



**Department of Education Review of the  
Education for Persons with Special Educational Needs Act 2004**

**Observations by the  
Ombudsman for Children's Office  
March 2023**

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## 1. Introduction

On 30 November 2022, the Minister for Education launched a public consultation on the review of the Education for Persons with Special Educational Needs Act 2004 ('the EPSEN Act'). According to the Department of Education's consultation paper, the purpose of this review is to ensure that the law that governs providing education for children with special educational needs ('SEN') is adequate.

The Ombudsman for Children's Office ('OCO') welcomes the decision of the Department of Education ('the Department') to conduct a public consultation on the review of the EPSEN Act, and the opportunity this consultation presents for us to comment on the law that governs the provision of education to all children with SEN. While the consultation paper states that the purpose of this review is to ensure that the law in this area is "adequate", the OCO invites the Department to be much more ambitious as regards reforming Ireland's current education system into a world-class inclusive education system for every child, regardless of their individual educational needs, and as regards underpinning this new model in statute through an amended EPSEN Act.

As the Department is aware, the provisions within the EPSEN Act relating to (1) a statutory entitlement to an educational assessment for all children with SEN, (2) the development of a statutory individual educational plan ('IEP') based on this assessment, (3) a legal entitlement to the delivery of services specified therein, (4) the periodic review of these IEPs, and (5) an independent and accessible specialised appeals process to adjudicate on disputes, have not been commenced.

The right to accommodation in education is enshrined in Article 42.4 of the Irish Constitution. This places the State under a high level of obligation to meet the educational needs of all children. The OCO is firmly of the view that legislative underpinning for the individual educational needs of children with SEN is vital to ensuring that their needs are identified and met in a timely and appropriate manner.<sup>1</sup>

In addition, there needs to be an acknowledgement by Government of the political commitment and resourcing required for the State to meet its obligations under a revised EPSEN Act and for the realisation of a truly inclusive model of education.

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<sup>1</sup> Ombudsman for Children's Office (2020), [Unmet Needs: A report by the Ombudsman for Children's Office on the challenges faced by children in Ireland who require an assessment of their needs](#), p.28.

## 2. The Ombudsman for Children's Role and Remit

The OCO is an independent statutory body established under the Ombudsman for Children Act 2002 ('2002 Act'). Under the 2002 Act, the Ombudsman for Children has two core statutory functions:

- to promote the rights and welfare of children; and
- to examine and investigate complaints made by or on behalf of a child concerning the administrative actions of public bodies, schools or hospitals, which have had, or may have had, an adverse effect on the child.

The Ombudsman for Children reports directly to the Oireachtas in relation to the exercise of these statutory functions.

The OCO has prepared the current observations pursuant to Section 7(4) of the 2002 Act, which provides that the Ombudsman for Children may give advice to the Minister of the Government concerned on any matter relating to the rights and welfare of children.

In preparing these observations, the OCO has also had regard to:

- Actions 2.1 and 3.3 of the OCO's Strategic Plan 2022-2024, namely:
  - to systematically identify and highlight measures required to promote access to, and participation in, education on the part of children with disabilities on an equal basis with other children; and
  - to identify and pursue changes in legislation that are directed towards ensuring that children's right to, and rights in, education are upheld in respect of all children.
- research commissioned and published by the OCO into the barriers that children with disabilities in Ireland face as regards the realisation of their rights;<sup>2</sup>
- the OCO's prior engagements with the Department on matters relating to children with SEN;<sup>3</sup> and
- the UN Convention on the Rights of the Child ('CRC') and the UN Convention on the Rights of Persons with Disabilities ('CRPD') to which Ireland is a ratifying State Party.<sup>4</sup>

As the Department is aware, the OCO has previously called on the State to implement legislative, policy and other measures directed towards providing an inclusive education

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<sup>2</sup> Ombudsman for Children's Office (2021), [Mind the Gap: Research on barriers to the realisation of rights of children with disabilities in Ireland](#).

