



**Access Arrangements, Reasonable
Adjustments and Special Consideration**

Policy Paper

December 2011

1 Introduction

The Northern Ireland Council for Ethnic Minorities (NICEM) is the umbrella body for 29 black and minority ethnic¹ community groups in Northern Ireland. Our vision is of a society free from all forms of racism and discrimination, and where human rights are guaranteed.

In June 2011 NICEM published a research paper on Promoting Racial Equality in Post-Primary Schools in Northern Ireland.² One of the issues considered in the report is how students with English as an Additional Language (EAL) can be provided with a level playing field to demonstrate their skills, knowledge and understanding in written examinations, without compromising the integrity of the qualifications. To this end, it proposes that the Joint Council for Qualifications (JCQ) make the following amendments to Access Arrangements, Reasonable Adjustments and Special Consideration, known as ‘the Pink Book’:

1. The ban on providing readers for students whose literacy difficulties are primarily caused by English not being their first language should be lifted.
2. Extra time to consult dictionaries should be provided to EAL students on the basis of need rather than the two year residency rule.

¹ In this document “Black and Minority Ethnic Communities” or “Minority Ethnic Groups” or “Ethnic Minority” has an inclusive meaning to unite all minority communities. It refers to settled ethnic minorities (including Travellers, Roma and Gypsy), settled religious minorities, migrants (EU and non-EU), asylum seekers and refugees and people of other immigration status.

² <http://www.nicem.org.uk/elibrary/publication/promoting-racial-equality-in-northern-irelands-post-primary-schools>.

This policy paper sets out the legal and educational basis for these two alterations.

2 Legal Basis for Revision of the Pink Book on Grounds of Race³

2.1 Public Functions Duty

In GB, public bodies have been subject to two race duties since 2000.⁴ Section 19B(1) of the Race Relations (Amendment) Act 2000, described as a ‘public functions’ duty, makes it “unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination.” This applies to both direct and indirect discrimination. Indirect discrimination involves a ‘provision, criterion or practice’ (PCP) which appears to be race-neutral but which can, in practice, have discriminatory effects. The equivalent of section 19B can be found in section 29(6) of the Equality Act 2010. According to section 19(2)(b) of the Equality Act 2010, discriminatory effects can be established if the PCP puts, or would put, persons [of a particular ethnic origin] at a particular disadvantage when compared with persons [of another ethnic origin]”.

Such disadvantage can be justified if two criteria are met. Public bodies must first demonstrate that there is a ‘legitimate aim’ behind the PCP. Secondly, public bodies must show that the PCP is a ‘proportionate means’ of achieving the legitimate aim. In assessing the compliance of

³ Section 9(1) of the Equality Act 2010 provides, “Race includes—(a) colour; (b) nationality; (c) ethnic or national origins.” ‘Ethnic origin’ will be used in this paper in relation to issues of racial discrimination under the Act (or the Race Relations (NI) Order 1997 (RRO)).

⁴ The Race Relations (Amendment) Act 2000 introduced section 19B (‘Discrimination by public authorities’) into the Race Relations Act 1976 (RRA) and replaced section 71 (‘Specified authorities: general statutory duty’).

the Pink Book with the public functions duty, we therefore ask three questions:

1. Does the PCP disadvantage persons of a particular ethnic origin compared with persons of another ethnic origin?
2. Is there a legitimate aim?
3. Is the PCP a proportionate means of achieving the legitimate aim?

2.2 Public Sector Equality Duty

Section 71(1) of the Race Relations (Amendment) Act 2000 is known as the ‘public sector equality duty’. It requires that due regard be given by public bodies to the need to eliminate unlawful racial discrimination and promote equality of opportunity between persons of different racial groups. The equivalent of section 71 is in section 149 of the 2010 Act. This duty requires the JCQ (and its constituent bodies in GB) to conduct an audit of policies to seek to identify potential indirect discrimination under the public functions duty and potential ‘adverse impact’ under the public sector duty.⁵ Where evidence of adverse impact (or of indirect discrimination) is identified, the public body should consider ways of mitigating or eliminating that disadvantage. On this basis we ask a further question:

4. Can the disadvantage be mitigated or eliminated?

⁵ The position in NI is not dissimilar. Article 20A of the RRO covers some public functions. Some aspects of the CCEA’s work may not be caught by Article 20A but we would argue that access arrangements are covered. Section 75 of the NI Act 1998 is the NI equivalent of the GB public sector duty, which is derived from the NI model.

2.3 Review of Pink Book

NICEM are also of the view that the public function and public sector equality duties oblige the JCQ to review the Pink Book on grounds of race and ethnic origin.⁶ In this context we propose that such a review takes place as soon as possible and that our recommendations be considered as part of that review. We also suggest that the CCEA conducts an equality impact assessment (EQIA) of the Pink Book under its equality scheme.

