

# ***Daniels v. The Attorney-General:*** **Children with Special Needs and the Right to Education in New Zealand**

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## **1. Introduction**

The nature of the right to education and the extent to which it is judicially enforceable has recently been at issue before the New Zealand High Court and the Court of Appeal, in the case of *Daniels v. The Attorney-General*.<sup>1</sup> In September 1999 a parent of Linda Daniels, a child with special educational needs, applied to the High Court for judicial review of the special education policy known as Special Education 2000 (SE2000) which had been introduced in 1998 by the then Minister of Education. In the period before the hearing in the High Court in December 2001 the plaintiff was joined by 14 other parents of children with special educational needs. Essentially the plaintiffs wanted their children to have the choice of attending special education facilities where mainstreaming was inappropriate or ineffective. The plaintiffs alleged that the policy of SE2000, pursuant to which these facilities were disestablished, infringed the right to equal education of children with special educational needs as provided by the Education Act 1989 (NZ).<sup>2</sup>

## **2. The legislative basis for the right to education in New Zealand, and SE2000**

Internationally, the right of all children to education is set out in Article 13 of the International Covenant on Economic Social and Cultural Rights, and the United Nations Convention of the Rights of the Child.<sup>3</sup>

In New Zealand this right is contained in section 3 of the Education Act 1989 (NZ):

‘Except as provided in this Act or the Private Schools Conditional Integration Act 1975, every person who is not a foreign student is entitled to free enrolment and free education at any state school during the period beginning on the person’s 5th birthday and ending on the 1st day of January after the persons 19th birthday.’

The provision of special education is legislatively a combination of sections 3, 8 and 9 of the Education Act 1989 (NZ) and the still existing section 98 of the Education Act 1964 (NZ). The latter Act defines ‘special education’ in section 2 as ‘education for children who, because of physical or mental handicap or of some educational difficulty, require educational treatment beyond that normally obtained in an ordinary class in a school providing primary, secondary or [continuing] education’. ‘Special education’ in section 2 of the 1989 Act incorporates the 1964 definition and adds ‘education or help from a special school, special class, special clinic or special service.’

Section 8 provides for mainstreaming as follows:

‘(1) Except as provided in this Part of this Act, people who have special educational needs (whether because of disability or otherwise) have the same rights to enrol and receive education at state schools as people who do not.’

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<sup>1</sup> [2003] 2 NZLR 742 (CA).

<sup>2</sup> Ss. 3 and 8.

<sup>3</sup> Ratified by New Zealand in 1993.

Section 9 of the 1989 Act provides that where the Secretary of Education is satisfied that a person under 21 should have special education they shall agree with the parents that the person should be enrolled or direct them to enroll at a particular state school, special school, special class or special clinic; or agree with the parents that the person should have, or direct them to ensure that the person has, education or help from a special service.<sup>4</sup> Those special schools and special classes were set up pursuant to section 98 of the Education Act 1964 (NZ) to cater for those students who are unable to be mainstreamed and required the ‘special education’ as envisaged by section 9 Education Act 1989 (NZ). Section 10 provides a right of reconsideration of any direction made under section 9. This includes an arbitration provision.<sup>5</sup>

The picture presented by the combination of sections 8 and 9 is that a child with special needs has the right to attend a conventional state school which it is presumed can make provision to accommodate him or her. However, if the school is unable to do so, section 9 imposes a duty on the Secretary of Education to agree with that child’s parents on a direction for enrolment of that child at a special school, special class or special clinic established by the Minister under section 98 Education Act 1964 (NZ). That section provides as follows:

- ‘1. Having regard to the provision of special education in any locality or localities, the Minister may
  - a. Establish any special school;
  - b. Establish, or authorise the establishment of, any special class, clinic, or service, either as a separate unit or in connection with any State ... school, or in connection with any public institution approved for the purpose by him ...
2. The Minister may likewise disestablish any special school, class, clinic, or service established under subsection (1) ... if he considers that sufficient provision is made by another similarly established special school, class, clinic or service, or by any other school or class in or reasonably near to the same locality ...’

