

A statement based on an investigation into provision
by the Department of Education and Skills and the
HSE for a child in care

July 2013



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Ombudsman for Children

**A statement under the Ombudsman for
Children Act 2002**

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Department of Education and Skills and the HSE for a child in
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Part I Introduction

Ombudsman for Children statutory role and remit

1.1 The Ombudsman for Children's Office provides an independent and impartial complaints handling service. The investigatory functions and powers of the Office are set out in Sections 8-16 of the Ombudsman for Children Act 2002. This provides that the Office may investigate the administrative actions of a public body, school or voluntary hospital where, having carried out a preliminary examination, it appears that the action has or may have adversely affected a child and where those actions come within the ambit of Sections 8 (b) or 9 (1) (ii) of the 2002 Act.

1.2 The Office can receive complaints directly from children and young people or any adult on their behalf. The Ombudsman for Children may also initiate an investigation of her own volition where it appears to her, having regard to all the circumstances, that an investigation is warranted.

1.3 The Office aims to carry out investigations and to make recommendations which are fair and constructive for all parties. In the context of an investigation, the Office is neither an advocate for the child or an adversary to the public body.

1.4 In accordance with Section 6(2) of the Act, the Office is obliged to have regard to the best interests of the child and in so far as practicable, to give due consideration, having regard to the age and understanding of the child, to his or her wishes.

1.5 The principal issues to be addressed through an investigation are:

1. whether the actions of the public body has, or may have adversely affected the child involved; and
2. whether those actions were or may have been:
 - i. taken without the proper authority;
 - ii. taken on irrelevant grounds;
 - iii. the result of negligence or carelessness;
 - iv. based on erroneous or incomplete information;
 - v. improperly discriminatory;
 - vi. based on an undesirable administrative practice; or
 - vii. otherwise contrary to fair and sound administration.

1.7 A copy of this draft statement has been sent to the public bodies under investigation, in accordance with Section 13 (6) of the Act in order to provide them with an opportunity to consider the findings and make representations in relation to same.

Part II Complaint Details

2.1 On 21st September 2010 this Office received a complaint from a Guardian *ad litem* (GAL) acting on behalf of a separated child¹, then aged 13 years, who was in the care of the HSE. This complaint was made through and supported by the GAL's solicitor. The role of a GAL is to ascertain the child's wishes and feelings about their care, to formulate an opinion on what is in the child's best interests and to report both of these to the courts. GALs can only be appointed to children in care by the courts.

2.2 The GAL informed the Office that the child was permanently excluded from his school in May 2008 due to behavioural issues. The GAL's legal representative further advised that these behavioural issues needed to be viewed in the context of recent separation from his mother and siblings, a violent family death and inadequate care from his father. Between June and October 2009 the child was in a non-EU state with his father, but returned as a separated child in October 2009. He was subsequently placed in foster care by the HSE.

2.3 Having been permanently excluded from his school in May 2008, the child did not return to full-time education until March 2010 as no school placement could be found for him, despite applications being made to in excess of 26 schools by the HSE with the assistance of the GAL and the National Education Welfare Board (NEWB). An application for Home Tuition was made on his behalf by the NEWB and Home Tuition of nine hours per week was provided by the Department of Education and Skills (hereafter the Department) for the majority of the period during which the child was out of school.

2.4 The GAL and solicitor contend that despite the involvement of the NEWB and the HSE the child remained outside mainstream school for almost two years. This, they contend, is the result of a lack of management of the child's education by the Department.

¹ Separated children were previously referred to as unaccompanied minors in Ireland. Under Section 8(5) of the 1996 Refugee Act (as amended), an unaccompanied minor is a child under age 18 who has arrived at the frontiers of the State or entered the State and who is not in anyone's custody.

They contend that a school placement is the child's right and that policy and procedures should be put in place to ensure that children are not left without this provision.

Part III The Investigation

3.1 The Office conducted a Preliminary Examination of the GAL's complaint and in March 2011 decided to undertake a statutory investigation. This focussed on the issues raised by the GAL in relation to the actions of the Department and also the actions of the HSE in respect of securing educational provision for a child in care. The issues on which the investigation focussed are as follows.

- The level of redress available to children who are left without an educational placement for significant periods of time.
- The level of educational supports available for children who are without a mainstream school placement for a prolonged period (apart from up to a maximum of 9 hours Home Tuition per week).
- The level of recourse available in situations where all schools in a child's catchment area refuse enrolment.
- The liaison which occurs with the relevant agencies tasked with dealing with cases of this nature.
- Policy and procedures to assist and guide advocates working on behalf of children in this regard.

3.2 Information was sought from the GAL, her legal representative, the Department and the HSE. The NEWB was outside the investigation remit of the Office at the time, but general information on school placements and specific information on the child's case was requested and provided to the Office.

3.3 Investigation meetings were held with representatives of the Department and the HSE.

3.4 In accordance with Section 6(2) of the Act, the Office is obliged to have regard to the best interests of the child and in so far as practicable, to give due consideration, having regard to the age and understanding of the child, to his or her wishes. The child's views on the effect of being out of school for a protracted period and on the Home Tuition provided by the Department were obtained in direct discussion with this Office in 2011.

