



Reasonable accommodation in education

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Author(s)	Quinlivan, Shivaun
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Abstract: This Article examines the duty to provide reasonable accommodation in education as provided for by the Equal Status Acts. The duty to provide reasonable accommodation is a reactive duty as such it is an individualised response to a particular situation. The duty imposes on an educational establishment the duty to accommodate a student with a disability. The duty as expressed in the ESA is weak, and arguably some of the interpretations further weaken an already weak duty.

Key words: education, disability, reasonable accommodation, Equal Status Acts

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1 THE DUTY TO PROVIDE REASONABLE ACCOMMODATION IN EDUCATION

1.1 Introduction

The Equal Status Acts 2000-2012 (hereinafter the ESAs) represent an innovation in the equality agenda in Ireland.¹ These Acts extended the scope of non-discrimination law beyond the context of gender for the first time, and the ESAs prohibited discrimination in the provision of goods and services including education. This article will assess the provision of reasonable accommodation for children with disabilities in education. The duty to provide reasonable accommodation applies only to people with disabilities it is therefore important to assess the definition of disability contained in the ESAs and who is covered by that term. While other provisions of the ESAs are also relevant, such as the prohibition of both direct and indirect discrimination – these issues will not be assessed in this article. To that end, the article will first look at the scope of the ESAs as it applies to education, it will then focus on the definition of disability and finally will assess the case law on reasonable accommodation.

1.2 Scope of the Act

The novelty of the ESAs was their application to areas outside of the realm of employment. The Acts apply to the provision of goods and services to the public,² the disposal of accommodation,³ and the operation of clubs⁴ and educational establishments.⁵ Educational establishments are defined in the Act as:

a pre-school service within the meaning of Part VII of the Child Care Act, 1991, a primary or post-primary school, an institution providing adult,

¹ See generally Olivia Smith, *Disability Discrimination Law* (Roundhall 2010); Judy Walsh, *Equal Status Acts 2000-2011 Discrimination in the Provision of Goods and Services* (Blackhall Publishing 2012); Gerry Whyte, 'Litigating the Right to Inclusive Education under Irish Law' (on file with the author 2014).

² Section 5 Equal Status Act 2000-12

³ Section 6 Equal Status Act 2000-12

⁴ Section 8 and 9 Equal Status Act 2000-12 but see also *Equality Authority v Portmarnock* [2009] IESC 73

⁵ Section 7 Equal Status Act 2000-12

continuing or further education, or a university or any other third-level or higher level institution, whether or not supported by public funds.⁶

It is evident from this definition that the term “educational establishment” is broadly defined, and that education whether publicly or privately funded is covered by the terms of this Act. While broadly defined neither the Department of Education and Science, or the Minister for Education come within the definition of an educational establishment. Consequently, cases based on the ESAs may result in individual school responses rather than responses that apply to all children with disabilities. However, in *Lyamina v The Department of Education and Science*,⁷ the Equality Officer was required to determine whether the applicant in the case had addressed her case to the correct respondent. In determining the action the Equality Officer noted the role of the Minister for Education and by extension the Department of Education under various sections of the Education Act, 1998;⁸ the Mission Statement of the Department of Education and Science; its Customer Service Charter; and its Statement of Strategy 2005-2007 and formed the opinion that the Department of Education and Science does “fall into the category of a provider of a “service” as defined in the Equal Status Acts.”⁹

In *Two Complainants v The Department of Education and Science*¹⁰ the Tribunal addressed the issue of maintenance grants payable to adults on further education courses. The applicants were refused the grants, and the question for the Tribunal was whether the Acts covered such grants. Section 2 of that Act defines “service” as “a service or facility of any nature which is available to the public generally or a section of the public.” According to earlier cases this covers services provided by the State.¹¹ The second question was to establish what was meant by the term “facility.” The Equality Officer noted that the same term was used in the UK discrimination acts, and then stated:

I note that Butterworths on Discrimination Law suggests the following “a facility is usually a manner, method or opportunity for the easy or easier performance of anything. It might enable a member of the public to have easier access to a service; a cash machine facilitates the withdrawal of money from a bank. It may present a method of obtaining goods; a collection point

⁶ Section 7(1) Equal Status Act 2000-12

⁷ *Lyamina v The Department of Education and Science* [DEC-S2009-16].

