

Special educational needs – Statement – whether school providing requisite hours of instruction – whether education Board guilty of discrimination: Education (Handicapped Pupils and Special Schools) Regulations (NI) 1973, Reg 21: Special Educational Needs and Disability (NI) Order 2005.

Neutral Citation no [2006] NIQB 24

Ref: **GIRC5529**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **03/04/06**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY TALIA McDOWELL (A
MINOR) BY HER MOTHER AND NEXT FRIEND ALIX McDOWELL
FOR JUDICIAL REVIEW**

and

**IN THE MATTER OF THE SPECIAL EDUCATIONAL NEEDS AND
DISABILITY (NORTHERN IRELAND) ORDER 2005**

GIRVAN J

Introduction

[1] The applicant, who is a child of six, sues by her mother and next friend. She seeks (a) a declaration that the actions of the Belfast Education and Library Board and North Eastern Education and Library Board in failing to provide age appropriate educational facilities for her is unlawful and contrary to the Special Educational Needs and Disability (Northern Ireland) Order 2005 (“the 2005 Order”); and (b) a declaration that the present educational provision for the applicant does not meet the statutory minimum period as provided in regulation 21 of the Education (Handicapped Pupils and Special Schools) Regulations (Northern Ireland) 1973 (“the 1973 Regulations”).

[2] The applicant suffers from a dystonic quadriplegic form of cerebral palsy. Her condition affects all four of her limbs and she requires a wheelchair. Her fine motor skills are poor. She can communicate using

Mayer Johnson symbols points with her eyes and her hands and she can vocalise "yes" or "no".

[3] In view of her learning difficulties attributable to her special circumstances she has recognised special educational needs falling within the provisions of the Education (Northern Ireland) Order 1996 Part II. In the light of the statutorily required assessment of her educational needs a statement of her special educational needs ("the Statement") was made. The initial statement was made on 3 December 2003 and was amended on 26 October 2004. The objectives of the special educational provision for Talia is intended to aim to meet the continued development of Talia's communication skills, ongoing development of her fine and gross motor skills and further progress in the areas of peer interaction, play and self help. As amended on 26 October 2004 the Statement provides that her special educational needs should be met by a small group placement in a school setting which caters for children with physical difficulties, specialist tuition from a teacher experienced in teaching pupils with her kind of difficulties, a favourable adult to pupil ratio and access to speech and language therapy as assessed, managed and provided by the Eastern Health and Social Services Board. Talia should have access to the full range of the Northern Ireland curriculum given her age, ability, aptitudes and attainments. Part IV of the Statement provided that Talia should attend the nearest school for children with physical difficulties further stating that she should attend "Mitchell House School" (Mitchell House). Under the heading "Non-educational Needs" the Statement stated that she needed transport assistance and access to physiotherapy and occupational therapy. Part V of the Statement was amended on 26 October 2004 to indicate that the non-educational needs of the child for which provision was appropriate if the child was to benefit properly from special education provisions was "medical condition". "Non-educational provision" in the amended Statement was "therapy as currently indicated in medical advice and subsequently by therapists at annual review.

[4] Although in its initial form the application for judicial review raised issues in relation to the transport arrangements for Talia, Mr Treacy QC on behalf of the applicant made it clear that the application was now restricted to two key issues. Firstly, it was contended that Talia was not being provided with the statutory minimum of instruction provided for in regulation 21 of the 1973 Regulations. Secondly and inter-connected with that he contended that the level of instruction that Mitchell House provided to the applicant was discriminatory and contrary to articles 19 and 20 of the 2005 Order.