Central to the policy known as Special Education 2000 (SE2000) was the disestablishment of special education facilities and the mainstreaming of students with special needs into ordinary classes with appropriate aid being provided. It provided for a system of resourcing state schools by way of three schemes dependent on the severity of the student’s disability. These schemes provided funding for the schools chosen by individual students with special needs who qualify. A Special Education Grant was established to fund schools in respect of special needs students who did not qualify. This money was not targeted at individual students and was allocated to schools on a formula based on the school’s roll and the school’s decile<sup>6</sup> rating. Expenditure of funding received was to be decided by each school’s board of trustees<sup>7</sup> in line with established guidelines which form part of the school’s charter.<sup>8</sup>

### 3. The High Court<sup>9</sup>

The plaintiffs argued that SE2000 largely removed their choice and thus adversely affected their children’s right to education. They argued that as it was fundamentally inconsistent with the schemes of both the Education Acts of 1964 and 1989 it was ultra vires and beyond the legal authority of the Crown. Further they argued that the policy failed to cater for the educational needs of the children and thus it was in breach of the provisions of the Education Act 1989 (NZ) and the continuing provisions of the 1964 Act. Specifically they argued that SE2000 deprived their children of their rights contained in sections 3 and 8 of the Education Act 1989 (NZ).

The plaintiff’s argument relied heavily on the report of July 2000 by Dr Cathy Wylie. Dr Wylie had been retained by the Crown to report on the effectiveness of the changes implemented by SE2000 and she had concluded as follows:<sup>10</sup>

<sup>4</sup> Education Act 1989 (NZ) s. 9(1) (a) and (b).

<sup>5</sup> S. 10(4) Education Act 1989 (NZ).

<sup>6</sup> All state schools in New Zealand have a decile rating of 1-10.

<sup>7</sup> Pursuant to the Education Act 1989 (NZ) each New Zealand state school is administered by a locally elected board of trustees which has full discretion to control and manage the school, subject to the laws of New Zealand.

<sup>8</sup> Under s. 61 of the Education Act 1989 (NZ) each school board of trustees is required to formulate a charter which, by virtue of s. 64, acts as an undertaking from that board to the Minister, to satisfy requirements imposed by statute and by the National Educational Guidelines and the National Administration Guidelines.

<sup>9</sup> Unreported Judgment of the High Court of New Zealand, Auckland Registry, Baragwanath J, 3 April 2002, M1615-SW99.

<sup>10</sup> Wylie, C. (2000), *Picking up the Pieces – Review of Special Education 2000 – He Tataritanga Mo te Matauranga Motuhake*, Minister of Education, Wellington N.Z., at p. 46.

‘There is no doubt in the sector that a sizeable number of children with special needs are missing out on the support they need to participate as much in school and class life as any other child, and to make real gains from their time at school ... There are undoubtedly students who have continuing needs throughout their education who do not fit the OTRS categories.’

She said that the disestablishment of staffing for special needs units within regular schools had had a profound effect. She said that this:

‘... exposed the absence of any government role in ensuring that there was satisfactory provision for students with special needs at the local level. It left parents feeling angry, impotent and betrayed. It remains all too easy for local schools to evade responsibility for the inclusion of students with special needs.’

She went on to say that those schools which were in the forefront of including students with special needs in meaningful ways, referred to by her as ‘beacon schools’, were struggling to maintain best practice faced with a lack of resources. She said:<sup>11</sup>

‘There is some evidence that the units, like the special schools, have become more attractive to parents. In some areas, other units who served a range of special needs have closed, and parents who found benefits for their children in such settings have had to find other options, some at considerable traveling time (and cost) from their homes. Others have found it difficult to find mainstream schools that will take their child, or have found that what is offered is poor quality, albeit well-intentioned, or insufficient (maindumping).’

Baragwanath J held it to be relevant that the report of Dr Wylie showed the scheme of disestablishment of special needs facilities pursuant to section 98(2) had led to the emergence of these beacon schools. He said:<sup>12</sup>

‘By such policy there has, at least de facto, been something of a swing back in the direction of the special needs concept that at least some proponents of mainstreaming appear to have considered unnecessary.’

In his view the report made clear that the popularity of these schools demonstrated that there was a need for such facilities, and that the funding of them was inadequate.

Accordingly, the judge agreed with the plaintiffs. He said:<sup>13</sup>

‘Where a child’s needs are met in an ordinary school, the Crown’s duty in respect of that child has been discharged. Where a conventional school is incapable of meeting a child’s need, the Crown has an obligation, pursuant to s. 9 of the Education Act 1989, to provide special education to the child sufficient to enable the child to receive some sort of worthwhile education.’

