or reasonable excuse of any kind' in 'very exceptional circumstances.'[14]

Sinnott was followed by *TD v Minister for Education.*[15] The majority in that case held that mandatory orders were permissible where the Executive had disregarded its constitutional obligations in an 'exemplary fashion.'[16] Murray J defined the term 'clear disregard' as meaning:

> *a conscious and deliberate decision* by the organ of state to act in breach of its constitutional obligation to other parties, *accompanied by bad faith or recklessness.* A court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would *impinge on the observance by the State party concerned of any declaratory order* made by the court.[17]

This an extraordinarily onerous hurdle for any would-be litigant to overcome, and the impact is exacerbated when we consider the nature of the cases taken under both Article 42.4 and former Article 42.5, involving as they did children with disabilities and vulnerable children, many of whom were in State care. The test suggests that *mere* 'official indifference and persistent procrastination'[18] or 'official inactivity'[19] would not amount to a clear disregard for a child's constitutional right to education. Furthermore, obtaining a mandatory order would also first require a declaratory order to be obtained and flouted, adding significant time concerns to any potential litigant in respect of a time-constrained right.

The ability to enforce any socio-economic right without a 'constitutional amendment or by the adoption of an entirely new constitution'[20] was questioned in *TD v Minister for Education,* suggesting that such actions were the sole preserve of other organs of Government. This reading of the Constitution appears to raise the principle of the separation of powers to a higher level than express constitutional rights, such as the right to education. The notion of judicial restraint required by this fixed view of the separation of powers is not one expressed within the Constitution, suggesting that it is as much a choice for the court as judicial activism.[21] It is hard to square this position with the ability to enforce an express

[13] *Sinnott* (n 12) 656.
[14] ibid 724.
[15] *TD* (n 1).
[16] ibid 724.
[17] ibid, emphasis added.
[18] *Sinnott* (n 12) 553.
[19] Niall Osborough, 'Education in the Irish Law and Constitution' (1978) 13 Irish Jurist 145, 66.
[20] *Sinnott* (n 12) para 319.
[21] Oran Doyle, 'The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation' (2002) 10 ISLR 222.

constitutional right to education.

Legislative and Policy Response

In the aftermath of the decision in *O'Donoghue,* numerous cases were taken seeking to enforce the right to education for children with disabilities. Those cases have slowed to a trickle if not a full stop, suggestive of one of two things.[22] One is that the State responded by making adequate educational provision for all children. The other is that the decision in *TD* has had a chilling effect on would-be litigants. It is suggested here that both of those statements are to an extent accurate: there was in fact increased educational provision; however, if you are not in receipt of education, or sufficient education, then the effectiveness of relying directly on the Constitution is questionable, not least due to time concerns.

Positive Actions Post-litigation

In the immediate aftermath of *Sinnott,* the then Government committed to the introduction of legislation. This eventually resulted in the adoption of the Education for Persons with Special Educational Needs Act, 2004 (EPSEN Act). Among the provisions of the Act were the introduction of:

- a comprehensive framework for the assessment of educational needs,
- legal entitlement to necessary services,
- the ability to require a school to take children with disabilities,
- a mechanism to address demarcation disputes,
- provision for individualised education plans (IEP), among other tangible ways to ensure that children with disabilities could access education.

There is also evidence of additional provision, albeit on a segregated basis.[23] For example, Banks highlights that in 2001 there were just 39 autism units; by 2014 that had increased to 627.[24] In response to a parliamentary question on education provision in 2018, we see that that figure had increased again to 1,456 special classes, with 1,192 of those being autism classes.[25] These are significant actions highlighting the response of the political system to an ongoing issue; this will also undoubtedly account for much of the reduction in litigation. While positive, it is important to highlight that there are ongoing problems and signs of significant slippage in provision.

