

Circular 0075/2022 – Frequently Asked Questions (FAQ) document

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New section 37A process

Q1. What is the main purpose of the Education (Provision in Respect of Children with Special Educational Needs) Act 2022?

The overall objective of this legislation is to support efforts to make provision in respect of children with special educational needs and to ensure that the rights of children with special educational needs to an appropriate education are met.

The legislation (section 6 of the Act) provides for a more streamlined section 37A process – the process by which the Minister can issue a direction to a school to make additional provision for children with special educational needs.

The legislation also places additional functions on schools (see Q5 below) and provides for an additional function for the NCSE (see Q15 below) to manage and co-ordinate admission to school in co-operation with parents and schools where necessary.

Q2. What does the new streamlined section 37A process entail?

The shorter more streamlined section 37A process includes the following sequential steps:

1. Where the NCSE is of the opinion that there is insufficient capacity in an area in relation to the provision of education for children with special educational needs, it shall prepare and submit a detailed report on the matter to the Minister. The NCSE report shall specify details on the existing provision in the area concerned, any relevant proposed or existing school building projects which may affect capacity, any schools in the area which the NCSE considers could meet additional demand, which schools the NCSE considers should be requested to make additional provision and such other matters as the NCSE considers appropriate.

2. On receipt of a report, and where the Minister is of the opinion that a relevant person (defined as a patron, board or any other person with a vested interest in the school premises) should make additional provision for children with special educational needs, the Minister may issue a notice in writing. A notice shall set out the Ministers opinion that the relevant person should make additional provision for children with special educational needs and state the reason for his or her opinion, include a copy of the NCSE report, specify details of the measures to be taken by the relevant person, detail the resources to be provided to the school, detail any property arrangements to be made including any arrangements in relation to the school accommodation and direct the patron or board to share the notice with any other person to whom the ownership of the school premises is vested where that person is not known to the Minister.
3. A relevant person on whom a notice is served may make representations in writing on any matter set out or specified in the notice within 14 calendar days.
4. After consideration of any representations received, and where the Minister remains of the opinion that a school should make additional provision for children with special educational needs, the Minister may serve a copy of a draft direction on a relevant person.
5. A relevant person on whom a copy of a draft direction is served may make representations in writing in relation to the draft direction within 14 calendar days.
6. After consideration of any representations received in relation to the draft direction, and where the Minister remains of the opinion that a school should make additional provision for children with special educational needs, the Minister may serve a direction on a relevant person. The direction shall set out the measures to be taken by the relevant person in relation to making additional provision for children with special educational needs, the period during which such measures shall be taken and any other relevant matters.
7. The relevant person shall comply with such a direction.

In line with the current section 37A process, all notices issued, representations received, draft directions and Ministerial directions shall be published on a website maintained by or on behalf of the Minister.

Q3. How often is it intended to use the section 37A process?

The preference for the Department and the NCSE is to continue to work collaboratively with schools to provide additional special classes and special school places. Consideration of the use of the section 37A process will be a last resort where efforts by the NCSE, in collaboration with schools, have not been successful in providing the necessary additional provision for children with special educational needs.

Q4. Will schools be allowed to make representations under this shorter more streamlined section 37A process?

The new section 37A process provides two opportunities for schools to make representations in writing to the Minister before a direction can be issued. The legislation requires the Minister to consider any representations made before moving on to the next stage of the process. The process for making representations will clearly be set out for schools at the appropriate time.

New obligations on schools, boards of management and patrons

Q5. What new obligations are being placed on schools, boards of management and patrons?

The new legislation places additional functions on schools (patrons, boards of management and schools). The main new function is to co-operate with the NCSE in relation to making additional provision for children with special educational needs. This is aimed at ensuring that all schools continue to take a child centred approach and are open to accommodating children with special educational needs.

The Department and the NCSE are committed to continuing to work with schools in a collaborative way to provide sufficient special classes and special school places. A range of planning and building supports, grant funding supports and training supports are available for schools opening new special classes.

Schools are also being required to include new text in admission policies (see Q13 below) and comply with directions under section 37A or section 67 (see Qs 7&8 below).

Q6. How will these new obligations operate in tandem with the section 37A process?

As outlined previously, any consideration to use the section 37A process will be a last resort where existing efforts have not been successful in securing an adequate provision for children with special educational needs. These new obligations on patrons, boards of management and schools relate to the regular ongoing engagement between the NCSE and schools each year to open new special classes or increase special school capacity. The new obligations are not intended to circumvent the section 37A process in any way.

Commencement of NCSE and TESS (formerly the Child and Family Agency) power (Section 67) to designate a school place

This provision has been in place since the enactment of the Education (Admission to Schools) Act 2018 and has just recently been commenced.

Q7. What factors do the NCSE have to consider before making a designation?

In making a designation of a school place for a child with special educational needs, the NCSE are required to have regard to the following factors:

1. The special educational needs of the child;
2. The wishes of the child's parents;
3. Where appropriate, and in accordance with the age and maturity of the child, the wishes of the child;

4. The availability of places in schools in the locality;
5. The school that, in the Council's view, it would be in the best interests of the child to attend, with preference given to the child's local school unless the best interests of the child require otherwise;
6. The ability of the school to accommodate the child concerned and to meet his or her special educational needs, including that ability when resources are made available to the school and
7. Any direction served by the Minister under section 37A that may be relevant.