Background

3.5 For the purposes of clarity in this investigation, the following key events are noted.

- The child was permanently excluded from secondary school on 8th May 2008 due to behavioural issues. At that time, he was living with his father and no evidence of previous HSE involvement with the family in respect of child care or protection issues has been provided to this Office.
- The child's case was first referred to the NEWB on 9th May 2008 and the child was subsequently assigned an Education Welfare Officer (EWO).
- The child continued to live with his father in Ireland until June 2009, when both the child and the father left the country.
- The child returned to Ireland alone in October 2009 as a separated child. At this juncture he was taken into the care of the HSE and subsequently placed in foster care. A GAL was appointed to him under care proceedings in the District Court.
- In January and February 2010, the child's social worker applied to 26 schools seeking a placement for the child. The social worker lodged one unsuccessful Section 29 Appeal against one of these schools.

3.6 Section 29 of the Education Act 1998 provides for the parents or guardians of a child aged less than 18 years, or a person who has attained the age of 18 years, to appeal the decision of a school to permanently exclude, suspend or refuse to enroll a student. These are known as Section 29 appeals. Procedures issued by the Department for such appeals state that they are generally only accepted by the Department where local resolution has been attempted and failed. Appeals are heard by Appeals Committees that comprise one inspector of the Department and two other persons who, in the opinion of the Minister, have the necessary independence, expertise and experience to hear such appeals. Prior to such a hearing, a facilitator will be appointed if the Appeals Committee considers that it is possible to facilitate an agreement between the appellant and the school. Where this is not possible or where the facilitation process fails, a formal hearing will take place. The Appeals Committee makes a decision on the basis of this hearing and notifies this to the Secretary General of the Department or their representative, who then notifies the parties to the appeal in writing. A Section 29 decision is binding on all parties, with the only further appeal process being application for a Judicial Review to the High Court.

3.7 The child's case was first referred to the NEWB on 9th May 2008 following his permanent exclusion from his previous school. The Educational Welfare Officer (EWO) assigned advised the GAL's legal representative that she visited the family soon after this and advised the father of his right to appeal the child's permanent exclusion from

his previous school under Section 29 of the Education Act 1998. The EWO has advised that the father declined to make such an appeal as he believed that it would not be successful.

3.8 The EWO advised that she assisted the family with applications to local schools but could not secure a placement for the child. In September 2008 the child commenced Home Tuition of nine hours per week. In November 2008, the EWO and the father lodged a Section 29 Appeal with one school, but this was later withdrawn by the father as he believed that this was not a suitable school for the child.

3.9 The EWO continued to assist the family with school applications but advised that in January 2009 the family moved house and ceased contact with her. The EWO re-established contact with the family through the child's former tutor (no date for this recommenced contact has been provided) and Home Tuition recommenced. The EWO assisted with an application to the family's preferred school in their new catchment area but no place was available.

3.10 The EWO referred the child to the Early School Leaver's Programme and the child was offered a place on this. However, when the co-ordinator of this programme attempted to contact the family in August 2009 for the child to take up his place, no contact could be established (both the child and his father were out of the country at this time). The EWO has advised that following six letters to the family, the co-ordinator offered the child's place to another young person.

3.11 The father and child left Ireland in July 2009. In October 2009 the child returned to Ireland as a separated child and was taken into the care of the HSE. He was subsequently placed in foster care under an Interim Care Order.

3.12 On 16th November 2009 the EWO contacted the three schools in the child's area but could not secure a placement for the child. On 23rd November the EWO contacted a fourth school, which informed her on 15th December that the school would not offer the child a place as he resided outside their catchment area and had not attended any of the primary schools from which they traditionally draw their pupils.

3.13 The EWO also advised that she contacted the Early School Leavers programme and a Youth Initiative but that no places were available. In December 2009 the EWO offered a Home Tuition group to the child's social worker by way of an interim measure.

3.14 A Section 29 Appeal was made by the HSE to one school following their refusal

on 15th December 2009 to enrol the child on the basis that they had no places. An Appeals Hearing was held on 3rd February 2010 and the school's decision was upheld. No other Section 29 appeals were lodged on behalf of the child to any of the remaining schools to which enrolment applications were made.

3.15 In addition to the school applications made by the EWO and the family in 2008 and 2009 (see 3.8, 3.9 and 3.12 above), in January and February 2010 the child's social worker applied to 26 schools for a placement for the child. Written responses were received from 11 of these schools. Responses were, on the whole, brief and cited the following reasons for not offering a place to the child:

- not having any free places (five schools),
- the child residing outside the school's catchment area (four schools),
- a Section 29 Appeal was on-going on the child's behalf (three schools),
- not meeting the criteria of their admissions policy (two schools)
- his previous behavioural issues (one school) and
- being unable to meet his academic needs (one school).

3.16 Home tuition was recommenced for the child in January 2010. In March 2010 a place was secured for the child in a school that had previously refused to enrol him and the child returned to full-time education. The GAL has advised that this placement was secured through contact between her and the Chief Executive Officer of the relevant VEC. The NEWB provide that this was due to the perseverance of the EWO.

3.17 On 17th December 2009 the GAL's legal representative wrote on her behalf to the Minister for Education and Skills outlining the child's situation and expressing their intention to make an application to the High Court seeking Leave to Apply for a Judicial Review at the High Court sittings on 21st December 2009 should an adequate response to the letter and a school placement not be provided. On the 22nd and 23rd December the Department replied to this letter stating that they have no direct role in identifying school placements for individuals and directing the solicitor and his client to the Section 29 Appeals procedure. The Department further highlighted that it is the role of the HSE to make such applications to schools and appeals for children in their care. The Department also referred the solicitor to the National Council for Special Education and confirmed that Home Tuition of nine hours per week had been sanctioned for the child until 12th February 2010 as an interim measure.

