Access To Education: School Zoning, Entitlement And Eligibility To Enrol Children With Special Needs

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INTRODUCTION

On 1 October 1989, under the banner of "tomorrow's schools" the Education Act was passed into law. As its title suggests[1] it was to provide a new order in education. Since 1989, the process of change has continued with numerous amendments[2].

Fundamental to the concept of "Tomorrow's Schools" is the principle that, excepting for foreign students, every person is entitled to free enrolment and free education at any state-funded school, between the ages of 5 to 19 years[3]. Correspondingly, subject to certain exceptions[4], every person who is not a foreign student is required to be enrolled at a school at all times between the ages of 6 and 16[5] and duly attend whenever the school is open[6]. Through the sanction of criminal-type penalties, parents carry the onus and responsibility not only to ensure that their child is enrolled[7], but that he/she is in regular attendance[8].

Although the right to free primary and secondary education appears to be paramount, it is arguably a right which must be read subject to those provisions relating to:

. Special education[9];

. Enrolment/zoning schemes[10].

This paper will address each area under four headings:

(i) An overview on the legislative framework with reference to departmental/ ministry policy were appropriate;

(ii) Background and key issues of interest arising;

(iii) The Canadian experience - a helpful insight;

(iv) The way ahead.

Legislative Framework

Special Education in New Zealand

The state education system was established in 1877. Since that time down to the present,

there has been an increasing acceptance of the right of all New Zealand children to a free education. The rights of a child with disabilities has not been recognised so readily[11]. The Education Act 1989 provides that subject to parental consent, the secretary for the Ministry can direct the enrolment of a child at a particular state school, special school, special class or special clinic, if satisfied that the person is under 21 and in need of special education[12].

To assist in the delivery of special education services, the Special Education Service (SES) was set up to employ specialists advisory staff working in the area of special education. The SES was formed from the amalgamation of the previous Psychological, Speech-language Therapy and Visiting Teacher Services, with the addition of Advisors on Deaf Children and Advisors on Early Intervention as well as almost all special education teachers at early childhood level. Services are delivered from about 200 separate locations[13]. It is possible for the secretary of education to direct parents/care givers to send their child to some form of specialist facility, or to be placed on the role of the resource teacher or to attend a regular school. It is also possible for the secretary to deny a parental request for special education subject to the parent's right of review[14] or arbitration[15]

School Zoning/Enrolment Schemes

Subject to the Race Relations Act 1971 and the Human Rights Commission Act 1977, school boards may put enrolment schemes in place where overcrowding is likely[16]. To do this the board must:

(i) Request the Ministry to agree that overcrowding is likely[17];

(ii) At least 14 days before the day on which it resolves to do so, advertise in a daily newspaper circulating in the area in which the school is situated;

(iii) Give notice, in writing, to the board of each school it thinks may be affected by the scheme or amendment notice stating that it intends to adopt a scheme or amendment and specifying its nature and effect, the day, place and time of the meeting[18].

As a general rule, the scheme is effective three months after its adoption for primary schools or on January the 1st of the following year for secondary schools[19].

The scheme will give entitlement to certain students to enrol[20].

There is provision for schemes to be implemented early if overcrowding is likely before the effective date of the scheme[21]. Before the 1st of July in any given year (provided an enrolment scheme has already been in force for more than three months), a school board is required to review its scheme to assess whether or not it is still required to avoid overcrowding. The board is required to abandon the scheme if it cannot satisfy itself that it is necessary to avoid further overcrowding[22].

Background And Key Issues Of Interest Arising

Zoning/Enrolment

As at 25th September 1992, 110 schools nationwide were operating an enrolment scheme of one sort or another. Of that group, 94 subscribe to an enrolment scheme and 16 (primary schools in the Auckland Management Centre) were governed by closed rolls, which have the same effect as an enrolment scheme. Of the total group, 41.8% are in the Auckland Management Centre[23].

School boards are given considerable flexibility in advising and implementing a scheme to govern enrolment. Various mechanisms are used, for example, age, entry tests, past associations with the school, extra curricular, location of residence in proximity to the school - to name a few. There is concern that some schools operate discriminatory enrolment policies[24].
On the assumption that schools provide a *service* to the public, it is unlawful to refuse that *service* or to provide it on less favourable terms or conditions than would otherwise be the case by reason of colour, race, ethnic or national origins[25]. Further, it is unlawful for an *educational establishment* or the authority responsible for the control of such an *establishment* to refuse to admit a person to the establishment or to deny or restrict access to any benefits or services provided by the establishment or to exclude or subject the person to any other detriment by reason of colour, race, ethnic or national origin, sex, marital status, religious or ethical beliefs[26].