3 Disadvantage Experienced by EAL Students

Research demonstrates that it usually takes EAL students two years to be able to communicate *socially* on a par with their peers, and between five and seven years to communicate *academically* on an equal basis.⁷ In other words, it generally takes at least five years before examinations provide a valid measure of the academic ability of EAL students. The disadvantage experienced by EAL students is indicated by figures from Northern Ireland where between 2007/08 and 2009/10 25.5% of EAL students left school with 2 or more A-Levels (grade A-E) compared with 50.3% of other students.⁸

⁶ The Pink Book has been substantially revised on the grounds of disability in response to similar duties under the Disability Discrimination Act 1995, as amended by the Disability Discrimination Act 2005. The DDA in Great Britain has now been superseded by the Equality Act 2010. Although the DDA was a UK-wide statute, amending legislation has been devolved in NI. The DDA still applies to Northern Ireland (NI). The equivalent of the 2005 Act is the Disability Discrimination (Northern Ireland) Order 2006.

⁷ J Cummins (2008) *BICS and CALP: Empirical and Theoretical Status of the Distinction* page 74.

⁸ School Leavers Survey. Data provided by the Department of Education.

The error in measuring academic ability, that is introduced by unfamiliarity with test information irrelevant to the subject/construct being examined (such as language or cultural references), is known as ‘construct-irrelevant variance’. This measurement error raises the question of how to ensure that EAL students are not hampered by their lack of proficiency in English and “are tested on subject content only”.⁹ This is the purpose of the Pink Book – to give all students an equal chance to express their ability in examinations.

We now consider two specific aspects of the Pink Book: the provision of readers and extra time to consult a bilingual dictionary.

4 Readers

4.1 Current Guidelines

Some students with reading difficulties find it easier to comprehend examination questions and so express their knowledge of the subject if the questions are read out to them. The JCQ guidelines currently stipulate that a reader (a person who reads out the questions) will be allowed for candidates with:

“a significant impairment ... whose reading skills (accuracy or speed or comprehension) have been measured in a test conducted by a specialist and the standardised score is ... 1 standard deviation below the mean of an up-to-date, nationally standardised test”.¹⁰

⁹ OFQUAL (2008) *Fair Access by Design* page 20.

¹⁰ JCQ (2010) *Access Arrangements, Reasonable Adjustments and Special Consideration* page 8 §2.5.5.

However the JCQ Guidelines state that: “A reader will not be allowed if a candidate’s literacy difficulties are primarily caused by English ... not being their first language”.¹¹

4.2 Analysis

4.2.1 Particular Disadvantage

A Delphi study¹² found that reading aloud test items from a plain English script is likely to reduce construct-irrelevant error for EAL students with beginner and intermediate levels of English language proficiency.¹³ The Inclusion and Diversity Service in Northern Ireland, which provides expert support to schools to meet the needs of newcomers, concurs that a reader would give many EAL students a more equal chance to express their knowledge in examinations. Therefore it is arguable that the prohibition of a reader for candidates whose literacy difficulties are primarily caused by English not being their first language clearly places those students ‘at a particular disadvantage’ compared to students of an ethnic origin whose first language is English.

4.2.2 Legitimate Aim

NICEM is not aware of the rationale for this exclusion. Certainly, it is unclear how the provision of a reader would provide an unfair advantage and therefore undermine the integrity of the qualification as a reader “will not be allowed to read questions or text in papers (or

¹¹ JCQ (2010) *Access Arrangements, Reasonable Adjustments and Special Consideration* page 8 §2.5.1.

¹² A Delphi study is one that utilises a panel of experts.

¹³ B D Acosta, C Rivera and L S Willner (2008) *Best Practices in State Assessment Policies for Accommodating English Language Learners: A Delphi Study* page 14.

sections of papers) testing reading”.¹⁴ On the contrary, the provision of a reader would strengthen the integrity of the examination because it would reduce construct-irrelevant variation.

4.2.3 Proportionate Means

Whatever the aim of excluding students whose literacy difficulties are caused by English not being their first language from accessing a reader, the JCQ is obliged to consider whether this is a proportionate means of achieving that aim. Given that the PCP disadvantages EAL students and consequently undermines the integrity of the exam, it is unlikely to represent a proportionate means of achieving its intended purpose.

4.2.4 Mitigation and Alternatives

It is clear that the prohibition of a reader for candidates whose reading difficulties are primarily caused by having EAL has an ‘adverse impact’ on those students. Therefore the JCQ should consider if this adverse impact can be mitigated or if there is an alternative policy that would avoid the adverse impact altogether. Permitting a reader for all candidates whose reading ability is measured as being below average represents an appropriate alternative policy.

