

**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