

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

Delivered: 21/12/04

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY N (A MINOR) BY C HIS
FATHER AND NEXT FRIEND FOR JUDICIAL REVIEW

GILLEN J

Introduction

[1] I have anonymised the name of the applicant and his father in this judgment in order to protect the identity of the child. In this matter, C, the father and next friend of N a minor, now applies to this court by way of judicial review as amended pursuant to an order I made on 7 October 2004. The applicant seeks an order of certiorari to quash a decision of an Education and Library Board (which I do not propose to name other than "the Board") not to proceed within a reasonable time with a stage three referral to receive Board support for his condition of dyslexia on the basis of a report provided by Mr Frank Fee, educational psychologist. Further he seeks an order of mandamus compelling the Board to comply with the request for a consultation with an educational psychologist dated 3 November 2003 and to provide such assistance as is required in respect of the special educational needs of the minor applicant. The relevant grounds as set out in the amended Order 53 statement of the applicant are as follows:

(a) A decision not to prioritise the minor applicant's case fails to have regard to a relevant consideration, namely the varying importance of prompt intervention in cases involving different types of special educational need, and the particular importance of prompt intervention in cases of dyslexia.

(b) The failure of the Board to comply with a request for consultation with an educational psychologist dated 3 November 2004 is in breach of its duty under article 4(2) of the Education (Northern Ireland) Order 1996 ("the 1996 Order") to have regard to the provisions of the Code (and in particular the

requirement that children with special educational needs should be identified as early as possible and assessed as quickly as is consistent with thoroughness) in the exercise of the Board's statutory functions.

(c) In failing to consider the report of Mr Frank Fee at the time of the receipt of the report, the Board misdirected itself in elevating the status of the guidance titled Regional EPS guidance for Dealing with Private Psychological and Educational Reports and in applying that guidance inflexibly to the detriment of the applicant and in breach of the duty under article 4(2) to have regard to the Code.

Background

[2] I have already set out the broad background to this case in an unreported decision of my own in this matter granting leave to amend the original application (Re C, unreported, GILC5096 7 October 2004). I have appended a copy of that judgment to the current judgment for ease of reference and I refer to paragraphs 4, 5, 6, 7, 8 and 9 setting out the factual background.

The applicant's case

[3] Mr Donaldson QC, who appeared on behalf of the applicant with Mr Sayers, in the course of a helpful skeleton argument augmented by oral submissions, made the following points:

(i) Article 6 of the 1996 Order requires that an Education and Library Board must "determine and keep under review their policy in relation to special educational provision" and "the arrangements made by it for special educational provision". Article 4(2) of the 1996 Order imposes upon the Boards a duty to have regard to the provisions of the Code of Practice on the Identification and Assessment of Special Educational Needs ("the Code") in the exercise of statutory functions. The Code emphasises that "children with special educational needs should be identified as early as possible and assessed as quickly as is consistent with thoroughness" (see paragraph 1.7). In light of the fact that Mr Irvine a Board education psychologist has indicated that this child may wait 18 months from a stage 3 referral to be seen by a Board educational psychologist, the applicant submits that these duties are being breached. In this context it is submitted that the Board has misunderstood special educational needs. The suggestion is made that whereas Ms Irvine, a Board educational psychiatrist has indicated at paragraph 17 of his first affidavit that prima facie evidence does exist indicating that the child requires special educational provision, that only

means that a statement of special educational needs will not be required. This error in the Board's conception with special educational needs informs its stance in respect of the applicant submits Mr Donaldson. He argues that as the applicant is at stage 3 of the Code of Practice scheme, the Board does not appear to view the applicant as requiring attention as a matter of priority in line with the emphasis placed by the Code of Practice upon prompt identification and assessment of special education needs. Priority appears to be given to stage 4 assessments, pre-school assessment and contributions to annual reviews.

(ii) The applicant submits that the Board failed to draw a distinction between consideration of a private report for the purposes of determining its adequacy and assessment of a child where the report provided is not adequate. He asserts that if a determination is made that a report is inadequate, the child would be required to remain on a waiting list awaiting adequate assessment. However, if a report is deemed adequate, then no assessment is required by the Board's educational psychologist. In such circumstances it is submitted that the relevance of the Board's justification based upon assessment by the Board's educational psychologist disappears. In terms the applicant submits that the Board has incorrectly considered that the provision for a private report involves the assessment of a child out of turn. Instead, it is argued, all that is required of the Board on receipt of a private report is consideration of the question of whether Board assessment is in fact necessary at all.