<sup>3</sup> See *supra note* 1 and Ombudsman for Children's Office (2022), [Plan for Places. Forward Planning for the Provision of Schools Places for Children with Special Educational Needs: A Children's Rights Issue](#).

<sup>4</sup> United Nations, [UN Convention on the Rights of the Child](#) (1989) and [UN Convention on the Rights of Persons with Disabilities](#) (2006)

system for all children.<sup>5</sup> We hope that these observations will assist the Department to identify and prepare amendments to the EPSEN Act that provide robust legislative underpinning to the State's obligations to realise the rights of children with SEN within a truly inclusive system.

While the OCO commends the Minister's recent simplification of the section 37A process, it is vital that children with SEN are not just admitted to schools, but receive a statutory IEP based on their assessed needs within an inclusive learning environment, and a legal entitlement to have the delivery of those services resourced by the Department. Although it may be necessary to meet current challenges, the provision of special classes is not ideal. Planning towards 'An Inclusive Vision for Education' should continue apace.<sup>6</sup> We need to meet the needs of all children today *and* to plan for the inclusive education of children in the future.

### 3. Consulting with Children

In 2021, the OCO published commissioned research about the multiple barriers that children with disabilities face with regard to the realisation of their rights. The overarching findings of this research highlighted that children with disabilities:

- are overlooked in many child- and disability-focused laws, policies, and programmes;
- are not actively or effectively involved in consultations on many existing laws, policies and programmes affecting them; and
- are relatively invisible in data.<sup>7</sup>

The Department has committed to ensuring that the experiences of people with SEN are fully understood and heard, and to conducting surveys and focus groups that will be used as tools to gather data on the lived experiences of people who have experienced the education system under the EPSEN Act. **The OCO recommends that a final decision on the outcome of the current review of the EPSEN Act should not occur until the Department has afforded children with SEN appropriate opportunities to share their views. The OCO also recommends that the Department integrate into its review the collection of sufficient and reliable data on children with SEN, disaggregated to enable the identification of disparities in the realisation of their right to education as compared with other children, to inform decision-making about prospective amendments to the EPSEN Act.**<sup>8</sup>

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<sup>5</sup> Ombudsman for Children's Office (2022), [Report of the Ombudsman for Children's Office to the UN Committee on the Rights of the Child pursuant to the combined fifth and sixth reports submitted by Ireland under the simplified reporting procedure](#), p.40.

<sup>6</sup> [Programme for Government: Our Shared Future](#) (2020), p.96.

<sup>7</sup> *Supra note 2.*

<sup>8</sup> See UN Committee on the Rights of the Child (2003), [General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child](#).

## **4. Deficiencies of the current EPSEN scheme**

### **4.1 Commenced Sections of the EPSEN Act**

The sections of the EPSEN Act containing interpretations, promoting an ‘inclusive’ approach to the education of children with SEN, and establishing the NCSE, have been commenced. While the sections establishing the Special Education Appeals Board have also been commenced, the Board is not yet in operation.<sup>9</sup>

#### **4.1.1 Use of Language**

The unconsidered use of outdated language to describe disability can cause people with disabilities to feel excluded and can be a barrier to their full participation. Significantly, the CRPD recognises that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.<sup>10</sup>

Section 1 of the EPSEN Act defines SEN as "a restriction in the capacity of the person to participate in and benefit from education on account of an enduring physical, sensory, mental health or learning disability, or any other condition which results in a person learning differently from a person without that condition".

The OCO is of the view that this definition of SEN fails to recognise that these ‘restrictions’ are not standalone, but interact with various other barriers that affect the child’s full and effective participation in the education system on an equal basis with others.

As such, the child’s educational needs arise not only from the child’s impairment, but also from the way the education system has been designed and continues to operate.

In his appearance before the Committee on the Rights of the Child in January 2023, the Minister for Children, Equality, Disability, Integration and Youth stated that Ireland was moving away from disability as a primarily medical issue.<sup>11</sup> The Committee on the Rights of the Child concluded, however, that Ireland should “review relevant legislation, including the Equality Acts, Disability Act and Education for Persons with Special Education Needs Act, to

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<sup>9</sup> [EPSEN Act 2004](#), Sections 1, 2 and 19-37.