⁸ *ibid* [7.5] the Equality Officer stated “that the Minister and the Department has a role in planning and co-ordinating the provision of education in recognised schools and centres for education. Indeed, the Act goes on to state that it shall be the function of the Minister to monitor and assess the quality, economy, efficiency and effectiveness of the education system provided in the State by recognised schools and centres for education.”

⁹ *ibid*.

¹⁰ *Two Complainants v The Department of Education and Science* [DEC-S2003-42-043].

¹¹ *Donovan v Garda Donnellan* [DEC-S2001-11].

in a department store facilitates the purchase of heavy or bulky commodities. The term should cover most instances where a person is not actually providing goods or a service himself, but providing a means to obtain access to those goods or that service.” On the basis of the above, I have formed the opinion that the provision of a maintenance grant is a “facility” covered by the provisions of the Equal Status Act.¹²

Consequently, where the Department of Education provides an educational service or a facility to assist in accessing such a service, it is covered by the ESAs. Thus while s.7 defines an “educational establishment”, other sections of the Act may be relevant where the service or facility being provided relates to an educational service. The ESAs require educational establishments not to discriminate in respect of

- (a) the admission or the terms or conditions of admission of a person as a student to the establishment,
- (b) the access of a student to any course, facility or benefit provided by the establishment,
- (c) any other term or condition of participation in the establishment by a student, or
- (d) the expulsion of a student from the establishment or any other sanction against the student.¹³

As stated above the duty to provide reasonable accommodation only applies to people with disabilities so it is necessary at this juncture to consider who is entitled to this protection.

1.3 Definition of Disability

The ESAs prohibit discrimination on nine separate substantive grounds: age, gender, religion, race, membership of the Traveller community, family status, civil status, sexual orientation and disability. How disability is defined is important as it determines who may take an action under the ESAs. Defining disability within non-discrimination legislation has proven controversial.¹⁴ While not wishing to revisit the entire debate, it is important to place the concept of “disability” within the context of that debate.

¹² (n 10) [7.2].

¹³ Section 7(2)(a)-(d) Equal Status Acts 2000-11.

¹⁴ For a discussion on the difficulties encountered in defining disability in non-discrimination legislation see Cheryl L Anderson, ‘Deserving Disabilities: Why the Definition under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement’ (2000) 65 Missouri Law Review 83; Robert Burgdorf, ‘Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability’ (1997) 42 Villanova Law Review 409; Claire Bruton and Shivaun Quinlivan, ‘Defining Disability in

Disability is hard to define as people with disabilities do not form a homogenous group, as may be the case with other protected grounds. Disability can encompass a variety of conditions: physical, mental and sensory. Moreover, disabilities may span in range, leading one commentator to question “when does a visual limitation constitute an impairment?”¹⁵ It has been contended that there are three distinct approaches to legislatively defining disability¹⁶ - the non-definitional approach,¹⁷ the restrictive approach¹⁸ and the purposive approach.¹⁹ It is suggested that the ESAs definition falls into the latter category. This approach ensures that the definition of disability does not act as a gatekeeper to the protections contained within the legislation. The purpose of the ESAs is to prohibit discrimination in the provision of goods and services, including educational establishments. Thus the focus of the Acts is primarily on whether or not discrimination has occurred and not whether or not a person is considered disabled enough to benefit from that prohibition. There is of course a necessity to come within the definition of disability, but the definition is broadly drafted, the terminology is neutral and there is no threshold of severity or duration to overcome.²⁰ Section 2 provides that:

“Disability” means

(a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,

the Employment Context: Perspectives from the CRPD & European Union Anti-Discrimination Law’ in Gerard Quinn and Charles O’Mahony (eds), *The United Nations Convention on the Rights of Persons with Disabilities: Comparative, Regional and Thematic Perspectives* (Intersentia 2015); Theresia Degener, ‘Definition of Disability’ (August 2004); Carol Woodhams and Susan Corby, ‘Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act 1995’ (2003) 32 *Journal of Social Policy* 159.