Q8. What factors do the Tusla Education Support Service (TESS)(formerly the Child and Family Agency) have to consider before making a designation?

In making a designation of a school place for a child, TESS are required to have regard to the following factors:

1. The wishes of the child's parents;
2. Where appropriate, and in accordance with the age and maturity of the child concerned, the wishes of the child;
3. The availability of places in schools in the locality and
4. The school that, in the view of TESS, it would be in the best interests of the child to attend.

Q9. Can a school make representations in relation to a designation?

Yes. Where the NCSE or TESS are deciding to designate a school place for a child, they will serve a notice on the board of the school and the board may make representations in writing within 10 calendar days in relation to the designation. Any representations made by a school board must be considered by the NCSE or TESS before they proceed to direct a school board to admit a child. It is also anticipated that the NCSE or TESS will have engaged with local schools before reaching a decision to consider making a designation.

Q10. Can a school appeal a decision to designate?

The legislation does not provide an appeal mechanism for schools to appeal a direction from the NCSE or TESS to direct a school board to admit a child.

Q11. In what type of situations might the NCSE or TESS make a designation?

Under existing legislation, a child must be admitted where the school has capacity. Parents can take an appeal under Section 29 of the Education Act 1998 if they wish to appeal a decision of a school board to refuse admission. It is envisaged that this new power to designate a school place will be used in limited circumstances. It is envisaged that the NCSE or TESS will engage fully with a school before considering a designation under section 67.

An appeal under section 29 and a designation under section 67 may not be made in respect of the same student and the same school at the same time.

Potentially, the option to designate could be used in co-operation with schools e.g. where the NCSE and school board of management agree to allow the NCSE to designate children for a new special class where the school does not yet have an admission policy that covers admission to the new special class. Additionally, where a parent has not made application to any school TESS in co-operation with a school may make a designation in respect of a child.

Q12. Will the NCSE and TESS develop procedures in relation to the making of designations?

Both the NCSE and TESS have developed operating procedures for their staff in relation to section 67.

New text to be included in Admission Statements

Q13. What new text must be included in Admission Statements?

The legislation requires schools to include a further statement in the admission statement which is part of their admission policy setting out that the school shall co-operate with the NCSE generally and in particular in relation to the provision and

operation of a special class or classes when requested to do so and a further statement that the school shall co-operate with any Ministerial direction under section 37A and any direction by the NCSE or Tusla under section 67. The two specific pieces of text to be added to admission statements can take the form of:

(Insert name of School) will cooperate with the National Council for Special Education in the performance by the Council of its functions under the Education for Persons with Special Educational Needs Act 2004 relating to the provision of education to children with special educational needs, including in particular by the provision and operation of a special class or classes when requested to do so by the Council.

And

(Insert name of School) will comply with any direction served on the patron or the board, as the case may be, under section 37A and any direction served on the board under section 67(4B) of the Education Act.

Q14. How should a school update its Admission Statement and do these additions require the formal approval of the school patron?

Yes in accordance with the Education Act, 1998 school boards must seek patron approval for these additions to the Admission Statement of the school. The Department will provide a template document for this which will set out a simplified approval process for boards and patrons.

Potential new role for the NCSE to manage and coordinate admissions for children with special educational needs

Q15. What does this new provision relate to?

The legislation provides for a new function for the NCSE to potentially manage and co-ordinate admission to school in cooperation with parents and schools. This function may be particularly useful in certain locations where schools could be supported to cooperate in relation to the admission of children to special classes –

i.e. avoid a situation where a large number of children apply for admission to a number of special classes in a specific area and schools have to accept, review and respond to a large number of applications.

Before the NCSE progress any plans in relation to the use of this new function, they will engage with education stakeholders and interested parties.

Q16. When might this new function be used?

This new function could be used to support parents and schools in a specific location where there is a high demand for special class places. The NCSE could engage with schools and parents to agree a process for managing the admission process. This could involve the NCSE establishing an advisory committee to review applications and support a number of schools to work together through the admission process for their special class or classes.

Q17. How might this new function benefit schools and parents?

The new function could potentially reduce the need for schools to have to consider a large number of applications for a small number of available special class places and it could assist parents who presently may apply to a large number of schools seeking a special class place for a child with special educational needs.

Commencement of sections 68 to 70 inclusive

Q18. What do these provisions provide for?

Section 68 is a provision that enables the patron to issue directions to the board of management where they have failed to comply with the admissions legislation, and if the board fails to comply (the patron) can appoint an independent person to carry out the action.

Section 69 gives the Minister the authority to nominate an authorised person to prepare a report where the Minister is of the opinion that the board of management has failed to prepare and publish an admission policy in accordance with the act. Upon consideration of the report the Minister can issue a direction to the board of management.

Section 70 is a provision for the Minister to make a request to a patron to direct the board of management to comply with a direction in accordance with section 68.

Q19. When might an independent person be appointed?

Where the Patron is of the opinion that the board of management fails to comply with a direction, the Patron shall, following issuance of a further notice and consideration of any representations received in relation to same, and subject to the consent of the Minister, appoint an independent person to carry out the direction under sections 68 and 70.

Review

Q20. Does the Department intend to review the new provisions being commenced?

The Department is committed to reviewing the operation of these new legislative provisions on an ongoing basis with education stakeholders and interested parties. In particular, the new legislation commits the Department to commencing a review of the operation of the new section 37A within 3 years.