<sup>10</sup> See the preamble to the UNCRPD at (e).

<sup>11</sup> Committee on the Rights of the Child (CRC), [92<sup>nd</sup> session, 25 January 2023](#).

bring them in line with a human rights-based approach to disability, particularly with regard to the definition of disability”.<sup>12</sup>

Having regard to a rights-based model of disability, **the OCO recommends that the definition of SEN in the EPSEN Act should be amended to acknowledge that the needs of children with disabilities arise within the context of an education system, which must move away from standardised learning towards the vision of inclusive learning enumerated in the CRPD.**<sup>13</sup>

Furthermore, the use of the word ‘special’ throughout the EPSEN Act denotes that this cohort of children are the exception rather than an estimated 25% of the total student population.<sup>14</sup> **The OCO also recommends that the EPSEN Act should be amended to emphasise individual educational needs within an inclusive learning environment, rather than emphasising difference through use of the word ‘special’.**

The term ‘individual educational needs’ is used in the remainder of this submission. However, **the OCO recommends that the Department consult with people with disabilities and, in particular, children with individual educational needs for the purposes of identifying a more inclusive term to replace the use of the word ‘special’.**

#### **4.1.2 Inclusive Learning Environment**

Section 2 of the EPSEN Act requires that:

“A child with special educational needs shall be educated in an inclusive environment with children who do not have such needs unless the nature or degree of those needs of the child is such that to do so would be inconsistent with -

- (a) The best interests of the child as determined in accordance with any assessment carried out under this Act; or
- (b) The effective provision of education for children with whom the child is to be educated.”

Although section 2 of the EPSEN Act speaks in the language of inclusivity, it provides no actual definition of what an inclusive environment looks like.<sup>15</sup> The OCO is concerned that the current provision may be interpreted as an obligation to educate children within an

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<sup>12</sup> UN Committee on the Rights of the Child (2023), [Concluding Observations on the combined fifth and sixth period reports of Ireland](#), para. 29(a).

<sup>13</sup> Article 24, UNCRPD.

<sup>14</sup> *Supra note 3*, Plan for Places, pp.15-16.

<sup>15</sup> See Rose, Shevlin, Winter and O’Raw (2015), [NCSE Research Report no. 19 ‘Project IRIS – Inclusive Research in Irish Schools’](#), p.22.

inclusive setting rather than to provide a broader, more holistic, and inclusive *learning* environment. **The OCO recommends that the reference to ‘inclusive environment’ in s.2 of the EPSEN Act should be changed to ‘inclusive learning environment’.**

In addition, the qualification under s.2(b) of the EPSEN Act effectively abrogates the promotion of inclusive learning and instead espouses a policy of integration, defined by the CRPD Committee as “a process of placing persons with disabilities in existing mainstream educational institutions, as long as the former can adjust to the standardized requirements of such institutions”.<sup>16</sup> In Ireland, this has resulted in the segregation of approximately 2% of the school-going population.<sup>17</sup> These students are, in the main, children with individual educational needs who are not able to integrate into the standardised school setting. Children with individual educational needs should not be precluded from accessing mainstream academic and social development programmes for any reason other than where it is in their own best interests under s.2(a) of the EPSEN Act. Therefore, **the OCO recommends that the qualification under s.2(b) of the EPSEN Act should be removed.**

The inclusive model, as advocated by the CRPD Committee “involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences”.<sup>18</sup> Significantly, inclusivity is a process rather than a fixed attainable ideal. The CRPD Committee envisages full inclusion to be the “result of a process of continuing and pro-active commitment to eliminate barriers impeding the right to education, together with changes to culture, policy and practice of regular schools to accommodate and effectively include all students”.<sup>19</sup> In addition, inclusion is not purely about the setting that the child attends, but also about whether the child is truly valued, accepted, and able to fully participate in their learning environment.<sup>20</sup> **The OCO recommends that s.2 of the EPSEN Act should provide for an expansive definition of what an inclusive learning environment is, in accordance with Article 24 of the CRPD and the CRPD Committee’s General Comment No 4 (2016).**

