

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR62's Application [2013] NICA 51

IN THE MATTER OF AN APPLICATION BY JR62 FOR JUDICIAL REVIEW

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

COGHLIN LJ (delivering the judgment of the court)

[1] This is an appeal from a judgment by Treacy J in the course of which he reversed a decision of the appellant Education and Library Board (the "Board") taken in 2011 declining to provide the minor respondent (the "respondent") with direct teaching support but indicating that his application would be reconsidered in the academic year 2012/13. At the material time it would appear to be common case that the respondent suffered from dyslexia and that he was being assessed at the "Stage 3" level of the Code of Practice (the "Code") issued by the Department of Education (the "Department") in accordance with the provisions of the Education (NI) Order 1996 (the "1996 Order"). For the purposes of this appeal the appellant was represented by Dr McGleenan QC and Mr Paul McLaughlin while Mr Liam McCollum QC and Mr Aidan Sands appeared on behalf of the Board. The court wishes to acknowledge the very considerable assistance that it derived from the carefully prepared and well marshalled written and oral submissions from both sets of counsel.

[2] The factual background to these proceedings has been helpfully and clearly set out in detail at paragraphs [1]-[8] of the judgment delivered by Treacy J at first instance which we gratefully adopt and reproduce for the purposes of the appeal:

[1] The applicant is a 9 year old boy who has special educational needs (SEN) including dyslexia. He does not have a statement of SEN but is at Stage 3 of the school based stages described in the Code of Practice on the Identification and Assessment of Special Educational Needs (“the Code”) which was issued by the Department of Education in September 1998.

[2] In March 2010, when in Primary 4, the applicant was referred to the educational psychology services of the Respondent Board (‘the Board’) by his School Principal on the basis that he ‘was experiencing difficulty in his literacy and numeracy skills and had poor concentration skills’. On foot of that referral he was assessed by Gabrielle Trinder, an Educational Psychologist employed by the Board on 27 September 2010. Her report noted that ‘L was provided with individual teaching in literacy during his P2 and P3 years’ and that in P4 he ‘receives four sessions of literacy and numeracy support each week within a small group’.

[3] In the course of her assessment Ms Trinder applied a series of tests which established that his ‘verbal, non-verbal and overall cognitive ability is within the average range’. She tested his core attainments and found that in word reading and spelling skills his score was in the well below average range and that his reading comprehension was also well below average. In each of the areas she assessed she found this average ability pupil was scoring so poorly that more than 98% of children of his age would have achieved a better score than he did. Clearly there was a startling difference between the results this average ability boy was capable of achieving and those he was achieving in fact. This was despite the very significant help his school had provided in his P2 - P4 years.

[4] Ms Trinder reported these results and made the following recommendation:

‘A referral will be made to the Board’s outreach support service for pupils with

specific literacy difficulties. In the interim he should continue to receive a high level of support for literacy and numeracy within the school's own special needs arrangements.'

[5] The applicant's mother swore an affidavit in September 2011 in which she said that as a result of Ms Trinder's report 'the Board placed L on a waiting list to receive direct literacy support ... I fully expected that this September (i.e. September 2011) he would be given a place in Cottown Reading Support Unit. It is a specialist facility run by the Board.' The mother's affidavit then exhibits a letter dated 28 June 2011 which she received from the school's Special Educational Needs Co-ordinator (SENCO) in which the latter reported a telephone conversation she had with the Board on the previous day. The SENCO enquired whether the applicant would receive support in Cottown Reading Unit during his Primary 5 year. She reports in her letter 'I was told that a letter confirming a part-time place for next year was to be posted out to you and school this week'. This information was confirmed in the child's annual school report for Primary 4 which states 'L will receive further support in Primary 5 - special needs, numeracy partnership and SEELB reading unit (part-time)'

[6] On 4th July 2011 the mother received a letter from John Shivers, an Education Officer with the Board, dated 27/6/2011. This letter stated that new arrangements had been put in place for the school year 2011-2012 under which it was proposed that a teacher from the Literacy Support Service would go out to the school to 'discuss L's previous test scores with the class teacher and offer general advice to the class teacher on teaching strategies that should be adopted ..' This was not the direct literacy teaching the mother was expecting. She sought legal advice.

[7] Her solicitor wrote to the Board recounting the history and asserting that the family had a legitimate expectation that direct teaching support would be provided for L for his P5 year. She pointed out that

the child met Board criteria for the provision of this form of support, and asked the Board to review the child's case. She received a substantive reply by letter dated 22 August 2011 from John Shivers in which he stated that 'due to the high level of referrals (for direct teaching support) the Board has had to apply criteria to access direct teaching'. He restated what the criteria were and noted that their effect which was that L 'will be considered as a priority for support in 2012/13'. He went on to say that 'whilst the Board regrets that L (must) wait another year for direct teaching the Board has a limited budget for the provision of non-statutory support'.

[8] The Applicant's mother is anxious that the provision currently offered by the Board is not meeting her child's needs or complying with Departmental policy on the treatment of numeracy and literacy difficulties. Para 25 of her affidavit refers to the Department of Education Strategy Document for these difficulties 'Count, Read, Succeed', issued by Circular dated 13/5/2011. This indicates that where a pupil has had a Stage 3 assessment, his needs should be met in line with that assessment. She also refers to evidence given by the Department of Education to the Assembly Committee for Education on 15/6/2011 in which it was said of literacy and numeracy difficulties that:

'Research shows ... that where we provide intervention at the age of six to seven, there is an 80% success rate for children with those difficulties. If you leave that intervention until the age of 10, there is only a 20% chance of those children becoming successful'.