¹⁵ Degener (n 14) 4.

¹⁶ Bruton and Quinlivan (n 14).

¹⁷ See for example the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (European Union); United Nations Convention on the Rights of Persons with Disabilities (United Nations) A/RES/61/06; Neither of these documents provide a definition of disability. This approach is not without its difficulties, see for example *Case C-13/05, Chacon Navas v Eurest Colectividades SA* IRLR 706 (CJEU); See Lisa Waddington, ‘Case C-13/05, Chacón Navas v. Eurest Colectividades SA, Judgment of the Grand Chamber of 11 July 2006, Nyr’ (2007) 44 *Common Market Law Review* 487; David L Hosking, ‘A High Bar for EU Disability Rights’ (2007) 36 *Ind Law J* 228.

¹⁸ See for example the American’s with Disabilities Act 1990, and section 4 of the American’s with Disabilities (Amendment Act) 2008 defines disability, inter alia, as ‘long term physical, mental, intellectual or sensory’ impairments. The initial definition contained in the 1990 Act was restrictively interpreted by the U.S. Courts making it very difficult for anyone to come within the terms of the Act. See Burgdorf (n 14); Bonnie Poitras Tucker, ‘The Supreme Court’s Definition of Disability under the ADA: A Return to the Dark Ages’ (2000) 52 *Ala L Rev* 321.

¹⁹ See for example section 2 Equal Status Acts 2000-2014, and section 4 of the Australian Disability Discrimination Act 1992.

²⁰ That stated even the CRPD has included a threshold of duration, therefore it would appear that it is now universally accepted that only disabilities that will persist for a period of time will be covered.

- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- (c) the malfunction, malformation or disfigurement of a part of a person's body,
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- (e) a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour.

This is a broad definition that does not aim to exclude any condition from the ambit of the definition of disability. To date the Equality Tribunal has held that the definition includes alcoholism,²¹ attention deficit hyperactivity disorder (ADHD),²² dyslexia,²³ autistic spectrum disorder, attention deficit disorder (ADD),²⁴ cerebral palsy,²⁵ asperger's syndrome,²⁶ learning disability,²⁷ and Down Syndrome.²⁸ The Employment Equality Acts 1998-2012 define disability in broadly similar terms and under those Acts it has been held that conditions which are minor and temporary come within the terms of the Acts,²⁹ as do imputed conditions.³⁰

We can extrapolate from the case law relating to both educational establishments and disability that both terms are broadly interpreted. This is important as the duty to provide reasonable accommodation in the education sphere only applies to people with disabilities.

1.4 Reasonable Accommodation

The equality ideal in the context of disability can be demanding. When considering equality and non-discrimination on other grounds it is often the case that the service provider is

²¹ *A Complainant v Café Kylemore* [DEC-S2007-57].

²² *Two Complainants (A mother and her son) v A Primary School* [DEC-S2006-28].

²³ *Two Named Complainants v Minister for Education and Science* [DEC-S2006-77].

²⁴ *Mrs A (on behalf of her son B) v A Boys National School* [DEC-S2009-31].

²⁵ *Mrs A (on behalf of her son, B) v A Childcare Facility* [DEC-S2009-41].

²⁶ *A Post Leaving Certificate Student v An Educational Institution* [DEC-S2009-43].

²⁷ *Mrs Cr (on behalf of her daughter Miss Cr) v The Minister for Education and Science* [DEC-S2009-51].

²⁸ *A Mother, on behalf of her Son v Board of Management of a Boys' National School* [DEC-S2012-012].

²⁹ For example see *Customer Perception Limited v Leydon* [2004] 15 Employment Law Report 101 (injuries sustained from a road traffic accident which resulted in a temporary reduction of movement in the back, neck and shoulder; In *Fernandez v Cable & Wireless* [DEC-E2002-52] (a condition as a result of an adverse reaction to and intravenous injection that required hospitalisation).