The Committee on the Rights of the Child recently articulated some measures that need to be taken by the Department for the realisation of an inclusive learning environment. In this regard, the Committee recommended that Ireland “ensure inclusive education in early childhood education and mainstream schools for all children with disabilities by adapting

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<sup>16</sup> UN Committee on the Rights of Persons with Disabilities (2016), [General Comment No 4 - The right to inclusive education](#), para. 11.

<sup>17</sup> NCSE (2019), [Policy Advice on Special Schools and Classes: Progress Report](#), p.68.

<sup>18</sup> *Supra note 16*, para. 11.

<sup>19</sup> *Supra note 16*, para. 10(d) and *supra note 3*, Plan for Places, pp.66-67.

<sup>20</sup> As I Am (2020), [Inclusion in Our Special Classes and Special Schools: A Submission to the NCSE](#), p.2.



curricula and training and assigning specialized teachers and professionals in integrated classes so that children with disabilities and learning difficulties receive individual support and due attention; and ensuring reasonable accommodation within school infrastructure and for transportation”.<sup>21</sup> **The OCO recommends that the Department consider incorporating these descriptors into an expansive definition of what an inclusive learning environment is.**

#### **4.1.3 Special Education Appeals Board**

The Special Education Appeals Board was established in 2006 pursuant to the commencement of sections 36 and 37 of the EPSEN Act.<sup>22</sup> However, the Board is not yet in operation due to the non-commencement of the preceding sections of the EPSEN Act. **The OCO recommends that, through this current review process, the Department ensures that children with individual educational needs have their right to access an independent appeals mechanism affirmed.**

#### **4.2 Non-Commenced Sections of the EPSEN Act**

As noted in the Department’s consultation paper, significant sections of the EPSEN Act, including those which would have conferred a statutory entitlement to an educational assessment for all children with SEN, the consequent development of a statutory IEP, the delivery of detailed educational services on foot of the IEP, a review, and an independent appeals process, have not been commenced.<sup>23</sup>

For this reason, additional supports for children with individual educational needs are based on policy, not law. This has led to imperfect outcomes for children with individual educational needs. The NCSE’s longitudinal study of the experiences of, and outcomes for, pupils with SEN in Irish schools found that the failure to implement the EPSEN Act in full resulted in the inconsistent development and application of individual plans and in uneven policy development on establishing inclusive schooling.<sup>24</sup>

As stated above, and in previous reports<sup>25</sup>, the OCO is of the view that legislative underpinning for the individual educational needs of children is vital to ensuring that their needs are identified and met in a timely and appropriate manner. At present, there is no statutory SEN assessment and planning scheme in operation, and no timelines within which such an assessment or education plan must be carried out. There is also no mechanism for

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<sup>21</sup> *Supra* note 12, para. 37(c).

<sup>22</sup> [S.I. No. 507/2005 - Education for Persons with Special Educational Needs Act 2004 \(Commencement\) Order 2005.](#)

<sup>23</sup> EPSEN Act 2004, Sections 3-13, 15-18 and 38-39.

<sup>24</sup> *Supra* note 15, p.2, p.8 and p.9.

<sup>25</sup> See in particular *supra* note 1, p.28.

parents to complain about the failure to assess, plan and/or deliver services that might avoid the need to revert to High Court litigation to have their children’s constitutional right to education vindicated.

While the OCO is of the view that sections 3-13, 15-18 and 38-39 of the EPSEN Act should be commenced as soon as possible, **the OCO recommends that the proposed amendments and insertions set out below are made to ensure that children’s right to, and rights in, education are upheld.**

#### **4.2.1 Guiding Principles**

Article 42A.1 of the Irish Constitution states that:

“The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.”