3.18 On 23rd December 2009 the solicitor again wrote to the Minister for Education highlighting that the child needed a school placement, that the Department had a

constitutional responsibility to provide the child with an education and requesting that the Department liaise with the HSE, the NEWB, the GAL and relevant schools in relation to this matter.

3.19 The Department responded to this letter in writing on 5th January 2010. This response again stated that the Minister for Education and Science has no ‘...*direct role in identifying school placements for individuals.*’ This letter also stressed that the Constitution states that it is the responsibility of the State ‘...*to provide for* [emphasis in the original] *primary education rather than to provide education directly.*’ Again, the Department directed the solicitor and the GAL to the Section 29 appeals process and stated that ‘*While the Section 29 appeal process is ongoing, a parent/guardian may still formally apply to schools of their choice for a placement for their child.*’ Further, the Department again referred the solicitor and the GAL to the NEWB for assistance in securing a school placement, and to the National Council for Special Education should additional supports be required when a school placement was secured. The role of the HSE as the child’s guardian was again emphasised.

3.20 Further, on 22nd January, 2010 the Department wrote to the GAL’s solicitor refusing additional Home Tuition hours for the child as ‘*the objective of the Schools Division Home Tuition Scheme is to provide a temporary, interim, compensatory educational measure for children who are currently without a school place, or awaiting educational placement.*’ It is notable that the child had been in receipt of Home Tuition for almost one-and-a-half school years at this time. In addition, this letter indicates that the Department were aware that the child had previously been assessed by the National Educational Psychology Service (NEPS) in 2008 and that his overall ability was in the Borderline range (5th percentile, meaning that 95% of his peers were performing at a higher level) and that one-and-a-half resource hours per week had been allocated to the child in his previous school placement to help meet his needs.

3.21 The child was again assessed by NEPS in January 2010. This report indicates that when the previous NEPS assessment was conducted, the child’s date of birth was accepted by the assessor making him just over 13 years at the time of assessment. However, the HSE has advised a different date of birth based on the child’s passport making him just under 13 years of age.

The child’s correct date of birth recently emerged. Therefore the child was just over 15 years at the time of his second NEPS assessment.

3.22 This second NEPS report states that the child’s Full Scale IQ Score was in the

average range, but that he was significantly underperforming in Maths. The report concluded that there was no reason to suggest that he would not be able to participate in mainstream education and makes a number of specific recommendations in relation to his education. These included

- a referral to Speech and Language Therapy, which was considered to be essential by the NEPS assessor,
- assessment by a multi-disciplinary team to further investigate previously reported behavioural concerns,
- the development of an Individual Education Plan in Mathematics, and
- linking him in with Rainbows to support him with issues relating to separation from his family.

3.23 This NEPS report also made a number of general recommendations and suggestions in relation to supporting and further developing the child's reading comprehension, writing skills, maths, social skills and emotional intelligence and language skills. It should be noted here that these comments were made in light of a comparative assessment of children aged approximately 12-13 years when the child was in fact over 15 years of age.

3.24 Further communications between the solicitor and the Department issued until the child was offered a school place in March 2010. The position of both the solicitor and that of the Department remained unchanged.

3.25 When the child returned to school on 8th March 2010, the school, the HSE and the solicitor wrote to the Department requesting that the home tutor be retained for the child in order to allow him to catch up with his school work. The child had now been out of full-time education for the end of the school year 2007/2008, the entire school year 2008/2009 and most of the school year 2009/2010.

3.26 The Department refused this request on 16th March 2010 stating that *'...whereas Home Tuition has been, and will be provided for this child for the period where he is out of school or awaiting placement, there is not scope under this scheme to extend or maintain Home Tuition for students who are in receipt of a school place and have obtained school placement.'*

3.27 Following further communication from the HSE, the Department wrote to the HSE solicitors and the GAL's solicitor on 13th April 2010. This letter restated the above position in relation to the extension of Home Tuition. However, it went on to state that

the Department had written to the child's school and NEPS for advice on whether extra Home Tuition hours or other appropriate supports may be beneficial to the child and assist in his '*...reintegrating to the school and to develop his potential...*' On 6th May 2010 the Department sanctioned an additional six weeks Home Tuition for the child on the basis of advice from the HSE and NEPS. In a letter to the GAL's solicitor the Department stress that this decision was made '*...taking into account the individual and exceptional circumstances in relation to this case and does not set a precedence in relation to any other such cases.*'

3.28 The Department has advised that no claim for Home Tuition was made by the HSE in respect of the child for April or May 2010. In light of this, the additional six weeks Home Tuition was sanctioned for September 2010.

3.29 The child was the subject of on-going care proceedings in the District Court from his return to Ireland as a separated child in October 2009. In March 2010 the Court expressed concern about his education and his lack of school placement and requested that the Department provide a representative to the Court to explain why the extension of Home Tuition following the child's return to school had been refused. A representative of the Department attended a Court hearing in May 2010 at which point the child had returned to school and an extension to Home Tuition had been granted.

Adverse Affect

3.30 The complainant in this case contends that the child's absence from mainstream education had an adverse effect on his social and academic development. The complainant contends that the child would require extra tuition to address the educational deficit that has resulted from almost two years without a school placement. On his return to school in March 2010, the complainant's solicitor advised that the child was managing the school curriculum with the exception of French and Irish and was experiencing difficulties in Maths.

3.31 In direct discussion with this Office in February 2011, the child advised that being out of school made him feel 'left out'. He also stated that nine hours Home Tuition per week was not enough for him to keep up with all of his subjects and that he felt that he was falling behind with his school work.

