

余若薇立法會議員辦事處

Office of Audrey Eu, Legislative Council Member

23rd June 2009

Mr. Raymond Tang
Chairperson
Equal Opportunities Commission
19/F, Cityplaza Three
14 Taikoo Wan Road
Hong Kong

Dear *Raymond*

I understand the Equal Opportunities Commission (EOC) is looking into complaints from children with special education needs (SEN) who have reached 18 years of age. They are complaining of discrimination in the code of aid for special schools which requires students with SEN to apply for extension of stay once they reach 18 whereas the code of aid for main stream schools does not subject students to the same requirement. This different requirement constitutes a clear case of discrimination.

I am dismayed to read an earlier paper written by the EOC dated 19th May 2005 on this matter, a copy of which is enclosed herewith. In particular, paragraph 7 of the paper tries to argue that this is not a “requirement” but a “choice”. Ironically, the students with SEN are not provided with a choice to stay in school. More importantly, it is not a matter of choice, indeed it should be a matter of *right*, a right to education which is enshrined in the UN Convention on Rights of Persons with Disabilities (“the UN Convention”). Further I enclose for your information the latest government paper which admits that there is a “requirement” imposed on students with SEN. Their excuse is that the “requirement” has always been there. I am sure you would agree that prolonged discrimination is not a justification for continuous discrimination.

Furthermore I am flabbergasted and baffled by paragraph 9 of the same paper which argues that the requirement imposed by the Education Department is based on academic performance instead of age, hence such requirement may not be unjustifiable. I would be grateful if you can enlighten me as to where I can find any reference to “academic performance”. The code of aid only refers to age and not to performance, academic or otherwise. Where does the EOC find reference to “academic performance” and on what provision or document was such observation made?

The education panel will be hearing deputations on this matter this coming Saturday and I believe an invitation has been extended to the EOC. Unfortunately I will be unable to attend as I have to attend another meeting. But I hope you will be providing the education panel with another more updated paper on this matter. Further I note that EOC contributed



to a study conducted by the UN High Commissioner for Human Rights on the key legal measures necessary for ratification and implementation of the UN Convention. You wrote to Mr. Ibrahim Wani, Chief of the Development Issues Branch at the UN High Commissioners for Human Rights on 14th August 2008, confirming that the EOC was prepared to do its part in implementing the UN Convention. Hence I would be grateful if you would take the opportunity this Saturday to inform the education panel as to what EOC has done to help students with SEN and protect their rights enshrined in the UN Convention. For your easy reference, I reproduce below Article 24 of the UN Convention:

“With a view to realising 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:...the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential.”

Yours sincerely,



Audrey Eu

Encl.

cc. Hon. Cyd Ho and members of Education Panel
Mr. Michael Suen, GBS, JP, Secretary for Education Bureau
Mr. Kenneth Chen, JP, Undersecretary for Education Bureau

**Subcommittee to Study Issues Relating to the
Provision of Boarding Places, Senior Secondary
Education and Employment Opportunities for
Children with Special Educational Needs (Subcommittee)**

Meeting on 30 May 2005

- Submission from the Equal Opportunities Commission -

Introduction

This paper is submitted in connection with the Subcommittee's invitation for the Equal Opportunities Commission (EOC) to send representatives to attend the Subcommittee's meeting scheduled for Monday, 30 May 2005. The Subcommittee has also requested the EOC to comment specifically on whether the following would constitute discrimination against children with special educational needs (SEN) in education or a breach of the Disability Discrimination Ordinance –

- (a) the provision of a three-year junior secondary and a three-year senior secondary education to students in mainstream schools but a six-year secondary education to children with SEN in special schools under the proposed "3+3+4" academic structure; and
- (b) the requirement of students with SEN to leave special schools at the age of 18 whereas students in mainstream schools are not subject to such age limitation.

The Disability Discrimination Ordinance (DDO)

2. The DDO renders unlawful discrimination against persons on the ground of their or their associates' disability in respect of their employment, accommodation, education, access to partnerships, membership of trade unions and clubs, access to premises, educational establishments, sporting activities and the provision of goods, services and facilities. Under Section 36 of the DDO, subject to certain exceptions, it is unlawful for the Government to discriminate against a person with a disability in the performance of its functions or the exercise of its powers. Thus, the DDO binds the Government.