(iii) The applicant rejects the Board's proposition that if a child were to receive an immediate referral to the Board's support services, he would be afforded access in advance of his rightful place in the waiting list. The point is made that the waiting list referred to is a waiting list for assessment not for access to support services. A referral does not mean that another child is denied access to support services.

(iv) It is applicant's submission that the Board has improperly elevated the status of a guidance document namely "Regional EPS Guidance for Dealing with Private Psychological and Educational Reports" exhibited to the first affidavit of Mr Irvine and marked "SR12". That document sets out procedures that require to be followed when a parent provides a private report to a Board's educational psychology service. It is argued that the Board has allowed this to fetter its discretion to dispense with a requirement of an assessment by the Board's educational psychologist in cases in which an adequate alternative assessment has been conducted. Point 5 of that guidance requires that the Board's educational psychologist carry out an assessment in sufficient deal to satisfy the Board that the pupil meets the criteria for Board based provision and verify that the tests specified by the Board is part of its admission criteria have been administered recently and to the acceptable standards of professional psychology practice. This procedure is contrasted

with the procedure in respect of a stage 4 statutory assessment. In this regard, when making such an assessment (under article 15 of the 1996 Order) the Board is obliged to seek advice from a number of different sources (from the child's parent, educational service, medical advice, psychological advice, social services advice and any other advice which the Board considers appropriate for the purpose of arriving at a satisfactory assessment). However by Regulation 5(5) the Board need not seek psychological advice if it has obtained such advice within the preceding 12 months and the Board, the person providing the advice and the child's parents are satisfied that the existing advice is sufficient for the purpose of arriving at a satisfactory assessment. Hence it is argued that the Board is imposing a more stringent procedure in the case of stage 3 assessment.

(v) Mr Donaldson submitted that the seven categories of special educational needs set out in the appendix to the Code of Practice make it clear that a varied spectrum of learning difficulties is encompassed by the definition of special education needs. However it is argued that the Board fails to recognise that the definition of learning difficulty includes cases in which no disability is involved, but in which the child is not developing at a similar rate to other children of their age. Consequently, the argument runs, the Board fails to recognise the different categories of learning and that no consideration is given to the benefit of prioritising suspected cases of learning difficulty (such as dyslexia) in which Mr Fee claims prompt intervention is of particular importance. This, it is argued, conflicts with a duty to have regard to the stated practice of early identification and assessment of children with special educational needs.

The respondent's case

[4] Ms Gibson, on behalf of the respondent, in the course of a clear and skilfully presented skeleton argument and oral submission made the following points.

(i) Article 4(2)(a) of the 1996 Order imposes a duty on Boards and Boards of Governors of grant aided schools exercising functions under Part II to have regard to the provisions of the Code. The referral made by the school placed the minor applicant at the onset of stage 3 of the Code of Practice and hence part of the school based stages of assessment and provision. It is useful at this stage to note that stages 1-3 are described in the Code as school based stages, being those stages where there is a continuous and systematic cycle of planning, action and review within the school to enable the child with special educational needs to learn and progress. It is for the individual schools, in consultation with Boards, to adopt the procedures most suited to their circumstances so as to fulfil most effectively their duties towards pupils with special educational needs. In contrast stages 4 and 5 are the statutory

assessment with the statutory involvement of the Board. Stage 4, for example, involves consideration by the Board, working with the school parents and other agencies, as to whether a statutory assessment of the child's special educational needs is necessary. Stage 4 involves reaching that decision, and if appropriate, conducting the assessment. However, an assessment under article 15 of the Order will only be taken if the Board believes that it needs, or probably needs, to determine the child's special educational provision itself by making a statement. It is Ms Gibson's submission that this instance is clearly a stage 3 area where the school has made a request to the Board for a consultation with an educational psychologist. This is outside the statutory assessment procedure. She argued that in accepting the schools referral for assessment and making arrangements for same, the Board is not exercising any functions under Part II of the 1996 Order.

(ii) Alternatively it is argued that the Board has not failed to have regard to the provisions of the Code or that the procedure adopted and decisions taken would constitute a failure to have regard to the same. It is submitted that by organising a composite waiting list, with the waiting list for each educational psychologist, the Board in a systematic manner causes its educational psychology service to determine whether any intervention or provision is to be made. The Board accepted the minor applicant's referral and accordingly he is waiting his turn in the list. The waiting time is dictated by the demands made on the Board's educational psychology service limited as it is. It was submitted that the Board is currently operating to the capacity of its existing educational resources and can do no better.