Para 26 of the affidavit describes her son's current learning difficulties and the effects they are having on this p.5 child:

'He finds his reading, writing and spelling very difficult both at home and in school. He can really only spell words of 2 or 3 letters.... L..... is a good

and well behaved child at school but I have noticed a marked deterioration in his behaviour at home which I believe is due to the stress he experiences from not being able to cope with school work and home work. This school term L... has been coming home from school with home works that are simply beyond his capability. L... is becoming very distressed and aggressive when attempting his home work and I have to return his books to his school bag with the work set incomplete. L... is becoming very anxious about going to school in the morning without having completed his homework from the night before. Consequently, he is doing all that he can to slow down the journey to school in the mornings and it is clear that he really doesn't want to go to school.'

Para 27 of the affidavit describes the help his school is providing for these difficulties:

'In 2010/2011 L... got school based small group support of three half hour sessions for literacy and two forty minute sessions for numeracy.....this year it will be reduced to 2 half hour sessions for literacy and two 40 minute sessions for numeracy. This means that his special educational provision for this year will actually be less than last year. This provision is not in lieu of direct teaching support; L... would have received this in any event.'

[3] Two further events of significance occurred in May 2011. These were:

(i) In May 2011 the Department published a new Strategy entitled "*Count, Read: Succeed – A Strategy to Improve Outcomes in Literacy and Numeracy*" the focus of which was to improve literacy and numeracy standards amongst all children. Paragraphs 2.18–2.20 of that document provided as follows:

“2.18 One aspect of how schools can improve literacy and numeracy standards is by setting high expectations and by providing high-quality, well-supervised teaching and learning. This must be complimented with early intervention where necessary for pupils of any age, informed by the effective use of data, to address the needs of those who are struggling.

2.19 Effective early intervention must be available to pupils in their early years, which develop the foundations for literacy and numeracy, and also to pupils in primary and post primary provision. Early intervention must be accompanied by support for teachers, schools and pupils with additional needs, taking account of existing DE policies...

2.20 When a pupil is facing a barrier to learning, whether that is temporary or likely to be permanent, the class teacher remains the person responsible for meeting the pupil’s needs. The teacher must be properly supported within the school and by the wider support system in addressing such challenges drawing on informal and formal sources of advice and assistance as appropriate.”

(ii) Also in May 2011 the Department issued a Resource Allocation Plan (‘RAP’) to the Board identifying targets which had to be achieved from the budget allocated to it for the academic year 2011/12. The RAP was issued by the Department in accordance with the provisions of the Education and Libraries (N.I.) Order 2003. One of those targets related to the provision of special education needs and provided that “Agreed ELB support, advisory and educational psychology services to be provided to Stage 3 SEN within six months of Stage 3 assessment.”

[4] The new Department Strategy recognised that, in some cases, the school might wish to seek support from external sources, including the Board. Paragraph 5.30 noted that a non-statutory assessment at Stage 3 of the Code would identify any such support and resources required by the individual pupil to supplement the school’s provision but that the class or subject teacher remained responsible for meeting the pupil’s needs.

[5] There were two changes to the form of literacy support services provided by the Board in the academic year 2011/12. It was appreciated that transporting pupils

to the Cottown Reading Centre on a part-time basis incurred significant costs both in terms of emotional stress to the pupils concerned and financially for the Board in terms of transport costs. Consequently, a decision was taken that, for pupils accepted to Cottown on a part-time basis, the teacher would travel to the schools and provide part-time direct teaching within a familiar environment. Secondly, it was the responsibility of Mr Shivers to ensure that the Board complied with the target contained in the RAP to provide agreed support, advisory and educational psychology services within six months of Stage 3 assessment. This was the first time that the Board had ever received a target from the Department contained in a RAP which was related to this aspect of special educational need provision. According to Mr Shivers, the Department did not make clear any reasons for the new target, although it was “understood” by the Board that it was part of the implementation of the new Count, Read: Succeed Strategy. No corresponding increase in funding to enable this new target to be met was forthcoming from the Department. It seems that Mr Shivers approached the Chief Executive of the Board in an attempt to secure appropriate additional funding but without any success. In response to this target, the Board asked Mr Shivers to develop a tailored programme of educational and literacy support for each child who required assistance but who did not achieve a place in the reading centre. Mr Shivers then set himself to devise a provision which would not involve any reduction in the number of dedicated places within the reading centres. That programme was to be created by co-operation between the classroom teacher, the school’s special education needs co-ordinator and a specialist literacy teacher from the Board. It became known as “Outreach Advisory Support.” The progress of individual children within that programme was to be subject to continuous review and supervision by the Board’s specialist teacher throughout the academic year. For those who had not been allocated part-time or full-time reading centre places, Outreach Advisory Support provided enhanced teaching provision within the existing classroom setting with assistance, advice and monitoring provided to the child’s teacher by one of the Board’s specialists. That provision was approved by the Board which resulted in three different levels of Board intervention being available at Stage 3 including advisory support, direct teaching (part-time) and direct teaching (full-time) as detailed at paragraph 13 in the affidavit provided by Mr McKeever. It was the Board’s view that the new programme of advisory support complied with the Department’s Strategy document “Count, Read: Succeed” in locating the child’s classroom and teacher at the heart of the support and the first place at which intervention should occur. The programme also complied with paragraph 2.66 of the Code by involving a specialist in an advisory capacity.