[22] More recently there has been a marked increase in litigation on the right to education, however, much of that litigation relates to the cancellation of the Leaving Certificate in 2020 due to the pandemic. See Jess Casey, 'Cancelled exams see doubling of legal actions against Department of Education' *Irish Examiner* (28 July, 2021) https://www.irishexaminer.com/news/arid-40347518.html> Accessed 16 September 2022.

[23] United Nations Convention on the Rights of Persons with Disabilities vol A/RES/61/06. Ireland ratified the Convention in 2018, which enshrines a right to inclusive education. It is questionable whether this significant expansion in segregated provision is compliant with Ireland's international obligations.

[24] Joanne Banks, 'Examining the Cost of Special Education' in Umesh Sharma (ed), *Oxford Research Encyclopedia of Education* (OUP Oxford 2020) fig 3.

[25] Minister for Education and Skills, John Bruton, Dáil Deb 4 October 2018, ≤https://www.oireachtas.ie/en/debates/question/2018-10-04/90/> Accessed 5 October 2022.

Lack of Legislative Redress Mechanisms

First, large elements of the EPSEN Act remain un-commenced, so are unenforceable. The sections commenced establish the National Council for Special Education (NCSE) and some other functions; however, the substantive elements, in particular the sections addressing IEPs, assessments and appeals, have yet to be commenced. Of most concern is that the redress mechanisms are not in force, so the Act does not provide an effective means to enforce the right to education for children with disabilities.

Another potential legislative tool available to the Minister for Education is section 37A of the Education Act 1998-2018. This grants the Minister for Education and Science the power to direct a school to provide additional special educational places and to ensure that there are sufficient places provided for all children with disabilities in the State. In July 2022 the Minister for Education confirmed that the 37A process has been initiated only twice in 24 years and that those processes took between 6 and 18 months to complete.[26] In response to an ongoing crisis of provision, and the unacceptable delays associated with section 37A, the Government introduced emergency legislation, the Education (Provision in Respect of Children with Special Educational Needs) Act 2022, which seeks to strengthen the effectiveness of section 37A and requires School Boards of Management to cooperate with the NCSE with regard to provision of education for children with disabilities. Actions to make the section 37A process more timely and effective are welcome, however, the question as to why successive Ministers for Education have not used section 37A in the face of ongoing issues regarding the enrolment of children with disabilities remains unanswered.

In addition, section 29 of the Education Act 1998 allows a parent or child to challenge a decision to exclude, suspend or refuse to enrol a student in a school. However, as initially drafted, section 29 did not apply in the context of schools that are oversubscribed. The Children's Rights Alliance have noted:

> Despite the increased allocation of resources, some special schools are oversubscribed and there are hundreds of children on waiting lists for special classes in mainstream schools; in many cases, the only place that parents can find may be far outside the local school-catchment area.[27]

Therefore section 29 as originally drafted did not offer a route for parents to address a refusal to enrol in the context of oversubscribed schools, even though the data available suggest that that was the primary reason for a refusal to enrol. Section 29 was revised in late 2020 and now provides a process of appeal for failure to enrol a pupil due to oversubscription.[28] This too is to be welcomed, but it is not yet evident that this process is effective, especially given the most recent crisis in provision of educational places for children with disabilities, outlined below.

Ongoing Failure of Educational Provision

The lack of school places for children with disabilities has been widely reported. In July 2022, an estimated 160 pupils were without a school place for the upcoming academic year.[29] In

[26] Minister for Education and Skills, Norma Foley, Dáil Debates, 1 July 2022, vol 1024, col 6 <https://www.oireachtas.ie/en/debates/debate/dail/2022-07-01/3/> Accessed 5 October 2022.
[27] Children's Rights Alliance, 'Report Card 2020: Is Government Keeping Its Promises to Children?' (2020) 27.
[28] School (Admissions to Schools) Act, 2018, relevant section commenced November 2020.
[29] "Roughly 160' children without place in special schools' (*RTE News*) 19 May 2022 <https://www.rte.ie/news/2022/0519/1300031-school-places/> Accessed 16 September 2022.