The Relevant Regulations

[5] The 1973 Regulations were made under the then provisions of the Education and Libraries (Northern Ireland) Order 1972. It appears that those Regulations remain in full force and are now deemed to be made under the

provisions of article 34 of the Education and Libraries (Northern Ireland) Order 1986 having regard to the Interpretation Act (Northern Ireland) 1954. Regulation 15 of the 1973 Regulations provides:

“The education provided by the school shall be suited to the ages, abilities and aptitudes of the pupils in attendance thereat and shall have regard to their particular handicaps. The school shall be conducted in accordance with an approved timetable and suitable arrangements shall be made by the school authorities for the continuance of school work during the absence of any teacher.”

Regulation 8 of the Regulations makes clear that in order to be approved a school must comply with the requirements imposed on it by or under the relevant order and if it does not so comply approval may be withdrawn. Regulation 21(1) provides:

“On each day on which a school is in operation in accordance with the requirements in regulation 18 the school day shall, unless the Department otherwise approves, comprise:

- (a) at least three hours of secular instruction in the case of a pupil enrolled in a class composed mainly of pupils who, at the commencement of the school year, had not attained the age of eight years ...

provided that if the school authorities are duly advised by a qualified medical practitioner that it would be detrimental to a pupil to remain under instruction for three hours they may reduce the period of attendance for such pupil.”

Regulation 21(3) provides that attendance of a pupil under instruction may include in addition to any time occupied by pupil in accordance with arrangements set out in the approved timetable of the school.

“(b) any time occupied by a pupil in undergoing medical or other appropriate treatment or examination.”

[6] The provisions in the 1973 Regulations in relation to the hours of instruction are similar to what is required in ordinary primary schools by virtue of regulation 20 of the Primary Schools (General) Regulations

(Northern Ireland) 1973 ("the Primary School Regulations"). Under regulation 20(1) it is provided:

“Subject to the following provisions of the Regulations an attendance shall mean an attendance on any day under instruction, other than in religious education, for a period of not less than (a) three hours in the case of a pupil enrolled in a class composed mainly of pupils who at the beginning of the school year had not attained the age of eight years.”

Regulation 22 provides that the minimum time specified in para. 1 of regulation 20 may include anytime occupied by a pupil:

“(a) In undergoing inspection or treatment under arrangements for medical and dental inspection etc of school children and young persons...”

The educational provision or Mitchell House

[7] Talia attends school five days a week. The day starts at 9.00 am. There is a break at 10.15 am for half an hour for break, toileting and social activities and lunch, toileting and social activities take place between 12.00 and 1.00 pm. Talia undergoes various therapies during the week. Her therapy timetable occurs:

- (a) On Monday between 9.30 am and 10.30 am (the therapy being described as joint treatment therapy and covers occupational therapy, physiotherapy and speech and language therapy).
- (b) Tuesday between 10.00 am and 10.30 am (occupational therapy provided in a six week block).
- (c) On Wednesday between 9.00 am and 9.30 am physiotherapy and between 9.30 am and 10.00 am speech and language therapy.
- (d) On Thursday between 10.45 am and 11.15 am occupational therapy (in a six week block) and physiotherapy between 1.00 pm and 1.30 pm.
- (e) On Friday between 10.00 am and 10.30 speech and language therapy.

(The occupational therapy is provided in blocks. From January to June 2006 her timetable is for two six week blocks of two individual occupational therapy sessions a week.)

[8] Talia's mother complains that the additional therapy which Talia has to undergo each day eats into her academic day and reduces formal teaching. In the result, she argues that she is not receiving three hours of secular instruction as directed by the Regulations.

[9] The school principal in her affidavit contends that in viewing the provisions of instruction at the school the break period between 10.00 am and 10.45 am is not just break but also toileting and social activities which should be considered as learning situations, a learning context for the development of eating, drinking, social and communication skills. The therapies should not be or viewed to be considered as constituting an interruption to educational provision. Mitchell House provides education for children with physical disabilities through a co-ordinated holistic programme of teaching and therapy. Talia is taught in small groups of seven children where she receives an intense level of individual teaching and learning support from the teacher and classroom assistance which is not generally available at a mainstream school.