³⁰ See *Health Service Executive Employee v Health Service Executive* [DEC-E2006-13]; *Health Service Executive East Coast Area v A Worker* [EDA 0711]; *Ms X v An Electronic Company* [DEC-2006-42] For more on this see Bruton and Quinlivan (n 9).

required to ignore irrelevant factors such as race or religion when making their services available. In the context of disability it may be that the service provider is required to see past the disability to focus on the individual's ability and to make "positive space for people with disabilities to participate."³¹ It is evident that traditional non-discrimination tools on their own may not suffice to achieve equality in education for children with disabilities. In that context the introduction of the reasonable accommodation requirement is essential as it injects a positive duty on service providers to respond to the individual with a disability.

The essence of the reasonable accommodation notion is that service providers are under an obligation to provide an accommodation in order to facilitate a person with a disability to access the service in question and a failure to do so would be discriminatory. The definition of reasonable accommodation as contained in the ESAs is a rather weak rendition of this particular duty. The reason for this relates to the turbulent history surrounding the introduction of the ESAs.³² That weakness noted we must assess the duty as provided for in the ESAs.

The aim of this provision is to force service providers to overcome their preconceived notions about disability and to focus on the capabilities of individual applicants instead. The Equal Status Acts provide for reasonable accommodation in section 4(1) which provides:

For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.

Section 4(2) states:

A refusal or failure to provide the special treatment or facilities to which *subsection (1)* refers shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.³³

³¹ Gerard Quinn and Shivaun Quinlivan, 'Disability Discrimination: The Need to Amend the Employment Equality Act 1998 in Light of the EU Framework Directive on Employment' in Cathryn Costello and Eilis Barry (eds), *Equality in Diversity: The New Equality Directives*, vol 29 (Irish Centre for European Law, 2003).

³² *In Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *In Re Article 26 and the Equal Status Bill* [1997] 2 IR 387; For a more detailed discussion of these decisions see generally, Quinn and Quinlivan (n 31); Smith (n 1); Walsh (n 1).

³³ Section 4(3) states: "A refusal or failure to provide the special treatment or facilities to which *subsection (1)* refers does not constitute discrimination if, by virtue of another provision of this Act, a refusal or failure to provide the service in question to that person would not constitute discrimination."

Crucially under the Equal Status Acts the failure to provide reasonable accommodation is equated with discrimination.³⁴ Thus where a service provider fails to provide a reasonable accommodation this may be deemed discriminatory and importantly there is no necessity to shoehorn the concept of reasonable accommodation into either direct or indirect discrimination.³⁵ A service provider including an educational establishment must provide an accommodation where a failure to do so would make it “unduly difficult” or impossible to avail of the service. The duty to provide reasonable accommodation is not an open-ended obligation. It is evident from section 4(2) that there is the obvious limit that any accommodations should not give rise to a cost – other than a nominal cost. In addition to this limit, the case law suggests that there are both procedural and substantive limits to this duty.³⁶ Under the procedural limits to the duty to provide reasonable accommodation, there is the necessity for knowledge, the necessity to engage and the burden of proof.³⁷ The substantive limits relate to the interpretation of the duty contained in section 4, particularly the interpretation of terms such as “unduly difficult” and “reasonable.”

1.4.1 Procedural Limits

1.4.1.1 Knowledge

Reasonable accommodation is primarily a reactive duty. To really tackle disability discrimination there is a necessity to address systemic discrimination: reasonable accommodation will not do this because of the individualistic nature of the duty. The duty to provide reasonable accommodation is triggered by an actual situation. In *Garcia-Rodriquez v Bus Éireann* the equality officer stated:

The duty to provide reasonable accommodation arises when a service provider becomes aware of the need to provide special treatment or facilities to a person with a disability.³⁸

³⁴ This is in line with the definition of discrimination contained within the United Nations Convention on the Rights of Persons with Disabilities; this link is not express in the Employment Equality Acts 1998-2014.