Having regard to Article 42A.1 of the Irish Constitution, the CRC and the CRPD, **the OCO recommends that the Department should consider the insertion of a section setting out guiding principles, which must inform the interpretation and implementation of the EPSEN Act in its entirety.**

In this regard, the OCO suggests that consideration should be given to including guiding principles that have regard to the following:

- Children are independent rights-holders.
- Children have the right to respect for their dignity, bodily integrity, privacy, and autonomy.
- Children have a right to have their best interests treated as the paramount consideration in all actions and decisions affecting them.
- Children have a right to development to the maximum extent possible.
- Children with disabilities are entitled to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child’s active participation in the community.
- Children with disabilities have the right to non-discrimination and the State must take active steps to identify children who may require special measures for the recognition and realisation of their rights.
- Children with disabilities must be provided with reasonable accommodation and, therefore, should be provided with effective individualised support measures in educational environments that maximise academic and social development, consistent with the goal of full inclusion.
- Children have a right to express their views freely and to have due weight given to their views, in accordance with their age and maturity.

- Children are entitled to timely decision-making and accountability by decision makers.

The insertion of a section on guiding principles follows the approach adopted by the drafters of international human rights instruments, including the CRC and the CRPD, in setting out general principles at the outset.

There is also some recent precedent for this in Ireland. The Child Care (Amendment) Act 2022 amended the principal act to include a section on the paramountcy of the best interests of the child in the resolution of court proceedings, and a section on the determination of, and the accordance of due weight to, the views of the child, in order to make that legislation more child-centred and to bring it into line with the CRC.<sup>26</sup> The General Scheme of the Mental Health (Amendment) Bill 2021 also sets out guiding principles intended to guide all decisions made in respect of the admission, care and treatment of children under Part 8.<sup>27</sup> Furthermore, it is anticipated that the General Scheme of the Child Care (Amendment) Bill 2023 will include guiding principles to guide all decisions taken under this legislation, once enacted.<sup>28</sup>

#### **4.2.2 The Views of Children**

Article 7(3) of the CRPD provides that:

“States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.”

The EPSEN Act, as drafted, has received criticism for failing to ensure that children with individual educational needs are able to express their views independently and to participate actively in the education assessment and planning process in line with Article 7(3) of the CRPD and Article 12 of the CRC.<sup>29</sup> Recently, the Committee on the Rights of the Child also highlighted this requirement by recommending that Ireland “ensure the right of children with disabilities to be heard in all decisions that affect them”.<sup>30</sup>

Ensuring that children have the right to express, and have due weight given to, their views would require, among other things, the amendment of sections 3-13 of the EPSEN Act in

<sup>26</sup> [Child Care \(Amendment\) Act 2022](#), Sections 4 and 5.

<sup>27</sup> [General Scheme of the Mental Health \(Amendment\) Bill 2021](#), Head 104.

<sup>28</sup> Department of Children, Equality, Disability, Integration and Youth (2020), [Review of the Child Care Act 1991: July 2020 Consultation Paper](#), p.5f.

<sup>29</sup> *Supra note 3*, Plan for Places, p.49.

<sup>30</sup> *Supra note 12*, para. 29(d).

order to provide for a child-centred, rights-based approach. **The OCO recommends that sections 3-13 should be amended such that (1) the child may notify the school principal that they are not benefiting from the standard education programme and/or request that the NCSE carry out an assessment of their SEN, (2) the child’s involvement in the preparation of the IEP is not just facilitated, but their views sought as a member of the planning ‘team’ and those views form part of the content of the education plan, (3) the child is notified and given a copy of the education plan and review report, and (4) the child may appeal decisions in respect of their assessment and education plan directly to the Appeals Board.**

## **5. Additional Consideration**

### **5.1 The Disability Act 2005**

As the Department is aware, the Disability Act 2005 (‘the 2005 Act’) and the EPSEN Act were key elements of the National Disability Strategy and were drafted to work in concert with one another. The 2005 Act provided for an Assessment of Need (‘AON’) to determine the health or educational services required by a person with a disability, while the EPSEN Act provided for an assessment of SEN so that provision could be made for a child with such needs to be educated in an inclusive environment.<sup>31</sup>