3.32 At an investigation meeting with this Office, the Department put forward the position that there is no evidence that the child was adversely affected by being absent from mainstream school from May 2008 to March 2010. The Department highlighted that many children do not attend mainstream schools for a variety of reasons, including

those who are availing of Home Tuition. Further, the Department was of the view that the child could have accessed secondary education by returning to one of the primary schools that served the secondary schools to which enrolment applications were unsuccessfully made, but that this option was considered unsuitable by those overseeing his case. The Department also identified the Section 29 Appeals process, the supports provided by the NEWB and Home Tuition as the architecture of supports through which the State meets its obligations to ensure that a child can receive an education. The Department suggested that such Section 29 Appeals could have been made by the HSE to each of the approximately 30 schools applied to on behalf of this child. Only one such Appeal, which was unsuccessful, was made on behalf of the child, while a second Appeal was initiated but withdrawn by the child's father. The Department advised that additional in-school supports are available when the child is enrolled in school, but that the Department was not aware that the child had been in receipt of any such supports.

3.33 In further commenting on the mitigation of adverse affect, the Department advised at this meeting that while nine hours is the maximum Home Tuition hours provided for under the scheme, and that this provision is intended as a temporary measure, additional Home Tuition hours can be requested for a child in receipt of Home Tuition for a prolonged period. Each request for such an increase in hours would be considered on a case by case basis. It is the understanding of this Office that there is no formal mechanism through which such a request can be made or for their assessment.

3.34 However, in responding to the Draft Investigation Statement, the Department informed this Office that '*...the number of hours available under the terms of the [Home Tuition] scheme are reflective of the school grouping principle whereby a teacher is assigned to a class of 20 plus pupils. As previously stated, the Department operates the Home Tuition scheme under sanction from the Department of Finance and there is no flexibility to sanction in excess of nine hours per week per child.*'

Analysis

3.35 The child was without a school placement from May 2008 until March 2010, that is, almost two full school years. Under Section 27 of the Education (Welfare) Act 2000 the NEWB has responsibility to '*...make all reasonable efforts to have the child whom the decision concerned relates enrolled in another recognised school*' where a decision subject to a Section 29 Appeal has been upheld. Where such efforts fail, the NEWB has responsibility to '*...make such other arrangements as it considers*

appropriate to ensure that the child receives a certain minimum education and shall monitor the progress of the child's education.' The EWO in this case applied to a number of schools and early school leavers and youth initiatives prior to the child being taken into the care of the HSE as a separated child and provided further assistance to the child and the HSE in this regard.

3.36 The Office is also cognisant of the role that the HSE played in this case from October 2009, when the child returned to Ireland as a separated child and the HSE became responsible for his care and welfare. This included securing a suitable care and educational placement. As stated above, the HSE applied to 26 schools on behalf of the child and initiated one, unsuccessful, Section 29 Appeal.

3.37 The Department sanctioned Home Tuition hours of a maximum of nine hours per week as provided for under the Home Tuition Scheme for the time during which the child was without a school placement and directed the child's representatives to the NEWB. This Office understands that the current practice of the Department is not to intervene with individual schools in relation to their enrolment policy but to ascertain, through the Section 29 Appeal process, whether a school's enrolment policy is valid and has been applied fairly and in a non-discriminatory manner. The Department has written to this Office stating that it is the responsibility of the Department '*...to ensure that schools in an area can between them cater for all pupils seeking places....*'. However, in this case the child had been refused enrolment by all schools within a reasonable travelling distance and had been without a school placement for a protracted amount of time. The Section 29 Appeal process is currently the Department's only mechanism for addressing schools' refusals to enrol a student. In this case this would have resulted in up to 30 separate Section 29 Appeals having to be taken to the various schools applied to by the EWO and the HSE. In this context questions arise as to the suitability of the Section 29 Appeal process as the sole form of redress available to parents and guardians outside of the High Court, and particular issues arise in relation to this child and many children in care.

3.38 Where a child is in the care of the HSE, the HSE must not only find a home for the child but also a school placement. The importance of a school placement in securing a foster placement for a child and in stabilising such placements should not be underestimated. When considering a foster placement for a child, the HSE must consider whether it will meet all of the child's needs, including their educational needs. If a school placement cannot be found, the only recourse available to the HSE as the child's guardian is to proceed with Section 29 Appeals. The time given to hear an appeal may cause considerable delays in securing a school placement. The absence

of a school placement may, in turn, delay the securing of a foster placement and establishing its stability and long-term viability.

3.39 The applications for school placements for the child in 2009 and 2010 in particular were made when the academic year was already well commenced. The NEWB has expressed the view to this Office that this was most likely a significant factor in the inability to secure a school place for the child until March 2010, as second level school places are allocated well in advance of the beginning of the academic year. In view of this, Section 29 Appeals made in the middle of the academic year for which a school place is sought may not be feasible as schools may not have the capacity to enrol additional students. It remains, however, that many children move house during the school year and therefore need to have access to school places. This applies to all children but may be particularly relevant to children in care who may enter care or change care placement during the school year. In addition, children who have been excluded from school cannot be left without a school placement for the remainder of the school year in which they are excluded. The Section 29 Appeals process may not only have been particularly unsuitable to the child in this case but may also be inappropriate for many children who have no option but to change school at any point during the academic year.