[6] In a letter from the appellant to the Court of Appeal dated 13 December 2012 the appellant indicated that, following the judgment of Treacy J, the appellant was provided with direct literacy support from the Board’s specialist literary teacher as part of an existing outreach programme for the remainder of his P5 term. He was then provided with a place at Cottown Reading Centre at the beginning of his P6 term. The appellant notes that, in those circumstances, the case has become academic

but argues that the learned judge's decision was wrong in law and that there is sufficient public interest in the legal issues raised to merit consideration of the appeal by this court.

The Legal Framework

[7] Part 2 of the 1996 Order makes provision for the circumstances of children with special educational needs. Article 3 defines "special educational needs" as "... a learning difficulty which calls for special educational provision to be made" for the pupil concerned and "learning difficulty" is defined in sub-paragraph 2 as follows:

"(2) For the purposes of this Part, subject to paragraph (3), a child has a "learning difficulty" if-

- (a) he has a significantly greater difficulty in learning than the majority of children of his age,
- (b) he has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in ordinary schools, or
- (c) he has not attained the lower limit of compulsory school age and is, or would be if special educational provision were not made for him, likely to fall within sub-paragraph (a) or (b) when he is of compulsory school age."

and "special educational provision" is defined as:

".. in relation to a child who has attained the age of two years, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in ordinary schools,"

[8] Article 4(1) of the 1996 Order requires the Department to issue a Code of Practice giving practical guidance to, amongst others, education boards in relation to their functions in respect of special education needs children, while Article 4(2) places a "duty" on the boards "to have regard to the provisions of the Code." Article 6 requires an Education Board to determine its policy in relation to special education provision and to keep under review both its policy and any arrangements made by it

for special education provision. In so doing a board is required to consult with Boards of Governors of grant-aided schools in its area, other boards, the Council for Catholic Maintained Schools and such other persons as it thinks fit. Article 8 identifies the duties placed upon ordinary schools in relation to pupils with special educational needs in respect of whom no statement is maintained under Article 16. The Boards of Governors of such schools are to use their *best endeavours* to secure that the special educational provision called for is made to meet the needs of any pupil attending the relevant school.

[9] Also relevant to these proceedings are Articles 13, 15, 16 and 17 of the 1996 Order the relevant provisions of which are:

“Identification and assessment of children with special educational needs

General duty of board towards children for whom it is responsible

13. - (1) A board shall exercise its powers with a view to securing that, of the children for whom it is responsible, it identifies those to whom paragraph (2) applies.

(2) This paragraph applies to a child if-

- (a) he has special educational needs, and
- (b) it is necessary for the board to determine the special educational provision which any learning difficulty he may have calls for.

(3) For the purposes of this Part a board is responsible for a child if he is in the area of the board and-

- (a) he is a registered pupil at a grant-aided school, or
- (b) he has attained the age of two years, is not over compulsory school age and has been brought to the attention of the board as having, or probably having, special educational needs.

Assessment of educational needs

15. - (1) Where a board is of the opinion that a child for whom it is responsible falls, or probably falls, within paragraph (2), it shall serve a notice on the child's parent informing him-

- (a) that the board is considering whether to make an assessment of the child's educational needs,
- (b) of the procedure to be followed in making the assessment,
- (c) of the name of the officer of the board from whom further information may be obtained, and
- (d) of the parent's right to make representations, and submit written evidence, to the board within such period (which shall not be less than twenty-nine days beginning with the date on which the notice is served) as may be specified in the notice.

(2) A child falls within this paragraph if-

- (a) he has special educational needs, and
- (b) it is necessary for the board to determine the special educational provision which any learning difficulty he may have calls for.

(3) Where-

- (a) a board has served a notice under paragraph (1) and the period specified in the notice in accordance with paragraph (1) (d) has expired, and
- (b) the board remains of the opinion, after taking into account any representations made and any evidence submitted to it in response to the notice, that the child falls, or probably falls, within paragraph (2), the board shall make an assessment of his educational needs.

(4) Where a board decides to make an assessment under this Article, it shall give notice in writing to the child's parent of that decision and of the board's reasons for making it.

(5) Schedule 1 (which makes provision in relation to the making of assessments under this Article) shall have effect.

(6) Where, at any time after serving a notice under paragraph (1), a board decides not to assess the educational needs of the child concerned it shall give notice in writing to the child's parent of the board's decision and the reasons for making it.

Statement of special educational needs

16. - (1) If, in the light of an assessment under Article 15 of any child's educational needs and of any representations made by the child's parent, it is necessary for the board to determine the special educational provision which any learning difficulty he may have calls for, the board shall make and maintain a statement of his special educational needs.

(2) The statement shall be in such form and contain such information as may be prescribed.

(3) In particular, the statement shall-

(a) give details of the board's assessment of the child's special educational needs, and

(b) specify the special educational provision to be made for the purpose of meeting those needs, including the particulars required by paragraph (4).