addition to this immediate crisis, there have been ongoing reports over a number of years that a significant number of children with disabilities are in receipt of home tuition because they do not have an appropriate school place.[30] Most recently, it was suggested that as many as 800 children were in receipt of home tuition in lieu of an appropriate school place.[31] Non-Governmental Organisations (NGOs), such as Children's Rights Alliance,[32] Barnardo's,[33] Inclusion Ireland,[34] and AsIAm[35] have raised ongoing issues with education provision for children with disabilities. On the issue of home tuition, the Children's Rights Alliance highlighted:

> A significant number of children are being educated at home with the support of home tuition grants because a school place has not been made available meaning they are missing out on the key social development elements of being in an educational setting.[36]

It is questionable whether this form of educational provision could be considered as complying with the right to education.[37] Additionally of concern is the less obvious exclusion from education of both children with disabilities and children from other minority groups, via the use of reduced timetables, where children are provided with (often significantly) less tuition than others.[38] On the issue of reduced timetables, Inclusion Ireland commissioned research that highlighted that one in four children with an intellectual disability or developmental disability was on a reduced timetable; many were on reduced timetables for extended periods of time; many are missing certain subjects either partially or entirely; and that children with autism were more likely to experience reduced timetables.[39] Reduced timetables are akin to exclusion, even if it is partial exclusion. Based on the decision in *O'Donoghue,* it is hard to see how this form of educational provision could be considered a discharge of the State's educational duties. Moreover, it was, until recently, a hidden practice, as the Department of Education collected no data on its prevalence and all relevant information came from NGOs in the sector. In 2021, the government responded to the ongoing use of reduced timetables and introduced guidelines governing their use with the view to ensuring that this intervention is used only where absolutely necessary and that when it is used, Tusla Education Support Services are notified.[40]

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[30] Carl O'Brien, 'Children without school places: "It's heart-breaking and a national disgrace"' (*The Irish Times*) 29 October 2019 <https://www.irishtimes.com/news/education/children-without-school-places-it-s-heart-breaking-and-a-national-disgrace-1.4059028> Accessed 16 September 2022.

[31] Carl O'Brien, 'More than 800 children in receipt of home tuition due to lack of appropriate school places' (*The Irish Times*) 11 July 2022 <https://www.irishtimes.com/ireland/education/2022/07/11/more-than-800-children-in-receipt-of-home-tuition-due-to-lack-of-appropriate-school-places/> Accessed 16 September 2022.

[32] Children's Rights Alliance (n 27).

[33] Barnardo's, 'Barriers to Education Facing Vulnerable Groups' (June 2018).

[34] Deborah Brennan and Harry Browne, 'Education, Behaviour and Exclusion: The Experience and Impact of Short School Days on Children with Disabilities and Their Families in the Republic of Ireland' (Inclusion Ireland September 2019).

[35] AsIAM, 'Invisible Children: Survey on School Absence & Withdrawal in Ireland's Autism Community' (2019).

[36] Children's Rights Alliance (n 27) 27–28.

[37] See *McD v The Minister for Education and Science* IEHC 265 (2008).

[38] Kitty Holland, 'Children on reduced timetables "denied education"' (*The Irish Times*) 16 November 2018 <https://www.irishtimes.com/news/social-affairs/children-on-reduced-timetables-denied-education-1.3699181> Accessed 16 September 2022.

[39] Brennan and Browne (n 34) 2.

[40] Department of Education and Tusla Education Support Service, 'The Use of Reduced School Days Guidelines for Schools on Recording and Notification of the Use of Reduced School Days' (Department of Education September 2021).

It is evident that the Government and legislature have responded at various points in response to high profile issues in respect of education for children with disabilities, leading to some progress, albeit coupled with significant gaps. However, what is also evident is a paucity of cases on the right to education for children with disabilities. This is particularly noteworthy in light of the continuing gaps in provision, and when we consider the level of litigation on this issue in the late 1990s and the early 2000s.

TD v Minister for Education – A Chilling Effect?