³⁵ As happened in *A Worker (Mr O) v A Named Employer* [2005] ELR 132

³⁶ For a more detailed discussion of this point see Smith (n 1); Walsh (n 1).

³⁷ For a more detailed discussion of the limits on this duty see Smith (n 1).

³⁸ *Garcia-Rodriquez v Bus Éireann* [DEC-S2008-77] [5.5].

Thus there is an onus on the individual requiring an accommodation to inform the service provider of their disability.³⁹ It appears from the case law that a service provider, including an educational establishment, must have “actual or constructive knowledge”⁴⁰ of the disability of the person concerned. Walsh notes that it is unclear how “constructive knowledge of a disability will be inferred from the facts in any given case.”⁴¹ This is an understandable requirement a service provider cannot be expected to anticipate or guess what accommodation is necessary for an individual. However, it is contended that the relationship between an educational establishment and a student is more akin to the employer/employee relationship. Thus the relationship is an on-going relationship, a consequence of that is that it may be easier to infer constructive knowledge on the part of the educational establishment. In *Two Complainants v A Primary School*,⁴² the respondents alleged that they were not aware of the second complainant’s disability. The second complainant had Attention Deficit Disorder (ADD) a fact not formally notified to the respondent. However in that action the Equality Officer stated:

I note that both the Principal and the class teacher recognised the symptoms of ADD ... Both described in their evidence that they discussed ADD with the complainant's parents. I also note that his class teacher said that M was not bold or naughty, but that he had a concentration problem, which meant he could not sit still in class for long periods and this got him into trouble.⁴³

From this evidence it seems that the equality officer was willing to infer knowledge on the part of the educational establishment. Further, it must be noted that those working within an educational establishment are professionals trained to deal with children and often to identify developmental and learning disabilities. As is evident in this action, it was the educational establishment that suggested the National Educational Psychologists Service (NEPS) assess the complainant. Thus it may be easier to assume constructive knowledge of a disability in the context of education.

1.4.1.2 Process of Engagement

³⁹ From the case law it seems this requirement is more strictly interpreted in the context of Equal Status Acts cases than it does in the context of employment cases.

⁴⁰ *McMahon and five others v McGowan’s Pub* CC, 23 June 2005; For a more detailed review of this case see Equality Authority, ‘Annual Report 2005’ (May 2006); Walsh (n 1) 211.

⁴¹ Walsh (n 1).

⁴² *Two Complainants v A Primary School* [DEC-S2006–28].

⁴³ *ibid* [6.10]

The duty required by section 4 is to “provide special treatment or facilities” to ensure that someone can avail of the service in question. The duty applies to all elements of the ESAs and all people with disabilities. As a result the duty to provide reasonable accommodations can be incredibly varied. As is evident from the education cases alone the accommodations can include: prioritising a pupil for assessment,⁴⁴ providing sufficient resource teachers,⁴⁵ altered assessment, additional time in exams⁴⁶ and the provision of material in alternative format.⁴⁷ Couple this with the variety of disabilities that people may present with and it is evident that accommodations can take a wide variety of forms. Additionally under the ESAs, with the possible exception of educational establishments, the relationship between the potential service user and service provider is likely to be transient - suggesting the necessity for the service provider to engage with the person with a disability.

In *Gallagher and Wilson v Donegal County Council*,⁴⁸ the Equality Officer adopted the test established in relation to the Employment Equality Acts in *A Health and Fitness Club v A Worker*.⁴⁹ In that case the Labour Court established a test to determine the procedural elements of the duty to provide reasonable accommodation. The Labour Court held it was necessary for the employer to be “in full possession of all the material facts concerning the employee’s condition.” The Court went on to hold:

In practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee’s capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee’s doctors or obtained independently.

Secondly, if it is apparent that the employee is not fully capable Section 16(3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable. The Section requires that the cost of such special treatment or facilities must also be considered. Here, what constitutes nominal cost will depend on the size of the organisation and its financial resources.

Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.⁵⁰

⁴⁴ *Two Complainants (A mother and her son) v A Primary School* (n 22).

⁴⁵ *Mrs X (on behalf of her son, Mr Y) v A Primary School* [DEC-S2010-009].

⁴⁶ *Two Named Complainants v Minister for Education and Science* (n 23).

⁴⁷ *Kwiotek v National University of Ireland, Galway* [DEC-S2004-176].

⁴⁸ *Gallagher and Wilson v Donegal County Council* [DEC-S2006-60].

⁴⁹ *A Health and Fitness Club v A Worker* [EED037].

⁵⁰ *ibid.*

Thus in the case of *Maguire v Bob's News and Deli Dublin*,⁵¹ the complainant was mobility impaired, she could walk on occasion, but more often she used an electric wheelchair. The complainant had received assistance with shopping in the respondent's store but this service was withdrawn by the respondent. In withdrawing that service there was no discussion with the complainant to assess whether it would be "unduly difficult" or "impossible" for her to use her cane while shopping and carrying her purchases. It was the failure to explore the duty to accommodate under section 4 of the Act that led to a finding that there was a failure to accommodate the complainant. It is important for service providers, including educational establishments, to engage with the person with a disability to determine if there is a reasonable accommodation available that would enable that individual to avail of the service in question.

1.4.1.3 Burden of Proof

The final procedural element of this duty relates to the burden of proof. It is for the complainant to establish that s/he requires a special treatment or facility without which it would be "impossible" or "unduly difficult" for that person to avail of the particular service. This is not an insignificant evidential barrier for a complainant. The reason for this relates to the substantive interpretation given to terms like "unduly difficult" (discussed below). From case law it is evident that there is no requirement for the respondent to provide equal or perfect availability of the service, just availability.

1.4.2 Substantive Limits

1.4.2.1 Unduly Difficult

In *Connolly v Hughes and Hughes*⁵² the complainant was a wheel chair user and a regular user of the respondent's bookstore. The respondent had carried out renovations on their premises that resulted in part of the premises being inaccessible to the complainant. The complainant raised this fact with the respondent and the respondent responded by offering to bring the complainant a selection of books of his choosing to an accessible part of the store. The complainant refused this offer on the basis that he preferred to shop independently. The

⁵¹ *Maguire v Bob's New and Deli Dublin* [DEC-S2004-25].

⁵² *Connolly v Hughes and Hughes* [DEC-S2009-64].

Equality Officer relying on the decision of Hunt J. in *Cahill and Hollingsworth v Department of Education and Science*, stated:

I accept that the complainant has every right to turn down any assistance that he does not wish to obtain. This entitlement does not, however, render the respondent's offer unsound. ... it is clear that, in the circumstances of this case, despite the fact that the complainant was offered what could be construed as different treatment, that is, that the special assistance or facilities offered a different degree of accessibility to the complainant than to a person who does not have a disability/with a different disability does not constitute less favourable treatment within the meaning of the acts. It is clear that should the complainant have accepted the offer to have the books brought to him he would have been able to avail of the service in a manner that could not be construed as "impossible" or "unduly difficult".⁵³

This interpretation is disappointing, Walsh suggests that the phrase "unduly difficult" is in need of a purposive interpretation and refers to a UK code of practice which addressed the issue of what considerations a respondent should take on board when determining whether the service was available, that included: time, inconvenience, effort, discomfort, anxiety or loss of dignity entailed in using the service.⁵⁴ These considerations appear to be absent from Irish law, and arguably part of the rationale for non-discrimination law is to ensure the dignity of an individual in their ability to access goods and services. The decision in *Connolly v Hughes and Hughes* arguably fails to deliver on this front. This decision is arguably more problematic in the context of education. Based on the position adopted by the Equality Tribunal once a student is able to avail of an education service in a "manner that could not be construed as "impossible" or "unduly difficult""⁵⁵ then the educational establishment has fulfilled its duty, hardly satisfactory.