3.40 The Office notes that the HSE, as the child's guardian, made only one Section 29 Appeal despite having received refusals to enrol the child from 26 schools. The Office is aware of the administrative burden further appeals would have placed on those advocating on the child's behalf, in this instance, the HSE and the EWO, as well as on the schools in question and the Department. Further to this is the time required to hear a Section 29 Appeal, which under the Education Act 2007 may take up to 30 days to hear and which in this instance took two months. Given the significance of a school placement in terms of securing and stabilising a care placement, the provisions and administration procedures of the Section 29 Appeals process as the sole means of redress available to the child's advocates were inappropriate to the needs of the child in this case.

3.41 Additionally, the child had also been identified by NEPS as requiring additional support to maintain his educational performance (see paragraphs 3.20, 3.22 and 3.23 above). Given the need for such additional support, the expectation that nine hours Home Tuition per week for a protracted period would meet his educational needs and allow him to return easily to mainstream school is particularly problematic. The Department have noted that many children do not take part in mainstream education for a variety of reasons, including the decision of their parents to home school them.

However, this was not the case for the child, whose absence from school was not a matter of parental choice.

3.42 Following an absence of almost two academic years, the child re-entered mainstream school. The duration of his absence, the child's needs and the additional resources he required as identified by NEPS in addition to the child's own views on his ability to keep up with his school work indicate that he was in need of additional supports in order to catch-up with his peers at school. The provision of such supports both while the child was out of school and when he returned required a co-ordinated approach by the Department, the HSE and the NEWB, in collaboration with the foster carers and the school, in order that resources could have been put in place to meet the needs of the child. Such a co-ordinated approach is not evident. While there is some evidence that the EWO and the HSE co-operated in their attempts to secure a suitable school placement for the child, there is no evidence of a co-ordinated approach between the HSE and the Department to resolving the child's case, despite its protracted nature.

3.43 Provision for the child during his absence from school consisted of nine hours Home Tuition per week, the same as is available for children without additional needs and children who have been absent from the mainstream school system for short periods of time. This raises concerns about the adequacy of the maximum of nine hours Home Tuition hours per week for all children irrespective of their educational needs, the reasons for, and duration of their absence from mainstream school and their family circumstances. In this case the child required additional supports when he was out of school to maintain his education, and supports to catch-up with and settle into his new school placement. A more flexible approach where the appropriate number of hours of Home Tuition required is determined by the identified needs of the child and the views of statutory agencies involved in his care and education, and foster carers would appear to better serve the interests of the child.

Part IV Findings

4.1 Department followed the procedures and processes as set out in Circular 51/2011 in relation to the Home Tuition Scheme. However, the Office is concerned regarding the extent to which these processes and procedures were appropriate to and met the needs of the child and can meet the needs of children in care. This is due to the Department's application of these policies and procedures in a manner that is more appropriate to children who are absent from mainstream school for a short period of time or as a result of parental choice to home school their children with additional and

appropriate supports from parents being available. The specific needs of this child and of children in care more broadly, are not reflected in the current provision and administration of the Home Tuition Scheme and questions arise as to the appropriateness of these provisions for many children.

4.2 The Office recognises that the Section 29 Appeals process lies outside its investigative remit and therefore no findings can be made in relation to its operation. However, a number of comments are made here in relation to its operation in this case. The Office recognises that the Department acted within the existing policy and legislative framework, but this did not meet the needs of the child in this case. The Office welcomes the consideration of a more streamlined Section 29 Appeals process and the possibility of direct intervention by the Department proposed in the Department's *Discussion Paper on a Regulatory Framework for School Enrolment* (June, 2011). However, the investigation highlights a number of key concerns in respect of the Section 29 Appeals process as they pertain to this case. These are:

- (i) the appropriateness of this as the sole means of redress in situations where all relevant schools in the catchment area refused to enrol the child;
- (ii) the administrative burden that making up to 30 Appeals would have placed on the child's advocates, the schools and the Department;
- (iii) the time taken to hear such an Appeal, i.e., up to 30 working days. In this case, assuming that Appeals to up to 30 schools could not be run concurrently, this could have resulted in Section 29 Appeals being heard for a number of months;
- (iv) the position highlighted by the NEWB in this case whereby enrolment applications and Section 29 Appeals were unlikely to be successful if made in the course of the school year; and
- (v) the lack of an alternative Departmental mechanism to address the situation in this case where all schools in an extended area refused the child a place.

4.3 The child in this case had experienced a number of traumatic events that played a significant part in the disruptive behaviour reported by his previous school and his permanent exclusion from same. In addition, NEPS assessments in 2008 and 2010 state that the child was in need of additional educational supports, while the 2008 NEPS assessment also recommended that the child should be seen by a psychotherapist in relation to his behaviour. As a separated child he came into the care of the HSE in 2009 and was placed in foster care. Such events are disruptive in themselves and the lack of a school placement potentially created further disruption in his life. In recognising the importance of school for the child, the EWO and the HSE

made applications to all schools within a reasonable catchment area. Being removed from the school environment for almost two years and receiving only nine hours Home Tuition a week undoubtedly contributed to an educational deficit that became obvious in a number of subjects when the child returned to school. Further, the Home Tuition hours provided for the child failed to take account of the additional educational needs of the child identified by the NEPS in January 2008.

