

Atheist Ireland



To: Gerard Coady
Private Secretary to Comptroller & Auditor General

5 December 2022

Dear Gerard,

We sent you a complaint last December about the misuse of public funds regarding the failure of the Minister and Department of Education to meet the constitutional condition, when providing State aid to schools, of ensuring that the right to not attend religious instruction is not prejudicially affected.

You have brought this issue to the attention of the Comptroller and Auditor General and the unit responsible for the audit of the Department of Education for its consideration. We have since sent you several updates which you have added to your file on this issue.

We thank you for this, and we look forward to the outcome of this consideration.

During this time we have also been corresponding with the Committee on Public Accounts on this issue. That Committee has several times misunderstood what we are asking it to do, and has now determined that the matters that we are raising are not for it to consider. We have asked that Committee to reconsider that determination for reasons included in the attached letter.

We have included as part of this letter our understanding of the relevant duties of the Comptroller and Auditor General with regard to the regulatory part of the audit of the Department. We attach the letter below for your information, and we request that you include it in your consideration of the audit of the Department of Education.

Yours sincerely,

Jane Donnelly
Human Rights Officer

Michael Nugent
Chairperson

Chris Hind
Teachers Officer

Attached below: Letter to Public Accounts Committee

Atheist Ireland



To: Martin Hughes
Clerk to Public Accounts Committee
Your Ref: S1082 PAC33

cc Comptroller and Auditor General

5 December 2022

Dear Martin,

Thank you for your letter dated 22 November. As you know, we have now spent a year teasing out the procedural aspects of our complaint with your Committee. On the basis of your most recent letter, we ask you to reconsider, in the public interest, your determination that the matters we have raised are not for your committee to investigate, for the following reasons.

In your most recent letter, you say about our complaint:

“The Orders of Reference of the Committee are set down in Dáil Standing Order 218. Dáil Éireann requires that the Committee examine and report to it upon certain accounts audited by, and reports of the Comptroller and Auditor General.

It is the role of the Committee to examine expenditure in those accounts. It is not the role of the Committee to consider whether other choices could or should have been made in relation to the allocation of funds reported on in a given set of accounts...”

“In this instance, the Committee of Public Accounts has determined that the matters raised by you are not for it to investigate...”

“The Orders of Reference of the Joint Committee on Education, which are partially derived from Dáil Standing Order 95(1) provide for it to report to the Dáil on any matter relating to, inter alia: “legislation, policy, governance, expenditure and **administration** [emphasis added] of— (i) a Government Department”.”

To clarify, we are not asking you to consider whether or what other lawful choices could or should have been made. In this case, there are no other lawful choices that can be made. State aid for schools must be spent in a way that meets the constitutional condition in Article 44.2.4.

It is an evidenced fact this constitutional condition for State aid for schools is not being met. Whatever the administrative reasons for this happening, the Comptroller and Auditor General has a regulatory duty to be satisfied that the constitutional condition is being met, and to report on the fact that it is not being met, and your Committee has a duty to oversee that this is included in the reports of the Comptroller and Auditor General.

We agree with you that it is within the remit of the Oireachtas Education Committee to examine and report on the administration of the Department of Education. We have been writing to that Committee, and will now write to them again about this aspect of our complaint. That Committee should be able to examine and report on why this constitutional condition is not being met.

Meanwhile, in addition to that responsibility of the Education Committee, we ask your Committee to independently examine and report on the fact that this constitutional condition is not being met. That aspect of our complaint comes under the regulatory audit of the Comptroller and Auditor General, and the duty of everyone involved to uphold the Constitution.

The question of whether other choices should have been made

We recognise your comment regarding not considering other choices as appropriate in almost every other complaint that you are asked to examine. However, this case is different because of Article 44.2.4 of the Constitution, which puts a condition on State aid to schools and puts an obligation on the Oireachtas in relation to it, which in turn is reflected in the Education Act.

Therefore, we are not asking you to consider whether other choices could or should have been made, in circumstances where each choice would be lawful. In this case, there are no other lawful choices that can be made. State aid for schools must be spent in a way that vindicates the constitutional condition in Article 44.2.4, as reflected in the Education Act 1998.

The Comptroller and Auditor General is obliged in his audits and reports to satisfy himself that this happens. Section 3 of the Comptroller and Auditor General (Amendment) Act, 1993, states:

“3.—(1) The Comptroller and Auditor General shall in each year— (b) in the course of the audit of such an account, carry out such audit tests as he considers appropriate to satisfy himself as to— (ii) whether the amounts expended have been applied by the Department concerned for the purposes for which the appropriation made by the Oireachtas was intended,”

The Department of Public Expenditure and Reform’s Public Financial Procedures describes the auditing function of the Comptroller and Auditor General. This includes:

“9. Secondly, there is a regularity audit to ensure that expenditure accords with the intention of the Dáil, that expenditure has been sanctioned by the Department of Public Expenditure and Reform and that the provisions of the relevant statutes, regulations, etc. have been complied with.”

In the introduction to the Department of Public Expenditure and Reform’s Public Financial Procedures it states that:

“The principles of Government accounting are mainly derived from the Constitution, and from the institutional and financial relationships between parliament and the executive which have been developed over the years.”

As the principles of Government accounting are derived from the Constitution (Article 17), then the conditions in relation to State aid under Article 44.2.4 for schools must be part of that accounting. The text of the Article explicitly refers to ‘legislation providing State aid’.

The constitutional right to not attend religious instruction

Article 44.2.4 states that:

“Legislation providing State aid for schools shall not ... be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.”