(4) The statement shall-

(a) specify the type of school or other institution which the board considers would be appropriate for the child,

- (b) if the board is not required under Schedule 2 to specify the name of any grant-aided school in the statement, specify the name of any school or institution (whether in Northern Ireland or elsewhere) which it considers would be appropriate for the child and should be specified in the statement, and
 - (c) indicate any provision for the child for which it makes arrangements under Article 10(1)(b) otherwise than in a school or institution and which it considers should be indicated in the statement.
- (4A) Paragraph (4)(b) does not require the name of a school or institution to be specified if the child's parent has made suitable arrangements for the special educational provision specified in the statement to be made for the child.
- (5) Where a board maintains a statement under this Article-
- (a) unless the child's parent has made suitable arrangements, the board-
 - (i) shall arrange that the special educational provision indicated in the statement is made for the child, and
 - (ii) may arrange that any non-educational provision indicated in the statement is made for him in such manner as it considers appropriate, and
 - (b) if the name of a grant-aided school is specified in the statement, the Board of Governors of the school shall admit the child to the school.
- (6) Paragraph (5)(b) does not affect any power to suspend or expel from a school a pupil who is already a registered pupil there.

(7) Schedule 2 (which makes provision in relation to the making and maintenance of statements under this Article) shall have effect.”

[10] If the relevant Board determines that no special educational provision is necessary and refuses to make a statement, the parent of the child concerned may appeal to the Special Educational Needs Tribunal in accordance with Article 17.

The Code of Practice

[11] The Code of Practice issued by the Department in accordance with Article 4 of the 1996 Order identifies, at paragraph 1.6, a number of fundamental principles including the need for children with special education needs to have the greatest possible access to a broad and balanced education which should, wherever appropriate and taking into account the wishes of their parents, be delivered alongside their peers in mainstream schools. The Code adopts a 5 stage approach to special education provision with Stages 1-3 being school-based while the school shares responsibility with the relevant Board for Stages 4 and 5. The Stages are as follows:

Stage 1 Teachers identify and register a child’s special educational needs and, consulting with the school’s Special Educational Needs (SEN) Co-ordinator, take the initial action.

Stage 2 The SEN Co-ordinator takes lead responsibility for collecting and recording information and for coordinating the child’s special educational provision, working with the child’s teachers.

Stage 3 Teachers and the SEN Co-ordinator are supported by specialists from outside the school.

Stage 4 The Board considers the need for a statutory assessment and, if appropriate, makes a multidisciplinary assessment.

Stage 5 The Board considers the need for a statement of special educational needs; if appropriate, it makes a statement and arranges, monitors and reviews provision.

[12] The Code conceives of special education needs as a continuum and paragraphs 2.17 and 2.18 provide as follows:

“2.17 Progress in response to action taken at one of the first 3 stages may well mean that the pupil will not have to move on to the next. Only for those children whose progress continues to cause concern at one stage will the school need to move to the next stage. A relatively large proportion of children may be helped by the Stage 1 procedures, with smaller proportions at Stages 2 and 3. Only where children do not progress even with support at Stage 3, ie only in a very small minority of cases, should the school consider referral to the Board with a view to a statutory assessment. Information on a child’s learning difficulty, and the special educational provision made up to and including Stage 3, will provide evidence for the Board in deciding whether to make a statutory assessment at Stage 4.

2.18 These stages will not usually be steps towards statutory assessment; nor are they hurdles to be crossed before a statutory assessment can be made. They are means of informing decisions to be made by schools, in consultation with parents, as to what special educational provision is necessary to meet the child’s needs. There may be cases where action at Stages 2 or 3 will be appropriate even if no action has previously been taken at Stage 1.”

[13] Paragraphs 2.60, 2.61, 2.66 and 2.67 provide guidance specifically in relation to Stage 3 in the following terms:

“2.60 Stage 3 begins with a decision either at Stage 2 review, or following discussion about initial concerns between the SEN co-ordinator, principal, teachers and parents, that early intensive action with external support is immediately necessary.

2.61 The SEN co-ordinator continues to take a lead role, working closely with the child’s teachers and sharing responsibilities for the child with the appropriate external specialist services ...

2.66 The specialist(s) may be involved in working with the child directly; may act in an advisory capacity, supporting the class teacher or subject

teachers in implementing the plan, or may recommend additional specialist support. In some instances medical treatment or different management of the child in school, based on medical advice, may considerably reduce the child's special educational needs. Medical advice may include advice from the school health service, the child's GP and from therapists.

2.67 Specific targets should be set for all aspects of the education plan and special monitoring and assessment arrangement made ..."

[14] In Stage 3, the SEN co-ordinator should set a review date, normally within a term, which should focus on the child's progress, the effectiveness of the education plan, the need for any further advice and future action, in particular whether the child is likely to be referred in future for statutory assessment. In relation to these reviews, the Code states:

"2.70 The outcome of the review may be that:-

- The child continues at Stage 3

If progress has been satisfactory, a new educational plan may be drawn up. This should set new targets in light of the experience of the first plan. If progress remains satisfactory after 2 review periods, the SEN co-ordinator, consulting the external specialists involved, may decide to increase gradually the period between reviews; or

- The child reverts to Stage 1 or 2

If progress continues to be satisfactory for at least 2 review periods, the SEN co-ordinator, consulting the principal and external specialists, may decide that the child no longer needs external specialist intervention and special educational provision under Stage 3. The child may then be recorded as having special educational needs at Stages 1 or 2, and action appropriate to those stages taken; or

- The principal considers referring the child to the Board for statutory assessment

If, by the second Stage 3 review, the child's progress is not satisfactory, the principal, on the advice of the SEN co-ordinator, should consider advising the Board that a statutory assessment might be necessary."