1.4.2.2 What is "Reasonable?"

It is evident from section 4(2) above that the duty to provide reasonable accommodations is limited by the reference to the phrase "nominal cost" (discussed below). However it appears that from the interpretations to date, the term "reasonable" has been interpreted as a qualifying measure in and of itself. Clearly the term was always intended to ensure that a service provider was not required to provide unreasonable accommodations, but it has been interpreted as a separate standard that in effect qualifies the duty. Thus the word "reasonable" has further weakened what is an already weak provision. In *Wellard v*

⁵³ *ibid* [5.4].

⁵⁴ Walsh (n 1) 216–17.

⁵⁵ *Connolly v Hughes and Hughes* (n 52) [5.4].

*Killester College*⁵⁶ the complainant, who was visually impaired, applied to attend a course in the respondent college. The college and the complainant entered into a process of engagement over the required accommodations, not all of which were in place on the day the course commenced. The College had expended significant resources to ensure that the relevant assistive technologies were in place. There were teething problems: some information was not immediately available to the complainant and on occasion she had to wait longer than other students to access the relevant material. In finding for the respondent the Equality Office noted:

The complainant seems to confuse the concept of reasonable accommodation as envisaged by the Equal Status Act with what she personally terms reasonable. The evidence shows that the complainant's expectations in this regard are unreasonable.⁵⁷

This is a rather uncompromising position adopted by the Equality Tribunal, it is after all equally possible to argue that having course material available on time where a course provider has had sufficient notice of the students needs is in fact reasonable. This unfortunately is not the position adopted by the Tribunal or the Courts. In the Circuit Court judgement of Hunt J in *Deans v Dublin City Council*⁵⁸ he stated that “reasonableness must be judged according to the context of the individual case.” He went on to state “all that is commanded to do by equality legislation is to devise a “reasonable” solution to a problem, not to achieve perfection and not to give in to every demand that is made of it.”⁵⁹ Applying this to the context of education a child with a disability is not necessarily entitled to the same service as a child without a disability, all that is required is to devise a “reasonable” solution. These interpretations highlight some of the weaknesses of this provision. In effect the ESAs require a service provider to find a “reasonable” solution to allow a person with a disability to avail of the service in question, even if the availability is imperfect.⁶⁰

1.4.2.3 Nominal Cost

⁵⁶ *Wellard v Killester College* [DEC-S2008–24].

⁵⁷ *ibid* [8.1]; See also the decision of *Cahill v Minister for Education and Science* [2010] IEHC 227.

⁵⁸ *Deans v Dublin City Council CC*, 15 April 2008.

⁵⁹ *ibid*.

⁶⁰ See section 16(4) of the Employment Equality Acts 1998-2012 (Ireland) which provides a stronger provision on reasonable accommodation. This provision is not limited by the Supreme Court decision in *Re Article 26 and the Employment Equality Bill 1996* (n 86) as the legislature were able to draft a stronger section on reasonable accommodation to ensure that Ireland was in compliance with the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (European Union).

As a result of the Supreme Court decision *In Re Employment Equality Act*⁶¹ the reintroduced provision on reasonable accommodation contained a ceiling that the accommodation should not give rise to more than a nominal cost. Remarkably there are few cases addressing this particular element of the action. From the cases that address this issue we can infer a number of elements to this provision of the Acts. The issue of a “nominal cost” effectively operates as a defence to the duty to provide a reasonable accommodation. In the first instance where a complainant establishes a *prima facie* case of discrimination, it is for the respondent “to demonstrate how the provision of a special treatment or facility would create more than a nominal cost to it.”⁶² Further the figure that is assessed is the remaining cost of the accommodation after any public grant, funding or scheme available has been taken into consideration.⁶³ Once established that the cost would in fact give rise to more than a nominal cost, then the respondent has not failed in their statutory duty.