While the various responses by the executive and legislature to the lack of educational provision for children with disabilities must be acknowledged, the curious lack of legal cases in the context of ongoing failure to provide adequate or sufficient educational provision does raise some questions. One of the few exceptions to the general dearth of caselaw is the High Court case *A McD v The Minister for Education,*[41] where the applicant sought a mandatory order to direct the State to provide a school place. This was an interlocutory hearing pending the full trial of the issues.[42]

The child at the centre of this case was diagnosed with a number of disabilities and had challenging behaviour. The evidence adduced at trial indicated that the applicant was expelled from school in 2012 as a result of a violent episode. At the time of the hearing, the State had not managed to find her an appropriate school place and she was instead in receipt of home tuition. At the time of the interlocutory hearing the applicant had been in receipt of home tuition for fourteen months, even though it 'was only ever meant to be a stop-gap measure.'[43] O'Malley J accepted that 'she is entitled to a school place, she does not have one',[44] that 'her social education is gravely deficient,'[45] and if she was not found a place then her 'future life will be difficult in the extreme.'[46] The court then went on to hold that, while there were clear shortcomings to her educational provision, she had not discharged the burden of proof. In particular, the court referred to the fact that the applicant did not meet the very high standard required for a mandatory interlocutory order. Citing both *Sinnott* and *TD,* O'Malley J acknowledged that in extreme cases a mandatory order may be made, however, this case was not sufficiently extreme.[47] In particular O'Malley J highlighted that there was no 'element of bad faith, no matter how it might be described. This is not a situation where the rights of A have been consciously and deliberately disregarded or flouted.'[48]

It is evident that the shadow of both *TD* and *Sinnott* loomed large in this case. Moreover, it is hard not to conclude that the right to education for this student had been significantly compromised by the delay in finding her adequate educational provision. What is striking is the very clear recognition, by the court, of the impact the lack of a school place had on the child, yet the judge felt constrained in the remedies available to her. The decision also indicates the difficulty in litigating the right to education and the inability to meet the very

[41] *AMcD v Minister for Education and Skills* IEHC 175 (2013).
[42] It is of note that in both *Cronin* (n 10); *Nagle v The South Western Area Health Board and ors* (HC 30 October 2001) mandatory orders were granted at interlocutory stage.
[43] *AMcD* (n 41) [33].
[44] ibid [34].
[45] ibid [33].
[46] ibid.
[47] ibid [34].
[48] ibid.

onerous burden of proof imposed by both *Sinnott* and *TD*, even in the face of very significant failure to provide adequate access to that right.

Conclusion

O'Donoghue v Minister for Health established that all children had a right to free primary education, one that was later deemed to continue in the case of children with disabilities until they are eighteen years of age.[49] It can be argued that *O'Donoghue* drove the provision of additional educational provision, thereby ensuring that many others gained access to the right to education. It also triggered a series of cases on behalf of children with disabilities, including the decision in *Sinnott*. That decision resulted in the commitment to legislate to give effect to the right to education – which became the EPSEN Act 2004.

However, the unfortunate reality is that the EPSEN Act remains largely un-commenced, while successive Ministers have failed to use section 37A of the Education Act 1998 to direct schools to enrol students with disabilities. Section 29 of the Education Act also failed to provide a remedy to address schools that are oversubscribed, a fact only recently rectified. The impact of these failures is demonstrated by the fact that the government had to introduce emergency legislation in 2022 to ensure that 160 students with disabilities had access to a school place. Reports indicate that hundreds of children are in receipt of home tuition due to a lack of appropriate school places, and there has been widespread and inappropriate use of reduced timetables. Those applicants that still have to fight to enforce their express constitutional right to education – a right that is time-sensitive – face a Herculean battle, as evidenced in the decision in *A McD v Minister for Education*. The inescapable conclusion appears to be that the impact of both *Sinnott* and *TD* coupled with ongoing failures in provision has been to compromise the right to education expressed in the Constitution.

[49] *Sinnott* (n 12).