4.4 Therefore, it is the opinion of the Office that the Department's provision of nine hours Home Tuition did not provide sufficient alternative educational support, evidenced in the need for a further six weeks Home Tuition following the child's return to school to allow him to catch up with his peers. Further, being absent from school for almost two years deprived the child of opportunities for personal growth and development. The importance of schools in this arena is recognised in the White Paper, *Charting Our Education Future* (Department of Education and Science, 1995) which states that '*Schools actively influence all aspects of the growth and development of their students..... Schools provide opportunities for students to learn basic personal and social skills, which will foster integrity, self-confidence and self-esteem while nurturing sensitivity to the feelings and rights of others.*' Given the documented educational needs of the child, the limited amount of Home Tuition provided and the protracted period, for which the child was not attending mainstream school, it is the view of this Office that the administrative actions of the Department had an adverse effect on the child in terms of his educational and personal development.

4.5 In responding to the Draft Investigation Statement the Department has stated that '*The Department acknowledges that attendance at school, apart from educational attainment, provides a socialisation function. Clearly, non-attendance deprives a child of that benefit, whether it occurs when parents choose to educate their children at home, through illness, or through non-attendance in those situations which are a matter for the NEWB. It is not clear to this Department what specific remedy could be provided beyond ensuring a more effective means of securing a place in a school.*' Further, the Department states that '*Home Tuition of itself, involving a one to one situation, is unlikely to contribute to any significant degree in terms of social development.*' The Department further states that '*...it may be that this aspect can best be addressed by supports provided by the HSE within the care setting pending a return to school.*'

4.6 In conclusion, the Department states that it '*does not accept*' the findings that '*its administrative actions or non-actions had an adverse effect on [the child]. It seems*

that securing a school place for [the child] may have addressed the socialisation deficit. However,...the Department is not empowered to admit a child except in the event of a Section 29 Appeal's being upheld.'

4.7 It is the view of this Office that the Department did not ensure a more effective means of securing a place in school in this instance, whilst suggesting that such a remedy was available. Such action would have resolved this case in a more timely fashion and would potentially benefit additional children who are out of school. While the HSE undoubtedly has a role in the social development of children in care, the focus of this investigation is on the role that school plays in both the academic and social development of children, a role that is acknowledged by the Department and the spirit of the Education Act.

4.8 In addition, while this Office accepts that the Department is constrained in seeking the admission of a child to any individual school, it is the responsibility of the Department to ensure that the schools in a catchment area can cater for all pupils seeking a school placement. This obligation was not met in this case as approximately 26 schools in a wide catchment area were unsuccessfully applied to on his behalf.

4.9 While the Department's administrative actions in relation to the implementation of the Home Tuition Scheme in this case were applied within the framework and parameters of that scheme, two issues arise in relation to these actions. First is the appropriateness of the Home Tuition Scheme as a long-term alternative to mainstream education where the child's absence from school is involuntary. It is the opinion of this Office that greater flexibility in the administration of this Scheme by the Department was needed in this case as it represented the only education support to the child for almost two years. Continuing to apply the terms of this Scheme in this case where it clearly became other than an interim measure and did not address the on-going needs of the child represents undesirable administrative practice.

4.10 Secondly, it is noted here that contradictory views have been provided regarding the flexibility available to the Department to sanction additional Home Tuition hours over and above the standard maximum of nine hours per week (see paragraphs 3.33 and 3.34 above). If such flexibility exists, this was not notified to the child's advocates in this case. If such flexibility cannot be offered, this needs to be made clear to all Departmental officials concerned with this scheme to avoid confusion. This lack of clarity and the provision of directly contradictory advice by the Department is found by this Office to represent undesirable administrative practice.

4.11 In responding to the Draft Investigation Statement, the Department has stated that *'The Department does not accept that there has been a failure in its dealing with this case [in relation to Home Tuition]...'* In addition, the Department states that the findings of this investigation *'seem to suggest that Home Tuition could be an indefinite solution where the NEWB is not in a position to place a child in school.'* Further, the Department states that *'...the correct approach is to seek through legislative reform to more readily bring about the enrolment of children like [child] where the NEWB (or any successor agency to it) experiences difficulty in securing a place.'*

4.12 This Office is not of the view that Home Tuition is either a long-term or an indefinite solution for children who are involuntarily excluded from school. Rather, and as stated in 5.3 below, the Office is of the view that no child for whom a school placement is sought should be out of school for more than one school term, thereby limiting the need for Home Tuition to this period. The Office welcomes the Department's approach of ensuring that children are more readily enrolled in school through legislative reform.

4.13 The child in this case had a number of advocates concerned with his absence from school and the education deficit that this may give rise to. The child's solicitor, GAL and the District Court Judge in the case all expressed concerns in relation to this matter. In addition, the HSE and the EWO were also working on his behalf in trying to secure a school placement and Home Tuition. However, there is little evidence of a co-ordinated approach between the key actors, and in particular between the HSE as the child's guardian and the Department. A more co-ordinated approach that also involved the NEWB and the NEPS may have resulted in the child's case being resolved in a more timely manner.

4.14 In summary, following the conclusion of this investigation, pursuant to Section 13 of the Ombudsman for Children Act, 2002, this Office finds that the administrative actions of the Department come within the ambit of Section 8 of the Act as follows.

- Section 8(a) of the Act the actions of the Department have adversely affected the young person as set out in paragraph 4.4 above.
- Section 8(b)(vi) of the Act the actions of the Department have been based on an undesirable administrative practice as set out in paragraphs 4.9 and 4.10 above.

Part V Recommendations

5.1 The previous analysis and findings highlight a number of deficits in the operation of school enrolment policy, the appropriateness of the Section 29 Appeals process and the operation of the Home Tuition Scheme for children in care. In light of this, the Office makes the following recommendations.