Direct and Indirect Discrimination

3. The two major forms of discrimination prohibited under the DDO are “direct” and “indirect” disability discrimination. Direct disability discrimination means treating a person with a disability less favourably than someone without a disability in *comparable circumstances*. Indirect discrimination consists of applying the same requirement or condition on persons with a disability and persons without a disability, but is in practice discriminatory in its effect on persons with a disability because the proportion of persons with a disability who can comply with it is considerably smaller and the requirement or condition set is *not justifiable*.

Six-year Secondary Education for Students with SEN

4. Having reviewed the discussion paper (LC Paper No. CB(2)1317/04-05(02) entitled “*Proposed Arrangements for Students with Special Educational Needs under the New Senior Secondary Education*”) referred to by the Secretariat of the Subcommittee, it is noted that 3 years of senior secondary education would be provided to all students except SEN students in special schools for the mentally handicapped (MH).

5. On the face of it, SEN students in MH schools are treated “differently” under the proposed arrangements. However, whether they are treated “less favourably” than other students in *comparable circumstances* is less certain. Factors such as nature of the special educational needs of these students; appropriateness of the extra resources put into the second-half of the “six-year secondary education” for them; and appropriateness of the accommodations or adjustments made to the curriculum, etc. have to be taken into consideration. All these are questions of fact which need to be answered for the purpose of considering whether the proposed arrangement would constitute disability discrimination. It must however be stressed that the ultimate decision on whether a particular situation constitutes disability discrimination or breach of the DDO rests with the courts. The point to be made is that what is at issue is not so much the labels given to the arrangements (i.e. “3+3” and “6”) but the contents of the respective arrangements.

Requirement of SEN Students to Leave Special Schools at the Age of 18

6. According to the Education and Manpower Bureau’s (EMB) discussion paper entitled “*Issues relating to the proposed academic structure for secondary education and higher education*” (LC Paper No. CB(2)1130/04-05(02)), the existing year of junior secondary education for SEN students in MH schools is limited to four years, plus a two-year Extension of Years of Education Programme. There is no senior secondary education arrangement for these students at the moment, or under the proposed new academic structure.

7. One interpretation of the arrangements is that SEN students in MH schools are in effect "required" to leave their schools at the age of 18. However, another interpretation is that SEN students in MH schools are offered with more choices than their non-SEN counterparts. One choice is to proceed along the usual exit pathways to the various post-school placement destinations. Another choice is to study at the appropriate level in mainstream schools, if they can follow the mainstream curriculum. A third choice is to study in MH schools till they reach the age of 18 before proceeding to post-school placement destinations, if they cannot follow the mainstream curriculum. The latter interpretation, in the Commission's view, seems to describe the situation more accurately. Thus, the "requirement" or "condition" imposed by the EMB on all students for further education could well be academic performance based instead of age.

8. Similar to the situation of the "six-year secondary education" arrangement, SEN students in MH schools are treated "differently". However, whether they are treated "less favourably" than their non-SEN counterparts in the mainstream schools in *comparable circumstances* is less certain. Curriculum, support services, intended exit-paths, etc for SEN and non-SEN students are significantly different. So, it would be difficult, if not impossible, to identify a comparator to establish a case of direct discrimination.

9. One may argue that since the nature of the disability of SEN students in MH schools is such that their real "intellectual age" is significantly below that of their "chronological age", thus imposing an age limit of 18 would be indirectly discriminatory. As mentioned earlier, however, the "requirement" or "condition" imposed by the EMB on all students for further education is academic performance based instead of age, which may not be unjustifiable. Therefore, on the face of it, it would seem that no indirect discrimination is involved.

Special Measures

10. Notwithstanding the Commission's view above, the Commission urges the EMB to widely consult parents and to provide adequate resources to support the proposals and tailor special educational programmes to cater for the special needs of the SEN students in MH schools. These special measures, though not mandated, are encouraged under the DDO.

Equal Opportunities Commission

19 May 2005