[10] Regulation 16(3)(d) permits the reduction in secular instruction if time is occupied in any other approved manner. In the absence of any evidence of the Department has otherwise approved the school's obligation is to provide three hours of secular instruction. Secular instruction is in contra-distinction from religious instruction. Both sets of instruction relate to the provision of instructional educational and the normal meaning of instruction points to the provision of information and training. If it is considered that for some reason it is inappropriate or impracticable to provide what is required in regulation 21 the school may obtain the approval of the Department to depart from the statutory requirement. If a child is not medically fit to cope with the required period of instruction the attendance may be reduced if so advised by a medical practitioner.

[11] Occupational and physiotherapy is recognised by the Statement as falling within the child's non-educational needs. It is not of an instructional nature and while it is provided in the school within the context of the school day and in the context of the classroom as a matter of statutory interpretation it would not normally fall within the definition of secular instruction.

[12] Speech and language therapy fall within the educational provisions specified in the Statement. In R v Lancashire County Council ex parte M [1989] 2 FLR 279 the local authority sought to argue that speech therapy should not be treated as a special educational provision and that its inclusion in the relevant Statement of special educational needs was erroneous. However both the Divisional Court and the Court of Appeal held that speech therapy is properly to be treated as special educational provision. Teaching children to communicate by speech could not be any different from teaching them to communicate by writing. The courts took the view that both were

clearly educational (see also City of Bradford Metropolitan Council v A [1996] COD 449).

[13] The question is whether the time devoted to physiotherapy and occupational therapy (which is not to be regarded as secular instruction as such) nevertheless falls within regulation 21(3) as time occupied in undergoing appropriate treatment for if it is then the time so devoted could not be excluded from the calculation of the hours of secular instruction. Mr Treacy argued that this provision was intended to cover time taken out of class attending things like school dental and medical examinations and treatments flowing therefrom. He referred to the equivalent provisions in regulation 22(a) of the Primary Schools Regulations. However the provisions of the General Regulations are specific in referring to inspections and treatment “under arrangements for school children and young people” and thus clearly refers to specific dental and medical inspections and treatments designed for school children and young persons as a class. Regulation 21(3)(b) of the 1973 Regulations are not so defined. The provision refers to individual pupils who undergo appropriate treatment. That is not treatment that flows from a particular scheme for school children as a class it is pupil specific. This supports Ms Gibson’s argument that the time for therapies for individual children in a special school falls within the requisite period of secular instruction. In the result I conclude that time taken up with physiotherapy and occupational therapy does not mean that is time to be excluded from the requisite period of secular instruction. For the reasons indicated speech and language therapy would clearly fall within secular instruction. Time spent in break periods could not qualify as secular instruction even if the time so spent may have some wider educational value.

The discrimination issues

[14] Mr Treacy's second line of attack was that the school and the Boards were guilty of discrimination against Talia. Educational boards and schools must not discriminate against a disabled pupil in the discharge of relevant statutory functions. In providing a school day which is shorter than that which applies to children who are able bodies in ordinary schools of the same age the school was acting contrary to the duty outlined in article 20(2) of the 2005 Order. Counsel’s argument proceeded on the basis that the applicant is a “disabled person” as defined by Part III of the 2005 Order. Article 19 imposes a duty on Education Boards not to discriminate against a disabled person in the discharge of statutory functions therein. Article 20 particularises the duty with cross references to articles 15 and 16. In making provision for the applicant’s education the Board is discharging a function under the Education (Northern Ireland) Order 1996. Consequently the provision of article 19 and 20 are engaged. In providing a school day which is shorter than that which applies in schools with able-bodied pupils of the same age there is a breach of the duty under article 20(2). The information

provided by the Board indicates that schools in the Belfast Education and Library Board area all have longer school days for their pupils than the hours which are provided in Mitchell House. The Board's response indicates that they have not taken any reasonable steps to remove this disadvantage nor do they appear to accept that there is a substantial disadvantage with regard to the length of the school day for disabled pupils such as the applicant.