4.3 Recommendation

Applying both a legal and an educational analysis, we consider that the present policy is unjustifiable. NICEM therefore recommended that **the denial of readers to students whose reading difficulties are primarily caused by English not being their first language be removed and that**

¹⁴ JCQ (2010) *Access Arrangements, Reasonable Adjustments and Special Consideration* page 8 §2.5.6.

readers be available to *all* candidates whose reading skills are measured as being below average.

5 Extra Time for Use of Bilingual Dictionaries

5.1 Current Guidelines

Some newcomer students use a bilingual dictionary in order to help them understand and respond to examination questions. Consulting a dictionary can be highly time-consuming and in recognition of this, the JCQ guidelines allow “a maximum of 25% extra examination time, depending on need”.¹⁵ However extra time is only permitted to students who “have been resident in the UK for less than two years at the time of the examination”.¹⁶

5.2 Analysis

5.2.1 Particular Disadvantage

A residency restriction on extra time for use of a bilingual dictionary clearly places ethnic minority students who have been resident in the UK for more than two years ‘at a particular disadvantage’ compared to students who have resided in the UK for less than two years.

5.2.2 Legitimate Aim

We assume that the ‘legitimate aim’ is to prevent students who have had more than two years to acquire proficiency in English from gaining an unfair advantage.

¹⁵ JCQ (2010) *Access Arrangements, Reasonable Adjustments and Special Consideration* page 26 §2.18.1.

¹⁶ JCQ (2010) *Access Arrangements, Reasonable Adjustments and Special Consideration* page 26 §2.18.1.

5.2.3 Proportionate Means

Does the residency rule represent a proportionate means of achieving this aim? One problem is that UK residency is not an accurate measure of time spent learning English. This opens up potential anomalies. For example a student who has been resident in a non-UK English speaking country (such as the Republic of Ireland) for many years could be provided with extra time as long as two years were not spent in the UK.

In addition, a two-year limit seems unduly restrictive as it generally takes *at least* five years for newcomers to catch up with their peers academically. It is perhaps on this basis that “language specialists urge that the [residency] period be extended to five years”.¹⁷ However, given that students acquire academic proficiency at different rates, and that extra time is only granted on the basis of evidenced need, it is unclear why a UK residency limit is required at all. Indeed the access arrangements of the Scottish Qualification Authority do not refer to a residency test.¹⁸ The Delphi study cited above found that extended time (regardless of whether a bilingual dictionary is used¹⁹) is likely to reduce construct-irrelevant variance for EAL students with beginner, intermediate *and* advanced levels of English proficiency.²⁰

¹⁷ M Jefferson and J White (2011) *General and Vocational Qualifications: Consultation on Principles for Language Modification at Source* §5.17.

¹⁸ SQA (2008) English as an Additional Language in SQA Exams.

¹⁹ Extra time is justified regardless of whether a bilingual dictionary is used because EAL students “encode and decode text in English at slower processing speeds than in their native language(s). B D Acosta, C Rivera and L S Willner (2008) *Best Practices in State Assessment Policies for Accommodating English Language Learners: A Delphi Study* page 2.

²⁰ B D Acosta, C Rivera and L S Willner (2008) *Best Practices in State Assessment Policies for Accommodating English Language Learners: A Delphi Study* page 14.

5.2.4 Mitigation and Alternatives

Under the ‘**public sector equality duty**’, the residence requirement creates an ‘adverse impact’ on many students from ethnic minority communities. This could be mitigated by extending the residence period to at least five years. However the alternative policy of removing the residence requirement and providing extra time on the basis of need would eliminate the adverse impact altogether.

5.3 Recommendation

Once again, our legal and educational analysis indicates that the guidelines are unduly restrictive and that an alternative formulation can more effectively provide equality of opportunity for EAL students. Consequently **NICEM advocates the removal of the two-year UK residency rule and the provision of extra time to consult a bilingual dictionary on the basis of need alone.**

6 Conclusion

The recent increase in students with EAL has created challenges for the UK education systems. A major challenge is to provide a level playing field in examinations. Delivering this requires that a balance be struck between providing reasonable adjustments and ensuring standardisation. We appreciate that reaching this balance can be difficult. However this paper clearly demonstrates that two straightforward alterations to the JCQ Guidelines would promote equality for EAL students without compromising the integrity of the qualifications, in accordance with the JCQ’s legal obligations.

More generally, we note that knowledge of how examinations can equitably accommodate the needs of EAL student is still in development. In this context it may be helpful if the JCQ undertakes a comprehensive review of the existing literature and commissions research to address the gaps in information.

7 Further Information

For further information in relation to this submission, please contact:

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