



## Education Report: Proposed changes to Residential Specialist Schools direct access pathway

<b>To:</b>	Hon Chris Hipkins, Minister of Education Hon Jan Tinetti, Associate Minister of Education		
<b>Date:</b>	2 June 2022	<b>Priority:</b>	Medium
<b>Security Level:</b>	In Confidence	<b>METIS No:</b>	1288598
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<b>Messaging seen by Communications team:</b>	N/A	<b>Round robin:</b>	Yes

### Purpose of report

This report seeks decisions from you on proposed changes to the Residential Specialist Schools (RSS) direct access pathway. It supplements previous recommendations that were agreed to in principle [METIS 1286245 refers].

This report has been prepared following legal advice received on the proposed changes in the context of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the United Nations Convention on the Rights of the Child (UNCRC).

### Recommended actions

The Ministry of Education recommends that you:

- Note** that we have received legal advice on the proposed changes to the RSS direct access pathway in the context of the UNCRPD and UNCRC
- Agree** to the proposed changes to the RSS direct access pathway set out in METIS 1286245

☒ **Agree** / ☐ **Disagree**

☒ **Agree** / ☐ **Disagree**

- Agree** that to strengthen the Government's progressive realisation of the UNCRPD and UNCRC, the following components are incorporated into the detailed design of the RSS direct access pathway:
  - A documented best-interests assessment, with informed child and whānau participation, to be included alongside recommendations to the Director of Education to support their delegated role for Special Education Agreements (SEAs) under section 37 of the Education and Training Act 2020.

- Details of how the child will maintain connections to their whānau, community, and mainstream education environments during RSS enrolment forming part of the application process and being included as a documented part of the local group's consideration, as well as any review process.
- Information at an individual and systemic level as to the benefits and disadvantages of RSS enrolment being included in the new monitoring and reporting framework developed to provide national oversight of the redesigned pathway, and considered as part of the formal implementation review of the revised RSS direct access pathway to be undertaken in the first half of 2023.

**Agree / Disagree**

**Agree / Disagree**

- d. **Agree** to update the overarching principle [METIS 1276987 refers] by including explicit reference to a child's best interests, as follows:

The RSS, whānau and Ministry of Education specialist staff involved in decision-making agree ***that the RSS enrolment is in the child's best interests***, there are clear benefits to the child that outweigh the risks, and that any risks can be well managed

**Agree / Disagree**

**Agree / Disagree**

#### Proactive release

- e. **Agree** that this Education Report is published following announcements on changes to the RSS direct access pathway, and not before;

**Agree / Disagree**

**Agree / Disagree**

- f. **Note** that the sections of this report marked legal advice are legally privileged and therefore the content cannot be shared or referred to outside the Crown without the involvement of the Attorney-General; and

- g. **Agree** that the Ministry seeks the approval of the Attorney-General through the Crown Law Office to release the content of the legal advice.

**Yes / No**

**Yes / No**



Sean Teddy  
Hautū | Deputy Secretary  
Te Pae Aronui | Te Mahau

2/6/2022



Hon Chris Hipkins  
Minister of Education

17/ 6/2022



Hon Jan Tinetti  
Associate Minister of Education

06 /06/ \_\_\_\_ 2022

## Background

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1. In late 2021, you agreed to changes to the RSS direct access pathway that were to be implemented from Term 2, 2022, and that the Ministry consult with sector stakeholders on how to go about making these changes in Term 1 [METIS 1276987 refers].
2. Targeted engagement with stakeholders on draft proposals for change in March and early April 2022 revealed a range of views, including concerns that the proposed changes were a retrograde step in respect of Government's obligations under the United Nations Convention on the Rights of People with Disabilities (UNCRPD).
3. We provided you with advice on recommended changes in late April 2022, with decisions to be made in principle subject to further advice on the UNCRPD and United Nations Convention on the Rights of the Child (UNCRC) [METIS 1286245 refers].
4. The Ministry commissioned independent analysis on the proposed changes in the context of Government's obligations under the UN Conventions. This has now been received.

## Summary of legal advice: legally privileged

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5. The independent analysis constitutes legal advice and is therefore legally privileged.
6. The legal advice explores the position of RSS in relation to the UN Conventions. It concludes that RSS are neither prohibited nor authorised by the UN Conventions but need to be positioned as part of an overall system that is inclusive. The legal advice notes that the Committee on the Rights of Persons with Disabilities has made some strident comments on occasion that what it terms 'segregated' special schools are incompatible with the UNCRPD. However, the advice goes on to state that a view that specialist schools of any kind are incompatible with the UNCRPD is not legally correct.
7. The legal advice outlines that specialist schools are likely to be more consistent with the UN Conventions when they operate in the following ways:
  - Children attend either because their needs/requirements can only be met by a specialist school or because, on balance, a specialist school is preferable for their needs/requirements.
  - Specialist schools form part, and follow the same educational objectives, of a wider school system where the Government is committed to inclusive education and has a strong focus on reasonable accommodation.
  - Specific requirements, notably ongoing review of the enrolment and information gathering, are met.
8. Further, the legal advice states that enrolment in RSS does not amount to separation of the form restricted by the UN Conventions where it is voluntary and does not amount to disruptive and long-term separation from family.