(iii) Within the waiting list, statutory work takes precedence. Paragraph 7 of Mr Irvine's first affidavit refers to statutory work as including the statutory assessment procedure and contributions to annual reviews. Annual reviews relate to statements about children which the Board is required to undertake under article 19 of the 1996 Order. Statutory work takes precedence over the other two sections in each list.

(iv) It is submitted that the waiting list which is operated by the respondent ensures that referrals will be dealt with in the order that they are received. Private reports (and any other information provided by parents) are considered when the child's turn to be assessed comes on the waiting list. It is submitted that this is an entirely fair and rational system. Assessment must be the precursor to intervention. If a private report is considered by the Board on receipt and is found to be adequate, resulting in no further assessment being required, the submission is made that the advantage enjoyed by the provision of a private report in those circumstances is obvious in that such a child would be "jumping the queue". The Board contends that the operation of the system postulated by the applicant would confer an advantage over children referred to the Board before the applicant but whose parents could not afford to pay for the private report. In so doing the Board has reflected

the procedures set out in the Regional Educational Psychology Service Guidance document, has properly had regard to that agreement and guidance, and has made a provision which is neither unreasonable nor irrational. On the contrary, it is submitted that for the Board to depart from such a procedure would require some exceptional, fair, reasonable or proper grounds for conferring advantage on the minor applicant ahead of other children in the list. Far from fettering its discretion, the Board argues it is simply operating a fair and reasonable system.

(v) The respondent submits the importance of early intervention of the applicant's dyslexic difficulties and early provision to meet these difficulties is accepted. However, Mr Irvine in paragraph 26 of his second affidavit avers that it is difficult to conceive of any situation where early identification and intervention would not be regarded as urgent. The Board's evidence is that it is impossible to prioritise any particular category of disability as being more urgent or important than any other. There is no evidential foundation to the assertion made by the applicant that there is a varying importance of prompt intervention in cases involving different types of educational need and a special importance of prompt intervention in the cases of dyslexia.

Conclusions

[5] I have come to the conclusion that the argument submitted by the respondent in this case are correct.

I have determined the following findings in this matter;

(i) I remain unconvinced that the Board in dealing with this matter has not been exercising any function under part 2 of the 1996 Order. Although stages 1 to 3 of the Code of Practice are "school based stages", nonetheless the guidance contained therein is explicitly given, at paragraph 2.42 of the Code of Practice to "boards and schools as are the detailed procedures to be followed at stages 1 - 3". Once the school makes a request to the Board for a consultation with an education psychologist, and the assessment is to be carried out by the Board at this stage, notwithstanding this stage 3 is outside the statutory assessment as stage 4, I consider that the board still needs to conform with its duty under Article 4(2)(a) of the 1996 Order to have regard to the provisions of the Code. Indeed I note that at paragraph 20 of Mr Irvine's affidavit of 6 September 2004 he states;

"20. In its in this particular case, the Board has followed its procedures correctly, had regard to the Code and complied with its statutory duties."

I believe this accords with the intention of the code and in particular the reference to the five stages at paragraph 2.16 of the Code of Practice which states;

‘2.16 This Code of Practice, acknowledging that there is a continuum of special educational needs, sets out a five stage approach, within which responsibility for pupils within stages 1 - 3 lies at school level, (with close involvement by the Board at stage 3) and with both Board and schools at stages 4 and 5.’

Accordingly I conclude that the Board does have a function under stage 3 albeit not at stages 1 and 2. Article 4 of the 1996 Order states ‘4-(1) the Department shall issue, and may from time to time amend, a Code of Practice giving practical guidance in respect of the discharge by Boards and Boards of Governors of grant-aided schools of their functions under this power. It is my view that this was meant to embrace that part of their function which is included in its close involvement at stage 3 albeit that responsibility for the pupils at this stage lies at school level. As paragraph 1.3 of the Code makes clear, the Code has to read as a whole so that a full picture can be gained of the various parts of the process, the roles of all concerned and the particular considerations affecting provision for children at different stages in their lives and school careers. I do not believe that parliament intended that the Code of Practice should exclude the Board from stage 3 notwithstanding that it is clearly closely involved at that stage. To do so would afford the Board the luxury of power and involvement without responsibility.