In the case of *Mrs A (on behalf of her son, B) v A Child Care Facility*,⁶⁴ Mrs A had secured a place for her son, who had cerebral palsy, in a childcare facility. The crèche had adopted a blanket policy not to accept a child with a disability unless the child had a full-time personal assistant. The Health Service Executive (HSE) agreed to fund an assistant for 5 hours per week, which meant that the child could only attend the crèche for those 5 hours. The complainant claimed that the respondent’s failure to carry out an objective assessment of her son’s needs and the adoption of a blanket policy for children with special needs amounted to discriminatory practice. This case was primarily argued under one of the statutory exceptions, and in particular the crèche’s necessity to comply with both the Child Care Act, 1991 and the Child Care (Pre-School Services) Regulations, 1996 which impacted upon child staff ratios. In order to maintain these ratios the respondent determined that they were not in a position to offer the complainant a place. The Equality Officer, in determining this issue, noted the legislative and regulatory provisions in relation to the operation of childcare facilities and further noted the serious consequences for such facilities if they failed to comply with those obligations. The Equality Officer accepted the respondent’s evidence that the complainant’s son needed to be assisted on a full-time basis by a personal assistant. Therefore for the respondent to be in a position to accept the child into the crèche would have entailed the hiring of an additional staff member. This the Equality Officer determined amounted to more than a nominal cost and therefore the respondent was deemed not to have

⁶¹ *In Re Article 26 and the Employment Equality Bill 1996* (n 32).

⁶² *Hallinan v Moy Valley Resources* [DEC-S2008–25] [5.6].

⁶³ *A Complainant v A Local Authority* [DEC-S2007–49].

⁶⁴ (n 25).

failed in its obligation under the Acts.⁶⁵ As stated above the introduction of the duty to provide reasonable accommodation is perhaps the most important element of the equality agenda for a person with a disability, it is unfortunate that the duty imposed is so imperfect in this instance.

1.5 Conclusion

It must be considered a positive decision to introduce these Acts and to retain the provision on reasonable accommodation after the Supreme Court decision in *Re Equal Status Bill 1996*.⁶⁶ This turbulent birth of the ESAs has led to some inherent weaknesses in the Acts.

Most fundamentally as a result of the troubled introduction of the duty to provide a reasonable accommodation under the equality legislation, the provision within the ESAs is quite restrictive. This restrictive provision is at times further hampered by restrictive interpretations. It is now the case that to establish a duty to provide accommodation, the service provider does not have to provide an accommodation unless they have actual or constructive knowledge of a person's disability. It is for the complainant to establish that there has been a failure to provide a reasonable accommodation. The duty to provide reasonable accommodation is triggered when an accommodation becomes unduly difficult or impossible to access. These phrases have not been interpreted in a purposive manner and consequently the duty to accommodate may be fulfilled by affording a manner of access or availability not necessarily equal or perfect access. It is possible to establish a failure to provide reasonable accommodation through procedural failure. Where a service provider fails to enter into a process to establish whether an accommodation is possible this may be deemed a breach of the statutory duty, and therefore discriminatory. The Courts and Tribunal have on occasion interpreted the word "reasonable" as a limitation in and of itself on the obligation to provide an accommodation. The accommodation in itself must meet the reasonable threshold and there is the reference to nominal cost. The duty to accommodate will not amount to discrimination where it costs more than a nominal cost. It is evident that this is an imperfect rendition of the duty to provide a reasonable accommodation. The imperfect provision is a result of a failure to understand the concept of reasonable accommodation as is evident from the Supreme Court decision in *Re Employment Equality*

⁶⁵ See also *Kwiotek v National University of Ireland, Galway* (n 128) where the respondent highlighted the cost of the accommodations provided for the claimant and compared them to accommodations made for other students with and without disabilities. On the basis of the figures provided it was determined that the accommodations cost more than a nominal cost.

⁶⁶ *In Re Article 26 and the Equal Status Bill* (n 32).

*Bill.*⁶⁷ Thus a provision that promised so much arguably in the context of education will not deliver sufficient access to appropriate education for children with disabilities as is evident from the cases mentioned and the limits of the provision.

⁶⁷ *In Re Article 26 and the Employment Equality Bill 1996* (n 32); *In Re Article 26 and the Equal Status Bill* (n 32).