The Human Rights Bill 1992 provides new grounds for unlawful discrimination. Of relevance to *educational establishments* is the ground of disability[27].

The Bill, which purports to amalgamate and revise the Race Relations Act and the Human Rights Commission Act, makes it unlawful for an *educational establishment*, or the authority responsible for its control, or any person concerned in the management or teaching at an *educational establishment* to:

> (a) Refuse or fail to admit a person as a pupil or student; or
>
> (b) Admit a person as a pupil or student on less favourable terms and conditions than would otherwise be available; or
>
> (c) Deny or restrict access to any benefits or services provided by the establishment; or
>
> (d) Exclude a person as a pupil or student or subject him or her to any other detriment;

by reason of, among other things, disability[28].

It will not be unlawful for an educational establishment to refuse admission where:

> (a) The person requires special services or facilities that, in the circumstances, cannot be reasonably made available (being services or facilities that are required

> to enable the person to participate in the educational programme or to enable a person to derive substantial benefits from that programme); or
>
> (b) The person's disability is such that there would be a risk of harm to that person or to others if that person were to be admitted to the educational establishment and it is unreasonable to take that risk[29].

The Bill has received a mixed reaction from advocates for the disabled. It is perceived that the exception provisions relating to the disabled allows for discrimination and challenges their fundamental right to a free education[30].

In some cases, Government policy on funding is driving schools to adopt enrolment schemes to deal with genuine role growth (overcrowding). Current Ministry policy on overcrowding is that no additional accommodation will be provided where there is surplus accommodation available enabling schools for that age range of students. But where there is no surplus accommodation available, the Ministry will provide additional accommodation if it considers population growth within the area justifies such a provision[31].

This policy has caused hardship to schools who have outgrown their facilities and who are not now able to keep up with the demand for places from within zone[32].

Some schools have been forced by Government policy to implement enrolment schemes to limit its community by setting a zone and legislating against out-of-zone demand. This has led to disharmony within the community, culminating in threats by disaffected parents to sue the school board based upon the fundamental rights of their child(ren) to receive a free education[33].

Special Education

There are preliminary problems in defining who is disabled and entitled to special education programmes. Section 2 of the Education Act 1964 defines special education as:

Education for children who, because of physical or mental handicap or of some educational difficulty, require educational treatment beyond that normally obtained in an ordinary class in a school providing primary, secondary or continuing education.

Section 2 of the Education Act 1989 defines special education as:

Education or help from a special school, special class, special clinic or special service.

New Zealand, unlike some jurisdictions, has a clear legislative framework dealing with the rights and entitlements to special education. That, notwithstanding, there is still concern in some quarters that three years after the passing of the 1989 Education Act and subsequent changes to the system of education administration in New Zealand, there are still no definitive special education policies in place[34].

The Ministry has been criticised for failing to give a clear direction on what model of special education is appropriate for New Zealand[35]. Essentially, there are two:

- Mainstream minority model; and
- Supportive integration model.

Dealing with each in turn:

(a) Mainstream Minority Model

In this model, the goal is to reduce differences in students with disabilities in order for them to be accepted into the mainstream. The model permits degrees of transition between minority status and mainstreaming memberships. That is, the student must adapt or be "prepared" in order to move closer to the mainstream. It is the student who must adapt in order to move towards the mainstream rather than the system itself.

(b) Supportive Integration Model

In this model, individuals are not vigorously measured against a yardstick of common mainstream values. Integration rather than assimilation becomes the driving force. This model promotes one education environment for all students, not a continuum of placement or alternatives.

Sue Gates, the national co-ordinator advocacy for IHC New Zealand, says:

> No one gains in a two model system. It is a confused system and rather like the Titanic, it is a system that is sinking. Well meaning individuals are trying to keep it afloat by re-arranging bits and pieces of it. The deck chairs tend to be the resources and as various lobby groups cry out, they are given an injection of resources to make them quiet and feel comfortable, albeit a temporary state of comfortableness. Mark my words, adherence to two models is administratively impracticable and unrealistic, let alone philosophically suspect. My worry and premonition is that this jumbled system will founder and we may be left with nothing. Re-arranging the management of these two models will not work[36].