The decision at first instance

[15] In a carefully reasoned judgment, Treacy J focused upon Articles 13 and 15 of the 1996 Order each of which refer to the same two statutory conditions namely, the identification of a child with special educational needs in respect of whom it is necessary for the Board to determine the special educational provision which any relevant learning difficulty might require. However, in his view, the duties imposed by these two articles were quite different. In his view, Article 13 did not entitle the Board to make any "determination" of the needs of the relevant child but simply required the Board to identify children likely to require statutory assessment. Once identified, Article 15 imposed a specific duty upon the Board to determine the needs of a relevant child. He considered that Article 13 required Boards to make the interventions needed to enable a child to move forward towards "identification" which is reached when the evidence shows that no school based intervention is capable of meeting his/her needs. If the Board refuses a school based intervention that it has power to supply, such refusal automatically stops the process of identification from progressing any further and the child is effectively prevented from being assessed in accordance with Article 15. In effect, the child becomes stalled at Stage 3. Any request by the parents for statutory assessment or an appeal therefrom to the Tribunal would lead to an "administrative cul-de-sac" as the applicant would be unable to satisfy the statutory criteria.

[16] The learned trial judge did recognise that, in the exercise of its powers, a public authority might take resources into consideration and that Parliament had intended to allow Boards a margin of discretion as to the time frame within which identification of relevant children would be achieved. However, in his opinion, the relevant question for children then became "how long is too long or - when does delay amount to refusal?" The judge expressed understandable concern that a failure to act would have the potential to make any learning difficulty more severe or more entrenched than would otherwise have been the case. At paragraph [59] subparagraph (5) he expressed one of his conclusions in the following terms:

"In the present case, evidence from the Department of Education indicates that intervention for numeracy and literacy difficulties have an 80% success rate if provided at the age of six to seven, but only a 20% chance of success if delayed until the age of 10. This Applicant is fast approaching the end of the time frame for optimal success of intensive intervention,

therefore the intervention must be delivered for him without any further delay.”

Treacy J rejected the intervention proposed by the Board under its new criteria and outlined in Mr Shiver’s letter of 27 June 2011 as not sufficiently intensive to satisfy the requirements of paragraph 2.60 of the Code. In his view, the intervention required was the direct literacy teaching from a literacy specialist indicated by the educational psychologist.

The parties’ submissions

[17] The appellant submitted that the primary duty placed upon the Board was to “identify” those children for whom it was “necessary for the Board” to determine the relevant special educational provision. The mechanism by which the Board should decide whether or not it was necessary for it to determine the special educational provision for a particular child was through a formal statutory assessment under Article 15(3) which should be conducted where the Board has reached a conclusion that it was either necessary or probably necessary for it to determine the relevant provision. If, following assessment, that transpired to be the case, the necessary provision was to be secured by means of a statement. The Board was not under a duty to make special education provision for a child, unless it had first been determined by the Board that it was necessary or probably necessary for the Board to determine the special educational need which should be made for the particular child. In the present case the learned trial judge had erred in finding that the indirect literacy support provided by the Board to the applicant was “not sufficiently intensive to satisfy paragraph 2.60 of the Code” and was neither “specialist” nor “effective” – the applicant provided no expert evidence of any kind by which to challenge the adequacy of the indirect literacy support. Furthermore, even if there had been a breach of Article 13, the learned trial judge had effectively pre-empted the outcome of the assessment by identifying the provision which was required to meet the applicant’s special educational needs and by declaring that it should be made available without delay. Such a decision should only be made by educational professionals following the conduct of a detailed multi-disciplinary assessment. Since the respondent was one of a substantial number of children requiring literacy support, it was lawful for the Board to provide such support services through a combination of direct teaching with reading centres which had limited places while providing indirect classroom based support for other people with literacy needs. Since only a limited number of places were available in the reading centre, the Board was entitled to devise a system giving priority to children on the basis of age. The learned trial judge should only have rejected the age criteria if he had considered them to be irrational. Dr McGleenan accepted that the Board had not dealt with the respondent’s special educational needs as recommended by its own educational psychologist, but he emphasised that while it may not have been possible to provide the priority suggested the Article 13 decision had simply been slowed rather than prevented. Ultimately, the Board was dependent upon the

Department for resources and, given the extent of resources provided, it was compelled to adopt a rational scheme of priority.

[18] On behalf of the respondent it was submitted that paragraph 3.21 of the Code envisaged that a relevant child would not move on to Stage 4 and assessment in accordance with Article 15 until there had been relevant and purposeful action by the school with the help of external specialists. In such circumstances, it was self-evident that such progress could not be achieved if access to such specialists was prevented. The learned trial judge had correctly decided “in the particular circumstances of this case” that the Board’s discretion had been wrongly exercised in view of the evidence from the respondent’s mother, the school and the educational psychologist. It was clear that the respondent had been approaching the end of the time period for optimal success of intense intervention and, in such circumstances, Treacy J was entitled to reach the conclusion that intervention was required without further delay. There was no evidence that the indirect teaching prepared by the Board met the objective of early intensive action and, therefore, there was a failure to deliver the education to which the respondent was entitled on the basis of the recognised objective and principles. While the adequacy of resources might be a factor to be taken into account, resources alone could not be permitted to become determinative of the operation of the statutory power.