[15] Part III of the 2005 Order sets out the legislative provisions which have been made in relation to disability discrimination in education. Article 14 makes it unlawful for the body responsible for a school to discriminate against a disabled person in the arrangement it makes for determining on admission to the school, in the terms it offers to admit a person to a school as a pupil or by refusing or deliberately omitting to accept an application for admission. It is unlawful for the body responsible for a school to discriminate against a disabled pupil in the education or associated services provided or offered to pupils at the school. Discrimination in this context means less favourable treatment compared to that shown to non-disabled pupils. A responsible body also discriminates against a disabled person if it fails to comply with article 16 which requires the responsible body to take reasonable steps in relation to education and associate the approved services provided or offered to pupils at the school. Disabled pupils are not to be placed at a substantial disadvantage in comparison with non-disabled pupils. In the present case no issue of discrimination contrary to articles 14 and 16 arises. Those provisions point to acts of discrimination as between disabled and non-disabled pupils attending a particular school, a matter of significance now in light of the duty imposed to enable children with special educational needs to be educated in grant aided schools if there is no Article 16 Statement in place or if there is, unless that is incompatible with the parent's wishes or the provision of efficient education for other children.

[16] Under article 19 in carrying out its various statutory functions it is unlawful for a Board to discriminate against a disabled pupil as a disabled person who may be admitted to a school as a pupil. Under article 20 each board shall take such steps as it is reasonable for it to have to take to ensure that in discharging any function to which article 19 applies:

- (a) disabled persons who may be admitted to a school as pupils are not placed at a substantial disadvantage in comparison with non-disabled persons; and
- (b) disabled pupils are not placed at a substantial disadvantage in comparison with the pupils who are not disabled.

[17] Ms Gibson argued that it is the Board of Governors of the Mitchell House which carried out the functions of determining the school day not the Belfast Education and Library Board. The school finishing time is an internal

school management issue. The Board has not carried out any relevant function for the purposes of article 19.

[18] The applicant has not pointed to any statutory function to be carried out by the Board or either of them in relation to fixing the school timetable. The 1973 Regulations impose the duty on the relevant school to provide the minimum statutory number of hours of secular instruction in an approved timetable (approval in this context refers to approval by the Department.) Mr Treacy did not point to any statutory provision that transferred that function from the Department to the Board. A school falling within the Regulations must comply with the requirements imposed on them by or under the relevant Order and if it does not approval may be withdrawn by the Department. (See article 34 of the 1986 Order). The school itself is not guilty of discrimination as defined since it is treating equally its pupils (who are all disabled) in relation to the hours of instruction. The Department may well have power to impose requirements in relation to the school's timetable as a condition of its continued approval and if it considered it necessary or appropriate it may be able to effectively secure an increase in hours of instruction to bring the hours of secular instruction into line with what is provided in other schools. There are, however, many issues which would have to be addressed by the Department in consultation with the school in that context, taking account of a very wide range of factors. Since the Department is not a party to the current proceedings and none of these matters arose in the context in which the case is formulated and argued I forbear to comment further on those issues.

Further issues

[19] In view of the conclusions which I have reached it is unnecessary to address in detail the further arguments raised by Ms Gibson on the questions of standing and whether any discrimination claim should only be pursued through the Special Education Needs and Disability Tribunal for Northern Ireland. Had an arguable case of discrimination arisen I see considerable force in the argument that this court should in the exercise of its discretion decline to grant any judicial review relief and leave it to a relevant party to pursue a claim for discrimination before the expert tribunal which has been given a wide range of powers of investigation and fact finding and of determining what appropriate remedies should be provided to prevent discrimination in the future. It is clear from the legislation that a claim before the Tribunal must be pursued by the parents of the child.

[20] In the result I dismiss the application. I shall hear counsel on the questions of costs.