She adds:

> "At the moment efforts are made to resource both models at differing times. It is inevitable that each time one model gets something, there is vigorous lobbying from other groups who feel hard done by. ... so what do we have? We have a piece of legislation that is progressive, workable and provides a focus for developing an inclusive special education policy. We have a system at present that appears to espouse several models and attempts to respond to the differing needs of those models. We have policy development that is slow, torturous and seemingly lacking in any vision and purpose, primarily because of trying to maintain the present confused system."[37]

The Canadian Experience

All provinces in Canada now make provision for the education of the physically and mentally disabled child. In some provinces, such as Ontario, there are quite detailed provisions[38]. In other provinces such as Nova Scotia, little effort is made to define what education is appropriate for the child with special needs[39]. The Canadian Charter of Rights and Freedoms has made the education of the disabled a legal issue as well as a political and moral one. Section 7 of the Charter guarantees that:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Education is considered a constitutional right[40]. The first significant Charter case to raise Section 7 in the special education context was *Bales v Board of School Trustees*[41] (1984), 8 Adm. L.R. 202 (B.C.S.C.). In this case a child was placed in a special school for the moderately handicapped, after spending a period in the regular school. His parents objected to this, and after appeal to the superintendent and school board came to nothing, they took their child out of school and hired a private tutor. A court action was also commenced by the parents seeking a declaration that their child was entitled to attend a regular school, an order that the Board re-enrol him and damages in the amount of the tutor's fees.

Under the School Act (B.C.), the Board had the authority to assign students to various schools and classes and with the approval of the Minister, to create "special classes". This Act did not expressly authorise the creation of segregated schools for the retarded, an action which was contrary to the accepted principle of integrating the handicapped child into the regular school system - mainstreaming. Within British Columbia itself, mainstreaming was the norm and the *Bales* case was an exceptional one. The parents' action was dismissed. Despite the transition to mainstreaming, they failed to prove that segregated schools for the handicapped was harmful. Thus, it was held that the Board had acted reasonably in continuing such classes.

The importance of providing appropriate education for children with special needs is illustrated by *Hoffman v Board of Education in New York*[42]. In this case, a child with normal intelligence was placed in a class for the mentally retarded because his performance on the Stanford-Binet intelligence test placed him at a 74 intelligence quotient (IQ). Had he been one point higher, he would have been placed in the regular class. In spite of the recommendation by the clinical psychologist that his intelligence be re-evaluated in two years, he remained in the class for retarded children for 11 years without being retested. The child's mother was never informed of her son's placement. Moreover, she was unaware that her son was in a class for the mentally retarded. His mother did not discover his mis-classification until he was retested at aged 17. When the child was removed from the class, he suffered trauma at the loss of his friends and spent days crying in his room. At first instance, Mrs Hoffman was awarded $500,000 in damages but in later Court action, the school board was found not liable.

Of some interest is the view taken by the court on appeal, that the courtroom was not the proper forum in which to assess the adequacy of a student placement, and that the court should only intervene in matters of school management in extreme cases[43].

The Way Ahead

The fundamental right to a free education[44] must be balanced against a school board's overriding discretion to control the management of its school as it thinks fit[45]. The implementation of school policies on enrolment and special needs are management issues. In each case, the board will be constrained in its policy making decisions by legislation which protects individuals from discrimination[46].

In the case of enrolment schemes, many school boards will be driven by Government policy in relation to funding allocations and accommodation to deal with overcrowding. Boards must act within the law[46] but be fearless enough to manage their schools as they think fit in the best interests of their communities. It has become fashionable for disaffected members of a school community to threaten school boards with the issue of Court proceedings to restrain them to comply with the fundamental principle of *Tomorrow's Schools*, namely, the right to a free education. That is a most difficult position for a board to find itself in, particularly given the costs involved (in the event that it is uninsured) and the considerable down-time likely to result - all at the expense of the end user - the students.

Arguably the tide has turned. In *Maddever*[48], Williams J said:

> "Indeed, even in cases where pupils' rights are concerned, it seems to me, with respect, that there is need for very considerable judicial caution. In the sensitive area of education, there is a significant risk that the Courts will, in administering judicial review, unwittingly impose their own views on educational issues when they have no special competence for that task and the legislature has made it tolerably clear that such matters are not primarily judicial issues but rather issues of educational policy for school boards operating against the broad back-drop of the National Educational Guidelines."

The legislative framework for special education is sound and progressive, subject only to receiving some clear policy on an appropriate model to be adopted[49]. Recent reforms[50] will assist educators and persons with disabilities to focus clearly on issues of special needs as an element of the fundamental right to free primary and secondary education. The proposed reforms, if adopted, will go some way towards protecting disabled persons in the state school system from suspension/expulsion for behavioural problems that ought properly to be addressed through the special education service. IHC claims to be aware of a number of suspensions, which it regards as highly suspect involving children with special needs[51].