(ii) I consider that the Board has had appropriate regard to the provisions of this Code and that the procedure adopted and decisions taken comply with that Code. If I am wrong in my conclusion that the Board was obliged to comply with the Code, I have in any event come to the conclusion that the procedure and decisions adopted by the Board were rational, reasonable and appropriate. The concept of a composite waiting list, with a waiting list for each educational psychologist leading to assessment in order to determine whether any intervention of provision is to be made seems to me to be entirely appropriate. This child has been referred and is now on this waiting list. I can conceive of no fairer system than this. Given the demands made on the Board to assess a significant number of children, waiting periods are inevitable and the length of that time on the waiting list is certain to be influenced by the nature of the demands being made on the educational psychology service. That service is obviously a finite item and the delays will obviously be determined by the number of children seeking to avail of that service. I can conceive of no reason why the Board is not entitled to take the

view that statutory work at the later stage must take precedence which will include the statutory assessment procedure and contributions to annual reviews. Annual reviews according to Mr Irvine relate to statements about children which the Board is required to undertake under article 19 of the 1996 Order. I find nothing irrational about a process that ensures statutory work takes precedence over the other sections in each list. The courts must be slow to criticise the formulation of a policy for so dealing with children with special educational need when such a policy is peculiarly well suited to be drawn up by those with expert knowledge of the problems from which such children suffer. Indeed policies such as this are an essential element in securing a coherent and consistent performance of their functions. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion. The particular circumstances always require to be considered. Provided however that the policy permits the authority to retain a free exercise of discretion a policy such as this serves a useful purpose of giving a reasonable guidance to all concerned including schools, the children and the Boards. I find nothing unreasonable or unrational about this policy and I discern nothing inflexible in its operation in this instance. Clearly if some exceptional but nonetheless fairer reasonable ground for conferring an advantage on one child arises which should place that child ahead of the other children on the list, then the procedure must accommodate that. I am satisfied the Board operates such a policy but there was no need to invoke the exceptional circumstances consideration in this instance. Mr Irvine's affidavit of 6 September 2004 relates;

"As referrals are dealt with in the order in which they received, a private report will not confer an advantage in having the child assessed by the Board's educational psychologist ahead of other children who have been referred before him or enabling the child to access Board support services such as specifically learning difficulties support ahead of other children who have been referred before him. There are 35 children on the list ahead of the minor applicant all of whom were referred before him. There are four children from the same school due to be assessed before him who were referred to the Board between April and July 2003. There are no exceptional, fair, reasonable or proper grounds for conferring an advantage on the minor applicant ahead of the other children on the list. To do so would involve preferring the minor applicant ahead of all other children on the list with priority merely because his

parents had the financial means to commission a private report.”

(iii) I regard the Regional Educational Psychology Service Guidance document relating to private reports as an entirely appropriate method of ensuring a uniform approach to such private reports. I think there is a great deal to be said for Mr Irvine’s view that;

“Early identification of the child’s dyslexic difficulties and early provisions to meet those difficulties is important. However this observation applies to all categories of special educational needs. The report of the Northern Ireland Task Force on Autism specifically recommends in several places the importance of early diagnosis and intervention. The National Autism Plan for Children again stresses the importance of early identification and provision. A recently prepared report on developmental co-ordination disorder by a group of Northern Ireland educational psychologists stresses the importance of early identification and intervention for children with this condition. It is difficult to conceive any condition where early identification and intervention would not be considered as urgent. The Board is obliged to assess carefully and accurately all cases referred. It is impossible to prioritise any particular category of disability of being more important and more urgent than any other.”

I consider that this is an appropriate policy to adopt and it would be invidious to place the Board in a position of having to choose a priority list for consideration or assessment ahead of the normal waiting list. To do so would create not only a perception of injustice but would lend itself to accusations of financial preference. I fear that such an approach could create a smouldering sense of injustice in those who are unable to finance a private report and bring the reputation of the waiting list into disrepute. Accordingly I consider that the distinction that the applicant draws between consideration and assessment is a flawed one affording prima facie preference to those with funds to afford a private report. In adopting this policy I do not believe that the Board has improperly elevated the status of the guidance document or has applied a policy based upon the guidance inflexibly or to the detriment of the applicant. This is a procedure that applies to everyone equally with no advantage being given to any. In so far as priority is afforded to the statutory work which may lead to a statement of special educational needs, I find nothing irrational or unfair about that. That

is a priority which is based on appropriate criteria unconnected with any advantage afforded by a private report.

(iv) I have therefore concluded that this body has had a proper regard to the Code of Practice, it has correctly categorised the divergent nature of special educational needs, has not acted inflexibly or fettered its discretion improperly and has correctly refused to afford any priority based on the provision of a private report.

I therefore dismiss this application.