While he pointed to the difference in opinions held by experts on the desirability or otherwise of ‘mainstreaming’ special needs students he emphasized that this was a pedagogical matter which was outside the ambit of the court’s discretion. The decision to be made in this case was irrespective of the advantages and disadvantages of such a system. At the outset he set out what he saw to be the interrelationship of the Crown and the courts in this context:<sup>14</sup>

‘The Crown has the authority and the responsibility to determine what policies are to be preferred and to apply public resources to secure a principled and workable regime. It has access to expert knowledge and resources not possessed by the Court. Moreover, it is a basic constitutional principle that policy decisions should be made by and in the name of the Crown, whose Ministers are answerable to Parliament and to the electorate. By contrast, the Court’s role is simply to determine whether the law has been infringed and if so to award conventional relief, which in the present sphere is customarily by way of formal declaration of rights.’

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<sup>11</sup> Footnote 10 above at p. 70.

<sup>12</sup> Referring to Wylie, C., footnote 10 above at p. 75.

<sup>13</sup> Footnote 9 above, at para. 45.

<sup>14</sup> Footnote 9 above at para. 4.

In the judge's view the policy of SE2000 was in contravention of the educational obligations owed by the Minister of Education to children with special needs. He saw the right to education in these terms:<sup>15</sup>

'Faced with the choice between giving substance to the "entitlement" and "rights" to education, or emptying them of legally enforceable content, I am satisfied that the former must be adopted. In enacting s. 3 the Legislature deliberately conferred an entitlement to education. In my view it cannot have intended such entitlement to entail anything less than:

- it must not be clearly unsuitable (and in that specific sense of it suitable) for the pupil
- it must be regular and systematic'.

The Crown appealed.

#### 4. The Court of Appeal<sup>16</sup>

The decision of the court was delivered by Keith J. At the outset he stressed that the statutory right to education, and the corresponding legal obligation on education authorities to meet the education needs of each individual, apply equally to all children irrespective of whether they have special needs or not. In the view of the court the right to a suitable education was promoted by the establishment of a system by which it was provided, rather than in its being a judicially-enforceable right. On this point the court stated that it did not favour the 'all or nothing' approach to the justiciability of rights in education which had been adopted by Baragwanath J. Keith J said:<sup>17</sup>

'We return to the Judge's [Baragwanath J] finding about s. 3. Any requirement that the education be "regular and systematic" is met in its essence, it seems to us, by the statutory requirements including those for minimum days and hours, teacher registration and curriculum. Those and the other features of the Act mentioned above, together with the very opaqueness of the proposed standard, also appear to us to negate a judicially enforceable "not clearly unsuitable" general standard and the grave difficulty it presents for judicial supervision ...'

and:<sup>18</sup>

'To repeat, while there are rights under the 1989 Act that can be enforced by court process [such as natural justice on suspension and expulsion], those rights do not include generally, and abstractly, formulated rights of the kind stated by the Judge. Rather, the rights are essentially those specifically established by and under the legislation which, to recall the Judge's formulation, do in themselves provide for regularity and system and are designed to ensure appropriate quality.'

The judge referred to the decisions, particularly those from the United Kingdom, which Baragwanath J of the High Court had drawn on in support of his opinion.<sup>19</sup> He concluded that the cases were of limited assistance to either the plaintiffs or the Crown, as each one concerned an action by an individual student, either in reliance on a common law duty of care or on a breach of markedly different legislation or constitutional provisions. Keith J pointed particularly to the House of Lords decision in *Phelps v. Hillingdon London Borough*<sup>20</sup> in which the plaintiffs had succeeded in establishing the negligence of their local education authorities. He said that as it was an action taken by individuals who alleged a failure to assess learning disabilities and to provide remedial assistance it was distinguishable from the present case. Furthermore, he said that their Lordships there had been careful to hold that damages could not be sought for breach of statutory duty.<sup>21</sup> Similarly Keith J was able to distinguish *R v. East Sussex County Council, ex parte Tandy*<sup>22</sup> as that action was founded on specific facts relating to a failure to provide suitable education for a student suffering from ME who was unable to attend a regular school. However,

<sup>15</sup> Footnote 9 above at para. 137.