5.2 That the Department develop a specific policy for the education of children in care that would recognise the additional difficulties and challenges facing children in care. Such a policy should promote all possible educational opportunities (including access, participation and attainment in education) in accordance with the State's role and obligations as 'corporate parent' to children in care.²

In responding to the Draft Investigation Statement the Department has advised that 'The focus of provision is on the development of a more inclusive school environment through the whole school planning process, teaching practice, codes of behaviour and whole school evaluation. Admission policies and practices reside with individual schools. A basic objective of the proposed reform of admissions process is to secure a fully inclusive school system.'

The Office welcomes the Department's focus on greater inclusion in schools. However, it is of the view that children in care represent a particularly vulnerable group of children with specific needs. It therefore further recommends that the development of a more inclusive school environment and the identified processes that contribute to this take particular account of the needs of these children and that schools are encouraged to do likewise in their admission policies and practices, pending legislative reform. In considering the proposed reform of admissions processes to secure a fully inclusive school system, the Office recommends that children in care are considered as a high priority group. As previously stated, the Office urges the Department to progress this reform process as a matter of priority.

5.3 The adequacy of the Section 29 Appeals process where children are unable to access any school placement is considered in the Department's *Discussion Paper on a Regulatory Framework for School Enrolment (June 2011)*.

² Darmody, M., McMahon, L., Banks, J. and Gilligan, R. (2013). *Education of Children in Care in Ireland*. Dublin: Ombudsman for Children's Office.

This document acknowledges that, having exhausted the Section 29 Appeal process, children may still be left without a school place. This discussion document suggests that *‘Primary legislation might provide for a new mechanism to designate a school in circumstances where no school placement at all is available to an individual child but not to situations where it is simply a place in the school of the parents’ choice that is unavailable.’* This Office is of the view that such legislation would be of significant assistance and that appropriate implementation measures must accompany this in a timely manner.

The Department’s discussion paper also refers to implementation issues and to an increasing number of legal challenges to the decisions of Appeal Committees. In this context the discussion paper suggests that these concerns *‘underpin the need for a quicker, less formal and more parent friendly alternative to the section 29 process as it applies to enrolment.’* This Office concurs with this conclusion and further recommends that the Department:

- progress as a matter of priority the proposed regulatory framework for school enrolment;
- develop, as part of the proposed regulatory framework, a mechanism to ensure that no child is without a school placement for more than one term of the school year. This mechanism should ensure that no child is left without a school place for a protracted period of time where no medical or special education need requires this, nor is it a matter of parental choice. This mechanism should be available to parents and guardians where a reasonable number of applications and/or appeals to schools have been unsuccessful and where pursuing further applications and/or appeals will result in an extended absence from school; and
- this mechanism should have particular regard to cases such as this one where all schools in a catchment area have refused to enrol a child in need of a school place. Such a mechanism should allow for (i) an early warning system where by those seeking a school placement for a child can notify the Department when all schools have refused enrolment; (ii) a means for those seeking the school placement for the child to notify the Department when a number of Section 29 Appeals have been unsuccessful; and (iii) the identification of appropriate interventions by the Department following these Section 29 Appeals.

In responding to this recommendation, the Department has confirmed that ‘the operation of Section 29 is under review in the context of the work that this Department is engaged in with a view to creating a new legislative and regulatory framework for

school admission.the Minister is aiming to bring to Government shortly the draft heads of a Bill, and to seek Government approval to publish the Bill in draft form to allow a full public discussion.'

The Office welcomes the intention to produce draft heads of a Bill to address school admissions and urges the Department to consider the above recommendations in its proposed legislative reform.

5.4 The Department's discussion paper on a new regulatory framework for school enrolment does not specifically acknowledge or prioritise the importance of school placement for children in care. Attending school provides children with a daily structure, a means of meeting and interacting with their peers, as well as a means of integrating into their community. This is in addition to ensuring that their educational needs are attended to. For children in care, particularly those who have recently entered care or who have moved into a new placement, school will have a greater significance in their social integration and the stabilisation of care placements and represent a source of constancy and certainty.³ In addition, where a school-aged child has no school placement, it may be expected that foster placements may be more difficult to secure for the purely practical issues this may raise for foster carers, such as arrangements for their daytime care where foster parents are working. Therefore, in line with the recommendation made at 5.2 above, the Office further recommends that the Department's proposed regulatory framework for school enrolment should have particular regard to:

- the development of specific provision in relation to the educational enrolment of children in care, recognising the importance that such enrolment plays in securing and stabilising of care placements.
- putting all necessary resources in place, where necessary, for schools enrolling children in care with educational or behavioural difficulties.
- the need for a designated department or agency to have oversight of the implementation of the proposed legislative and regulatory reform. Such oversight should prevent cases such as this one, where children remain involuntarily outside school for protracted periods and numerous schools decline applications for a school place, arising in the future.