Under s. 8(9) of the 2005 Act, where the AON identified the need for the provision of an education service to the child, the Assessment Officer would refer the matter (1) to the school principal and the school principal would take such measures as are practicable to meet the educational needs of the student concerned, or (2) for a SEN assessment.<sup>32</sup>

In October 2021, the Court of Appeal described s.8(9) of the 2005 Act as a ‘cul de sac’ since the relevant section of EPSEN had not been commenced.<sup>33</sup> The Court of Appeal determined that s.8(3) of the 2005 Act applied to children as well as adults, such that there was a duty on the NCSE to nominate a person to assist the HSE in the educational assessment part of the AON process, if so requested.<sup>34</sup> The Court of Appeal stated that there was no ‘absurdity of duplication’ since the notional referral made under s.8(9) of the 2005 Act is made after the AON has been completed and has identified the need for the

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<sup>31</sup> The [Disability Act 2005](#) had commenced in full in relation to persons under 5 years of age by December 2007; see also s.7 of the 2005 Act and s.2 of the EPSEN Act.

<sup>32</sup> Section 8(9) of the 2005 Act.

<sup>33</sup> C.M. (A Minor) suing by his mother and next friend SM v. H.S.E. [2021] IECA 283, para. 3.

<sup>34</sup> Section 8(3) of the 2005 Act provides that where an assessment officer is of opinion that there may be a need for an education service to be provided to an applicant, they can request a person with appropriate expertise to assist in the carrying out of the assessment.

provision of an educational service to a child.<sup>35</sup> Therefore, while a child's pathway to services may begin with an AON under the 2005 Act, once the need for an educational service is identified, they 'land' at s.4(6) of the EPSEN Act.<sup>36</sup> The two Acts are therefore inextricably linked, and cannot be viewed – or reviewed – in isolation.

Since this judgment, the NCSE has introduced a new reporting process for all schools for the transfer of information held in student support plans to the NCSE, which will in turn provide information relevant to an AON to the HSE.<sup>37</sup>

Furthermore, 'disability' is defined in the 2005 Act as a substantial restriction in the capacity of the person to carry on a profession, business, or occupation in the State, or to participate in social or cultural life in the State, by reason of an enduring physical, sensory, mental health, or intellectual impairment. With its emphasis on productivity and participation, this definition is adult-centred rather than child-centred and is arguably even more outdated than the definition of SEN in the EPSEN Act.<sup>38</sup> As set out at section 4.1.1 above, the rights-based model of disability recognises that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.<sup>39</sup>

Appearing before the Committee on the Rights of the Child, the Minister for Children, Equality, Disability, Integration and Youth stated that the Government had no immediate plan to review the 2005 Act, but it was something that could be considered.<sup>40</sup> For the proper functioning of these pieces of legislation, it is essential that there is consistent messaging and strong coordination between the HSE, the NCSE and their parent departments, to ensure the timely assessment, transfer of responsibilities, and delivery of supports to children within inclusive learning environments. As stated previously,<sup>41</sup> **the OCO recommends that the review of the EPSEN Act needs to have due regard to the relevant provisions of the 2005 Act.**

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<sup>35</sup> C.M. (A Minor) suing by his mother and next friend SM v. H.S.E. [2021] IECA 283, paras. 104 and 107-108.

<sup>36</sup> C.M. (A Minor) suing by his mother and next friend SM v. H.S.E. [2021] IECA 283, para. 101

<sup>37</sup> C O'Brien, '[Teachers to play key role in education needs assessments for vulnerable children](#)', The Irish Times, 2 February 2023.

<sup>38</sup> Section 2 of the 2005 Act. See also *supra* note 1, p.7f.

<sup>39</sup> See the preamble to the UNCRPD at (e).

<sup>40</sup> *Supra* note 11.

<sup>41</sup> *Supra* note 3, Plan for Places.