Discussion

[19] Treacy J recognised that the purpose of the 1996 Order, together with the statutory Code of Practice established thereunder, was to institute an effective system for the identification and assessment of the special education needs of pupils for whom the appellant Board was responsible. The special education needs of such children are of very variable duration, intensity and effect and the system established by the Order and the Code has been designed to provide a flexible and measured response to the continuum of needs. The five stage process envisaged by the Code of Practice is intended to meet a child’s need at the earliest opportunity with the intensity of the measures specified in the later stages being reserved for those children whose needs have not been satisfactorily met by the earlier stages. While the Code refers to a ‘continuum’ it is important to remember that it also makes clear that the stages are not to be seen as a succession of hurdles leading inevitably to an SEN statement. As paragraph 2.17 of the Code provides:

“Progress in response to action taken at one of the first three stages may well mean that the pupil will not have to move on to the next stage. Only for those children whose progress continues to cause concern at any one stage will the school need to move to the next stage.”

Stages 1 and 2 are the sole responsibility of the school while, if a child reaches Stage 3, as Treacy J noted at paragraph [20] of his judgment, it is assumed that he may require forms of intervention which are not normally available in ordinary mainstream schools. Paragraph 2.60 of the Code states:

“Stage 3 begins with a decision ... that early intensive action with external support is immediately necessary ...”

[20] In this case the school had recognised that Stage 3 had been reached and that the assistance of the Board was required in assessing the respondent’s difficulties with literacy, numeracy and poor concentration skills. The appropriate action was to refer the respondent for assessment by the Board educational psychologist, Ms Trinder. She expressed the opinion that the respondent would benefit from literacy support from a teacher who had experience working with pupils having specific learning difficulties and recommended that a reference should be made to the Board’s outreach service advising that “*in the interim*” the respondent should continue to receive a high level of support for literacy and numeracy within the school’s own special needs arrangements. She did not recommend that the respondent should immediately be admitted to the outreach facility or that a formal statutory statement assessment should take place forthwith. It is common case that, at this stage, the Board was subject to the general duty to exercise its powers in respect of children for whom it was responsible with a view to identifying those with special educational needs for whom it would be necessary for the Board to determine the appropriate special educational provision in accordance with Article 13. The learned trial judge recorded that it was essential for the Board to discharge its duty of identification in accordance with Article 13 before the respondent could proceed to the formal processes of statutory assessment and, if appropriate, the provision of a statement of special educational needs in accordance with Articles 15 and 16 of the 1996 Order. However it was also necessary to recognise that the Stage 3 process of gathering evidence for identification purposes, including the recommendation made by Ms Trinder, might indicate that there were suitable and appropriate alternative ways to meet the needs of the respondent without proceeding to a formal statutory assessment/statement – see, for example, the last sentence of paragraph 2.17 of the Code.

[21] At paragraph [42] of his judgment Treacy J observed that:

“The question for this Court is can the Board lawfully delay his access to specialist intervention when assessment of the effects of that intervention is the only way he can ever become ‘identified’ as a child in need of statutory assessment?”

[22] In reaching his decision to grant judicial review the learned trial judge gave careful and anxious consideration to the decision by Weatherup J in Re JG [2006]

NIQB a case in which judicial review had been refused. In JG, as in this case, a recommendation had been made by the Board's educational psychologist that the applicant should receive additional assistance. Again, as in this case, the Board ultimately informed the applicant's parents that it was unable to make the recommended provision for the pupil concerned because of the extremely high demand for the service and that the recommended provision would have to be deferred for a further year. In JG, as in this case, the applicant contended that the duty imposed by Article 13 required the Board to provide the support services recommended by the educational psychologist since it was only then that the Board could discharge its Article 13 duty. However, Weatherup J was unable to accept that argument observing at paragraph [24] of his judgment:

"... it seems to me that to adopt the applicant's position is to impose a duty on the Board to complete the steps recommended by the educational psychologist before the Board can be said to have fulfilled the duty under Article 13. It does not appear to me that Article 13 imposes on the Board a duty to carry out those steps once a preliminary assessment is made upon referral to the Board's psychologist. Rather, I accept the respondent's position that in this case the Board is in the position to make an Article 13 determination, that is, they are able to determine that the pupil has special educational needs and further that it is not necessary for the special educational provision to be made by the Board. The Board has made a negative assessment in this case by accepting that the second limb of Article 13 has not been satisfied and therefore has not identified the applicant as a child under Article 13. Had the Board identified the pupil as falling or probably falling under the twin requirements it would have been necessary to have moved on to a statutory assessment under Article 15. I accept that the Board were entitled to reach the conclusion they did on the present evidence in the case."

[23] Treacy J appears to have formed the view that the decision in JG was directly in point but he rejected it as involving a misinterpretation of the Board's Article 13 duty. At paragraphs [47] and [48] of his judgment at first instance he said:

"[47] The duty in Art13 is no more than a duty to use the Board's powers 'with a view' to ensuring that children who meet the statutory assessment conditions are identified in due course. 'Due course'

will arise if and when the candidate children – generally those at Stage 3 – arrive at the point in the system when the Art 15 duties become operational.

[48] In JG's Application the Court accepted that the Board 'made an Art 13 determination' against the applicant and proceeded to its judgement on that basis. In my view the Board has no power to make any 'determination' under Art 13. That article is not directed towards 'determinations' at all. Determinations, with the procedures and conditions for making them, are dealt with fully and explicitly in Art 15."