Tomorrow's schools is still in its infancy. But in this writer's view, the new education order leads the way internationally by codifying a fundamental right of young people to a free education and the processes by which that may be achieved through consultation

between school boards and their communities in making policy. The system is by no means perfect and inevitably, the cause of fair play and justice will see parents and boards resolving disputes before the Court. That, notwithstanding the way ahead is clear and the rewards immeasurable.

1 *An act to reform the administration of education.*
2 Amendment Acts, 1989, nos. 136, 156; 1990, nos. 60, 118, 134; 1991, nos. 22, 23, 31, 43, 54, 60, 90, 135, 136, 139; 1992, nos. 55, 107, 142.
3 Section 3, Education Act 1989.
4 Sections 5, 6, 7(5), 13(3), 18(2), 19(1), 21(1), 25A(1), 25B(a) and (b), 26(1), 27(1), Ibid.
5 Section 20, Ibid.
6 Section 25(1), Ibid.
7 Section 24, Ibid.
8 Section 29, Ibid.
9 Section 9, Ibid.
10 Section 11A, Ibid.
11 Ministry of Education - (Draft), *Special Education Policy Implementation Information Pack* - May 1992 2.
12 Section 9(1) Supra n.3.
13 Supra n.11
14 Section 10(1), Supra, n.3.
15 Section 10(4), n.3.
16 Section 11A, Education Amendment Act 1991 (1991 no. 43).
17 Section 11A(2)(a), Ibid
Note: "*Over crowding*", in relation to a school means "*the attendance at the school of more than students than its site or facilities can reasonably be expected to take. Section 2, Ibid.*
18 Section 11C, Ibid.
19 Sections 11G, 11H, Ibid.
20 Section 11J, Ibid.
21 Section 11I(1)(a), Ibid.
22 Section 11K(1)(ii), Ibid.
See also *Ministry of Education Circular* no. 1991/16, 12 July 1991.
23 Information supplied by *Ministry of Education,* 1st April 1993.
24 See *EDUCATION FOR ALL - OR ARE WE JUST RE-ARRANGING THE DECK CHAIRS ON THE TITANIC?* - Paper presented by Sue Gates, National Co-ordinator Advocacy, IHC New Zealand to the Special Education Service Conference, Dunedin, January 24, 1993.
See also The *Educated Society* - a sermon by the Rev. Stuart Vogel to members of the Auckland District Law Society - McLaren Chapel, February 1993.
25 See Section 4(1)(a) and (b), Race Relations Act 1971.
26 See Section 26(1), Human Rights Commission Act 1977.
27 *Disability* is defined by Clause 34 of the Bill as:
(i) Physical disability or impairment;
(ii) Physical illness;
(iii) Psychiatric illness;
(iv) Intellectual or psychological disability or impairment;
(v) Any other loss or abnormality of psychological or physiological or anatomical structure or function.
28 Clause 71, Human Rights Bill 1992.
29 See Clause 74, Ibid.
30 *Submission of the IHC to Select Committee on the Human Rights Bill,* 26 February 1993.
31 *The Education Gazette,* 15 February 1993.
32 Western Heights Primary School. See report *New Zealand Herald,* March 12th, 1993.
Note: Subsequently resolved by Ministry agreeing to provide an additional classroom to meet demand.
33 Mangawhau District School - Mt Eden, 1992 *Central Leaders,* 2 September 1992, 11 November 1992, 18 November 1992.
34 Supra n.24.
35 Supra n.24.
36 Supra n.24.

37 Supra n.24.
38 Education Act, RSO 1980, c.129 (as amended).
39 Regulation 6(3), Education Act, RSNS. 1967, c.81.
40 School in Canada (1991), MacKay and Sutherland.
41 Bales v Board of School Trustees (1984), 8 Adm. L.R. 202 (B.C.S.C.).
42 410 N.Y.S. 2d 99, app. div. 1978; reviewed in further appeal; 424 N.Y.S. 2d 376, app. div. 1979.
43 Compare *Maddever v Umawera School Board of Trustees & Others* (Unreported) High Court, Whangarei Registry, CP No. 49/91, September 1992, Williams J at 42, 43, 45 and 46.
44 Supra n.3.
45 Section 75, Education Act 1989.
46 Supra n.25, n.26, n.28.
47 Supra n.17.
48 Supra n.43.
49 Supra n.28.
50 Supra n.28.
51 Supra n.24 at page 11.