This legislation providing State aid for schools, including through the Appropriation Acts, must not only be consistent with Article 44.2.4, but also with Section 30.2(e) of the Education Act, which states:

“The Minister (e) shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student.”

It must also be consistent with Section 7 of the Intermediate Education (Ireland) Act, 1878, which is still in operation, which states in even stronger language:

“The Board (now the Minister) shall not make any payment to the managers of any school unless it be shown to the satisfaction of the Board (now the Minister) that no pupil attending such school is permitted to remain in attendance during the time of any religious instruction which the parents or guardians of such pupil shall not have sanctioned, and that the time for giving such religious instruction is so fixed that no pupil not remaining in attendance is excluded directly or indirectly from the advantages of the secular education given in the school.”

The wording in the Constitution and the legislation is to ‘not attend’, which means to not be physically present in the classroom. It cannot mean sitting in the back of the classroom for two reasons: one, it is not what the wording means, and two, sitting in the back of the class never could and does not incur cost and therefore has no place in a constitutional Article regulating State financial aid for schools.

In practice, the Department leaves it up to each school to administer this right, and most schools do not vindicate the right. But the purpose behind Article 44.2.4 is to not leave it up to schools or the Department or the Executive to choose whether or not to vindicate this right. Its purpose is to involve the Oireachtas to ensure that State funding does not affect prejudicially the right to not attend religious instruction.

The Department has failed to put guidelines in place to ensure that this constitutional condition is met. Indeed, nobody has even informed us what procedure they would use to evaluate whether or not the constitutional condition is being met or not affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

The explicit strength of Article 44.2.4

Section 30.2(e) of the Education Act was also informed by Article 42.1 of the Constitution, which guarantees to respect the inalienable right and duty of parents to provide for the religious and moral education of their children, and Article 42.4, which commits the State to provide education with due regard for the rights of parents, especially in the matter of religious and moral formation.

Justice Charleton in the Burke case at the Supreme Court said that Article 42.4 accords with Article 41 (the authority of the family) which he described as a foundational pillar of the Constitution (para 4 Burke case). The Supreme Court has also said that Article 42.1 must be read in the context of Article 44.2.4 (pages 25, 26 Campaign to Separate Church and State case 1998).

However, the right to not attend other subjects (arising from these other Articles) does not have the stronger, more explicit, protection of the right to not attend religious instruction (under Article 44.2.4), that is expressed as a constitutional condition of State aid for schools.

Under Article 44.2.4, the Oireachtas has a duty to restrict funding to schools that vindicate the constitutional and statutory right to ‘not attend’ religious instruction. The Comptroller and Auditor General has a duty, under the regulatory part of his audit, to be satisfied that this happens, and the Committee on Public Accounts has a duty to examine the outcome of that audit.

The duty to not affect prejudicially the right to not attend

The wording of Article 44.2.4 refers to the duty to not affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

We are providing you with credible evidence that this constitutional condition is not being met and that state aid is prejudicially affecting the right to not attend religious instruction.

As just one example among many, in their Guidelines on the Inclusion of Students of Different Beliefs in Catholic Secondary Schools, the JMB state that: ¹

¹ <https://www.jmb.ie/LinkClick.aspx?fileticket=bvfg2Cvau3s%3D&portalid=0&resourceView=1>

“While it is a parent’s right to withdraw their son or daughter from RE class, the supervision of the student can present the school with considerable logistical and supervision dilemmas. In cases such as this, a school should make it clear that they may not have capacity for the individual supervision of the student outside of the RE classroom due to the limitations of the Department of Education and Skill’s staff allocation to the school.

“Students who opt out of Religious Education may often have to remain in the classroom while not participating. If it is feasible and the school has a local solution for supervision, such as the library or other supervised area, students could be invited to go there during RE class.”

These schools, as a condition of accepting State aid, have a constitutional obligation to ensure that students can ‘not attend’ religious instruction. The Department of Education has an administrative duty to ensure that this happens (as per the Burke case at the Supreme Court). The Comptroller and Auditor General has a duty under, under the regulatory part of his audit, to be satisfied that this happens, and the Committee on Public Accounts has a duty to examine the outcome under Standing Order 218.

Conclusion

As we said in our last letter, it seems to us that nobody is addressing the substance of our complaint. We do not understand why this is the case, as it is a fundamental issue regarding constitutional conditions on State aid for schools, and breaches of legislation and the Supreme Court’s determinations on the Constitution. It is our rights that are being prejudicially affected, including the rights of parents and children who have brought their concerns to us and directly to the Department, and we have brought that information to your attention.

This includes the Oireachtas when passing laws, the Department when translating those laws into administrative schemes, the patron bodies when implementing the administrative scheme, the Education Committee when examining the administration of the Department, the Comptroller and Auditor General when conducting the regulatory part of his audit, and the Public Accounts Committee when examining the reports of the Comptroller and Auditor General.

The fact that others also have a duty to act in accordance with the Constitution does not mean that any particular entity can neglect its own duty to do so with regards to the elements it is responsible for. But what we have experienced is the Department saying it is up to the patron bodies, the patron bodies saying the Department doesn’t give them enough money, the Public Accounts Committee saying it is within the remit of the Education Committee, and the Department failing to communicate with us since we met them seven months ago.

We again thank you for the time you have put into considering this issue. We again ask you to reconsider your determination that the matters we have raised are not for your Committee to investigate, for the reasons we have outlined in this letter.

The constitutional condition for state aid has been rendered meaningless by the failure of any State entity to take any responsibility for it.

We look forward to hearing from you,

Yours sincerely,

Jane Donnelly
Human Rights Officer

Michael Nugent
Chairperson

Chris Hind
Teachers Officer