[24] It must be accepted that each of these cases, including that of the respondent, is likely to be highly fact specific and it may be that, as a consequence, some confusion has arisen. In JG, Weatherup J rejected an argument by the respondent that the referral to the Board's educational psychologist was not part of the respondent's functions under this part of the 1996 Order, confirming his view that the referral and the report were part of the duty to identify relevant children under Article 13 and that, when carrying out such an exercise regard should be had to the Code of Practice. In that case, the provision recommended by the educational psychologist that he should be referred to the reading centre had not been afforded to the pupil because of the extremely high demand for places. It appears from paragraph [5] of the judgment of Weatherup J that the response of the parents was to request a statutory assessment (we consider that the reference to Article 13 in that paragraph is probably a misprint and that the intended reference was to Article 15). A panel of the Board gave consideration to the matter but considered that, on the evidence provided, the applicant's disability was not so serious as to identify him as a pupil that required a statutory assessment for the purposes of Article 15. Weatherup J held that the Board was entitled to reach such a conclusion. The panel in question seems to have reached its decision after taking into account all the available evidence, including the educational psychologist's report - see paragraph [15] of the judgment of Weatherup J. In such circumstances it may well be that the specific content of the report from the educational psychologist together with the detailed findings of the panel played a significant part in the outcome of the case. Some misunderstanding may have arisen from the reference to an "Art.13 determination" at paragraph [24] of Weatherup J's judgment. The panel's task was to decide whether the applicant had been identified as being a candidate to progress to statutory assessment/statement not to 'determine' the appropriate SEN provision according to the Article 15 procedure. We note from the affidavit sworn at first instance in this case by Philip McKeever, the Board's principal educational psychologist, that decisions as to whether a child should receive direct teaching support in the reading centre are made by a panel consisting of the education officer (John Shivers), an administration officer and himself as principal educational psychologist.

[25] In this case no such panel appears to have been instituted or, at least, to have formulated any relevant decision similar to that reached by the panel in JG. As we have earlier noted, in the course of his submissions before this court, Dr McGleenan accepted that the referral recommended by the educational psychologist was relevant to the production of evidence to enable the Board to discharge its duty in accordance with Article 13 and Stage 3 of the Code and that, in the circumstances, the production of such evidence had been slowed but not prevented. In the interim the previous level of support, referred to by the educational psychiatrist as ‘high,’ has continued until superseded by the Board’s Outreach Advisory Support.

[26] Consequently, the primary challenge by the appellant is to the decision by Treacy J that, in this case, the delay in any decision as to whether the respondent should be identified as a relevant child under Article 13 was such as to amount to a refusal to exercise that power which could not be justified by any question of limited resources. In support of that conclusion, the learned trial judge referred to the emphasis placed by paragraph 2.60 of the Code upon Stage 3 requiring “early intensive action” with external support being “immediately necessary”.

[27] However, the learned trial judge also accepted that a public authority may take resources into consideration in the exercise of its powers and that it appeared that Parliament had intended the Boards to use their powers to move all children in the direction of identification but to allow them a margin of discretion as to the time frame within which such identification might be achieved – see paragraphs [54] and [55] of the judgment at first instance. The affidavits from Mr Shivers and Mr McKeever set out in some detail the role that limited financial resources played in the development of the provision made by the Board for children with special educational needs such as dyslexia. In previous academic years the Board used its budget to operate a number of outcentres including, in particular, Beechlawn and Cottown, where children requiring additional literacy support received direct teaching upon either a full-time or part-time basis. That support was provided as part of a two year programme with pupils receiving reading centre support on a part-time basis during the first year and spending the remainder of the week in their normal school class. At the end of that year progress would be reviewed and, if the pupil had not made sufficient improvement, he would be moved to the reading centre on a full-time basis. Demand for places in the reading centres has significantly exceeded the number of places that could be provided within the Board’s budget and, accordingly, allocation was determined by applying criteria based upon age/school year with priority given in descending order to:

- Pupils in respect of whom a statement of special educational needs had been completed in accordance with Article 16 of the 1996 Order.
- Pupils who had been considered for a place during the previous year but had been unable to obtain a place and remained on a waiting list.
- Pupils in year seven.

- Pupils in year six.
- Pupils in year five.
- Pupils in year four until all places were filled. It seems that, prior to the year 2011/2012 the application of these criteria ensured that every child requiring support had been able to receive it at the reading centre before completing their primary school education.

In his affidavit sworn on the 3 November 2011 Mr McKeever confirmed that the application of these criteria had resulted in the Board being able to spread its resources among the entire group of children and, to date, their use had ensured that every child requiring support from an outreach centre had been able to receive it before completing their primary school education within the budget available to the Board.

[28] In the course of determining this appeal we have given particular consideration to the following matters:

- (i) The non-statutory assessment to be carried out at Stage 3 of the Code enables teachers and the SEN co-ordinator to seek external support and resources to supplement the school based provision although the class or subject teacher remains responsible for meeting the pupils needs in accordance with the Department's "Count, Read: Succeed Strategy".
- (ii) Article 13 of the 1996 Order places the Board under a duty when exercising its powers at Stage 3 to identify those children with special educational needs in respect of whom it is necessary for the Board to determine the appropriate special educational provision. It seems to us that the performance of such an exercise must envisage the possibility of elimination from the potential pool as well as that of positive identification. That is expressly recognised by the first sentence of paragraph 2.17 and paragraph 2.18 of the Code. Measures adopted by the Board for the purpose of Stage 3 identification may produce such a degree of improvement that, after review, a decision may be taken that the pupil does not need to progress to Stages 4 and 5.
- (iii) In the exercise of its Article 13 powers the Board must have regard to the provisions of the Code which include identifying children with special educational needs as early as possible and assessing them as quickly as is consistent with thoroughness, completing assessments and statements as quickly as thorough consideration of the issues allows and a decision that early intensive action with external support is immediately necessary. The need for "effective early intervention" is also emphasised by the Department's "Count, Read: Succeed" Strategy.