5.5 It is acknowledged by this Office that the Department sanctioned every

³ Darmody, M., McMahon, L., Banks, J. and Gilligan, R. (2013). *Education of Children in Care in Ireland: An Exploratory Study*. Dublin: Ombudsman for Children's Office.

application for Home Tuition in respect of this child and agreed to extend this provision for six week following his return to school. Nonetheless, the inappropriateness of Home Tuition as a long-term measure is clearly identified by the Department. Despite this, the child in this case had no other form of educational input for almost two years. In such circumstances, the upper limit of nine hours tuition per week is, in the opinion of this Office, insufficient to meet the educational needs of all children. Therefore the Office recommends that the Department reviews the provision under the Home Tuition Scheme in respect of children in care and special educational needs and engages with the Department of Finance in such a review. Additionally, the position in relation to the Department's current degree of flexibility in accepting applications for increased hours beyond the stated maximum of nine hours per week should be clarified. In particular the Department should:

- clarify the position in relation to whether or not it can accept applications on a case-by-case basis for increased Home Tuition hours above nine hours per week and communicate this to all relevant staff;
- provide for greater flexibility in the maximum number of hours available per week to allow children to maintain a standard of education commensurate with their needs and with that available to their peers in school;
- put in place an official mechanism where applications for the extension of Home Tuition hours for children who are outside the formal school system for protracted periods and/or have special education needs can be made following a child's return to school should such additional tuition be required to support reintegration and attainment in school.

5.6 That the Department of Children and Youth Affairs, the Department and the HSE establish a mechanism for the co-ordination of responses to cases of children in care where the child has been involuntarily outside the mainstream education system for a protracted period of time. In conjunction with the recommendations made above, this mechanism should be a key component of a specific policy on the education of children in care, the proposed regulatory framework for school enrolment and amendments to the Home Tuition Scheme. In particular, this co-ordination mechanism should:

- aim to resolve cases where school placements cannot be secured through the normal enrolment procedures for children in care as expediently as possible;
- determine the level of Home Tuition required by children in care and ensure that this is in place as soon as possible;
- include all relevant actors including the Department of Children and Youth Affairs, the Department of Education and Skills, the HSE, the NEWB and NEPS.

Concluding Comment

6.1 This Office understands that the Minister for Education and Skills will shortly bring draft legislation to Cabinet relating to the statutory framework governing admission to schools. The Minister has also indicated that he will publish a draft of the associated regulations. The Ombudsman for Children's Office believes that the consideration of the forthcoming legislation by the Oireachtas provides an opportunity to address the coordination difficulties outlined in this investigation statement. Although individual schools may not be under an obligation to admit particular students, a situation should not arise in which a young person is effectively denied access to education because of the cumulative effect of individual decisions made by a number of schools in a given catchment area. It is hoped that the Education (Admission to School) Bill 2013 will underpin the effective coordination required of State agencies to prevent such a situation arising in future.

Post-Script

In responding to the recommendations above, the Department has advised the following.

Admission to School Bill 2013

... it is intended to bring to Government draft heads of a bill – the Education (Admissions to School) Bill 2013 shortly. The Minister will seek to publish the Bill in draft form in the autumn to allow for a full public discussion. It is also intended to publish draft regulations when the Bill is enacted.

The policy objective is to ensure that every child is treated fairly and that the way in which schools decide on applications is structured, fair and transparent and fully inclusive. [The] recommendation regarding children in care will be considered in this context.

Home Tuition

The Department regards Home Tuition as a temporary educational arrangement and holds the view that legislative reform as referred to above is the best way to address cases such as [child's name] that may arise from time to time.

Mechanism for Co-ordination of Responses

The National Education and Welfare Board (NEWB) is the statutory agency with responsibility for school attendance with a mandate to assist parents who are having a difficulty in securing a place for their child.the functions of that agency has transferred to the Minister for Children with a view to ensuring a joined up approach to co-ordination of responses. While your report/recommendations refer to the enrolment process it is silent on the transfer of that agency to the Department of Children and Youth Affairs. This Department understands that there will be a Child Protection Agency and that it is likely that the NEWB will be subsumed to that agency. You may wish to consider this in your report for completeness.

The Department understands that the NEWB were in the process of developing protocols with the HSE for working arrangements for children such as [child's name]. The Department also understands that a protocol is in place between the NEWB and the National Council for Special Education (NCSE).

Conclusion

The Department shares your view that legislative reform is the best policy approach to address difficulties for children like [child's name]. The substantive basis for the complaint was to address the socialisation deficit, an issue that Home Tuition of itself could never possibly address. Additional supports provided by the HSE within the care setting pending a school placement would seem to be the optimum solution to addressing any socialisation deficit.

Comment by the Ombudsman for Children's Office

As stated at 6.1 above, this Office is of the view that the forthcoming Education (Admission to School) Bill 2013 can and may address a number of the issues raised in this statement and in particular in its recommendations. However, in the absence of the draft Heads of Bill, it is not possible for this Office to determine whether or not such legislative provision will address the issues raised here in a full and satisfactory manner.

Also of concern is the Department's response to recommendation 5.5 above regarding the review of the Home Tuition Scheme. This recommendation relates to a review of the Scheme in order to address operational issues including flexibility, clarity and extensions to provision in cases where children are without school placements for protracted periods of time and where unsuccessful applications have been made to numerous schools. While the forthcoming legislation may make broad provision for this Scheme, it is not anticipated by this Office that it would contain such operational detail. In addition, it is noted here that the

current *Discussion Paper on a Regulatory Framework for School Enrolment*, which was developed to inform forthcoming legislative and regulatory changes, makes no reference to Home Tuition. Therefore it remains the view of this Office that the review of the Home Tuition Scheme recommended above should be undertaken by the Department.

The Office is aware that the NEWB is the statutory agency with responsibility for the educational welfare of children and that, as of June 2011, its functions transferred to the Department of Children and Youth Affairs. Notwithstanding this, the Department remains the primary Government department with responsibility for education. Therefore, as recommended at 5.6 above, any mechanism for the development and the co-ordination of policy and operational responses to the education of children in care will require the Department to undertake a significant and active role.