<sup>16</sup> [2003] 2 NZLR 742.

<sup>17</sup> [2003] 2 NZLR 742 para. 82.

<sup>18</sup> Footnote 17 above at para. 83.

<sup>19</sup> *In re S (Minors) Care Order: Implementation of Care Plan* [2002] 2 AC 291; *Phelps v. Hillingdon London Borough* [2001] 2 AC 619; *R v. East Sussex County Council, ex parte Tandy* [1998] AC 714; and the Irish case, *Sinnott v. Minister of Education* [2001] 2 IR 505.

<sup>20</sup> [2001] 2 AC 619.

<sup>21</sup> Footnote 20 above at para. 87.

<sup>22</sup> [1998] AC 714.

he did concede that an important point to be taken from that case was the court's recognition that the financial resources of the education authority were an irrelevant consideration in relation to their obligation to individual students.

The judges disagreed with the view of Baragwanath J that the Irish case of *Sinnott v. Minister of Education*<sup>23</sup> provided clear support for the court's jurisdiction to 'declare a special needs student's entitlement to education appropriate to his or her needs'.<sup>24</sup> Keith J stated that the dispute in that case had been essentially about remedies, it having been accepted that the State had breached the plaintiff's constitutional rights. He said that it did not support the notion that there was a freestanding general right enforceable by the courts.

It is important that the reluctance of the Court of Appeal to recognize the justiciability of a general right to education did not detract from its recognition of specific rights which exist within the education system. Keith J reinforced the court's acceptance that there are individual rights which are legally enforceable when he said:<sup>25</sup>

'To return to the education legislation, there can be no doubt that in addition to the statutory powers of central government to intervene (notwithstanding the emphasis of the reforms introduced by *Tomorrows Schools* on local, especially parental administration) [the educational reforms enacted by the *Education Act 1989 (NZ)*], some of the failures of a school to comply with its obligations could give rise to legal proceedings ... In other words, we do not find helpful the "all or nothing" or "justiciability or not" discussions in the judgment below and submissions. The schools have duties correlative to the students' statutory rights and those general rights are capable of legal enforcement.'

The Court of Appeal upheld the Crown's appeal in its determination that no breaches of sections 3, 8 or 9 had been established. The plaintiffs however did retain some victory from the High Court decision in that the Court of Appeal agreed with Baragwanath J that the Minister of Education had acted in breach of section 98(2) *Education Act 1989 (NZ)*. This was on the basis that the correct procedure as prescribed by the statutory provision had not been followed before the special classes, units and services were disestablished pursuant to SE2000. However, the court drew no consequence from that conclusion and remitted the case back to Baragwanath J in the High Court for determination of relief.

Issues relating to discrimination arising under the New Zealand Bill of Rights Act 1990 had been the subject of extensive submissions from all parties, including the New Zealand Human Rights Commissioner as intervenor. However, time constraints at the Court of Appeal hearing meant that the judges did not address the challenge by the parents and the Human Rights Commissioner to Baragwanath J's finding of no discrimination. It was disappointing that the opportunity was lost for judicial discussion of an issue of such fundamental importance.

## 5. Conclusion

As an application for judicial review rather than a private claim for damages, this action was founded on an essentially different basis to the cases in other jurisdictions referred to above. Its significance however lies in the consideration of many of the issues which are fundamental to the provision of education in New Zealand, particularly for those children with special needs. It provides for New Zealand jurisprudence the first comprehensive consideration of the nature and justiciability of the statutory 'rights' and 'entitlements' to education. It was the primary finding of the Court of Appeal that the right to education is the right to a system, made available by legislation, which provides the framework for acceptable standards and accountability, in the words of Keith J:<sup>26</sup>

'So, in essence "education" is a general right to partake of a system as provided by and delivered pursuant to legislation, rather than a specific right, breach of which would be enforceable by individuals.'

<sup>23</sup> [2001] 2 IR 505.

<sup>24</sup> Footnote 9 above at para. 92.

<sup>25</sup> Footnote 17 above at para. 79.

<sup>26</sup> [2003] 2 NZLR 742, at para. 83.

It is significant however, that the Court did preserve the ability of students to establish breaches of duties owed to them as individuals. In this context this decision is in line with the courts in the UK and Ireland.