9. The legal advice supports the Ministry's initial assessment that the proposed changes to RSS are not inconsistent with the Government's obligation under the UN Conventions [METIS 1286245 refers]. It also goes further, stating that access improvements are consistent with Article 24 of the UNCPRD because the focus is on affording the most effective support to the child. In particular, altered criteria based on best interests, rather than last-resort provision, are more closely aligned to the objectives of the UNCPRD and rights of choice and participation under the UNCPRD and UNCRC.
10. In the legal advice, it is recommended that compatibility with the UN Conventions could be improved in the redesigned pathway by the following:
  - a A documented, evidence-based, best-interests assessment, with informed child and whānau participation, leading to a determination of whether RSS is the more or only effective means of providing required support. This is described in practice as entailing:
    - a documented and objective assessment of the child's educational and related requirements and how RSS enrolment and available alternatives correspond to those requirements;
    - a documented consultation over that assessment with the child and whānau, including of any steps taken to support the child's informed participation and expression of views and of any assessment whether particular views expressed by the child should or should not be followed;
    - identification, including through that consultation, of any broader advantages or disadvantages of RSS enrolment and available alternatives.
  - b Documented consideration of means by which the child enrolled in RSS will maintain connections to their whānau, community, and mainstream education environments. This would include:
    - identification of how relationships with whānau, the home community and cultural context can be supported, both on a day-to-day basis and in the longer term, including planning for time after RSS enrolment;
    - decisions, including ongoing review, either incorporating or accompanied by identification of steps to ensure continued whānau and community connections and connections to mainstream education environments.
  - c Information at individual and systemic level as to the benefits and disadvantages of RSS enrolment. The legal advice recommends this should be met in two ways:
    - the ongoing review of an individual's RSS enrolment should so far as possible includes some objective information-gathering about the positive and/or negative impact of that enrolment; and
    - there is ongoing systemic monitoring of the efficacy or otherwise of RSS alongside other services and scope for connection between RSS and others.

11. While the advice recognises these steps are in part already reflected in the proposed changes and are likely to be followed in practice, additional explicit adjustments can further align the pathway with the obligations arising from the UN Conventions. This will help to address the Disability Rights Commissioner's concerns about children being misplaced in RSS. These steps will also provide a better basis upon which to answer potential concerns from the UN Committee when it next reviews New Zealand's compliance with the UNCRPD in September 2022.
12. The legal advice also notes that, while it is at least, in principle, possible for RSS access to be challenged through the New Zealand courts with reference to the CRPD, whether as incompatible with that Convention or as discriminatory against children not enrolled in RSS, the more robust access criteria in the proposed changes provide a sound response to any such risk, again particularly if supplemented as recommended.

### Proposed changes to the direct access pathway

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13. We propose that the detailed design of the RSS direct access pathway includes additional process requirements to strengthen compliance with the UNCRPD and UNCRC, as follows:
  - a A documented best-interests assessment, with informed child and whānau participation, to be included alongside recommendations to the Director of Education to support their delegated role for Special Education Agreements (SEAs) under section 37 of the Education and Training Act 2020.
  - b Details of how the child will maintain connections to their whānau, community, and mainstream education environments during RSS enrolment forming part of the application process and being included as a documented part of the local group's consideration, as well as any review process.
  - c Information at an individual and systemic level as to the benefits and disadvantages of RSS enrolment being included in the new monitoring and reporting framework developed to provide national oversight of the redesigned pathway, and considered as part of the formal implementation review of the revised RSS direct access pathway to be undertaken in the first half of 2023.
14. In addition, we also propose to update the new overarching principle [METIS 1276987 refers] to aid compliance with Article 7 of the UNCRC and to align with the proposed requirement for a best-interests assessment. The proposed additional text is shown below, in bold italics:

The RSS, whānau and Ministry of Education specialist staff involved in decision-making agree ***that the RSS enrolment is in the child's best interests***, there are clear benefits to the child that outweigh the risks, and that any risks can be well managed.

### Next steps

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15. Subject to your agreement, we will incorporate the above supplementary changes into the detailed design and implementation planning of the RSS direct access pathway. We will update you on the implementation timeline, costs and resource implications once we have completed the detailed implementation planning.
16. We will work with your office to support announcements on the redesigned RSS direct access pathway, based on your preferences.

17. We are developing the detailed implementation plan for any approved changes.

## Proactive release

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18. We recommend that this Education Report is published following announcements on changes to the RSS direct access pathway is made, and not before.
19. Legal advice, as summarised in paragraphs 5-12 attracts legal professional privilege and may be protected from disclosure under the Official Information Act 1982. Where a Minister or a government department considers that it is necessary to release legal advice or refer to the content of such advice, the matter must first be referred to the Crown Law Office. The Crown Law Office will in turn refer the matter to the Attorney-General's office for approval.
20. Given the high level of interest from stakeholders in this matter, we recommend seeking the Attorney-General's approval to release the content of the legal advice. This would support transparency and assist our ongoing engagement with representatives from the disability community on the RSS direct access pathway, as well as work related to specialist school settings generally. Without this approval, neither Ministers nor the Ministry will be able to refer to the content of the legal advice publicly in any way, other than to say that advice has been sought and received.
21. We consider the risks associated with waiving legal professional privilege and releasing the legal advice to be low. The advice does not contain information about individuals, individual cases or litigation risk.
22. Any release of the legal advice would be done following announcements on changes to the RSS direct access pathway. We do not anticipate delaying announcements until the Attorney-General has considered this matter. We will have to maintain the legal professional privilege of this advice until a decision about waiving privilege is made.