- (iv) However the statutory duty placed upon the Board by Article 4 of the 1996 Order to secure that provision is made to meet the special education needs of a pupil is to “*have regard to*” the provisions of the Code. Such a duty is not absolute nor does it compel exact compliance with the provisions of the Code but simply requires that they should be properly and reasonably taken into account by the decision-maker – see the analysis by Kerr J of Article 44 of the Education and Libraries (Northern Ireland) Order 1986 in In Re James Agnew (a minor) [NIQB] 30/9/94, confirmed subsequently by the same learned judge, as Kerr LCJ, in In Re Downes’ Application (Brenda) [2009] NICA 26 at paragraph [12]. Before this court, Mr McCollum argued that there was no evidence that the appellant had actually had regard to the Code but we reject that submission in the context of the record of the Board Commissioners’ meeting of 26/27 July 2011 and Mr Shivers’ affidavit evidence.
- (v) As the learned trial judge accepted, in addition to the Code, one of the other factors which the Board was entitled to take into account was that of resources although there is no suggestion that resources could be determinative of policy. In this case an application for additional resources was made but proved unsuccessful. Appreciating the duties to which it was subject in accordance with the provisions of the 1996 Order, including the duty to have regard to the provisions of the Code, the Board found itself faced with the formidable task of seeking to reconcile the significant demand with the restricted number of places in the direct teaching facilities afforded by the limited financial resources provided by the Department. In order to achieve a practical and reasonably fair reconciliation of the varying needs displayed by pupils in differing age groups it decided to develop some means of prioritisation. The Board believed that the overarching aim should be to ensure that all pupils with special educational needs should receive the appropriate provision before leaving primary school and, accordingly, the priority criteria detailed above were established. It is not without significance that the scale adopted by the Board appears to have achieved the desired goal up to the present time and that the scale of priorities adopted by the Board has been approved in terms of fairness by both Gillen J and Weatherup J. The respondent’s case remained ranked according to that scale after receipt of the RAP from the Department and Mr McKeever’s application for additional resources had been rejected.

[29] At paragraph [26] of his judgment at first instance Treacy J summarised the applicant’s claim in the following terms:

“His complaint is that the Board has failed or refused to use its power to provide for him, except after a

period of delay which, he claims, is unreasonably long in his circumstances. He claims that the Board's undue delay in exercising its powers in his favour amounts to a breach of its duty under Art 13."

The learned trial judge referred to the scale of priorities adopted by the Board and, at paragraph [32] , to the view expressed by Mr Irvine in Re N approved by Gillen J at paragraph [5] (iii) of his judgment:

"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 as being more important and more urgent than any other."

Treacy J rejected the final sentence of this quotation stating, at paragraph [57]:

"I consider that action on a child's learning difficulty is sufficiently urgent to require prioritisation in any case where a failure to act will make the difficulty more severe or more entrenched than would otherwise be the case. Where this would be so, the failure to use a power of intervention actively contributes to the seriousness of the learning difficulty and *increases* the likelihood that it will eventually require statutory assessment. Such a result is inconsistent with a SEN system which continually promotes action designed to minimize or eradicate learning difficulties, and which reserves statutory assessment for the small minority of children whose learning difficulties have failed to respond to every intervention available in the school based stages."

[30] We have encountered some difficulty in identifying the evidence upon which the learned trial judge based the views expressed in paragraph [57]. It would seem that they were grounded upon the evidence of the respondent's mother, the Trinder report, to which we have referred earlier, and the statistics quoted by the Department representative to the Education Committee recorded in the transcript of the proceedings before the Committee for Education of the N.I. Assembly. That quotation referred to a statistically based success rate and was made in the context of a proposed course to enable teachers in primary schools to acquire the skills needed to implement the Count, Read: Succeed strategy. That was also the aim of the Outreach Advisory Support programme devised by Mr McKeever and adopted by the Board.

[31] The system of prioritisation employed by the Board was based upon age/school year and the underlying purpose was to ensure that the needs of all pupils would be provided for before leaving primary school. Prima facie that is a rational approach and, as we have indicated above, a system which has previously attracted judicial endorsement. An obvious vulnerability is the apparent absence of any provision for exceptional cases and the real concern about delay expressed by Treacy J reinforced the earlier views of Weatherup J in JG. However no evidence from an educational psychologist or other appropriate expert appears to have been submitted on behalf of the respondent in order to establish that, in his case, the particular form of his special educational need, dyslexia, was sufficiently serious to require priority attention or that failure to act would actively contribute to the seriousness of his learning difficulties or that the delay envisaged in access to the outreach facility amounted to a refusal to provide the appropriate provision. Nor was any such evidence advanced to establish how a fair and transparent system of prioritisation might be devised based upon the assessment of individual comparative needs. For example, no evidence was provided to contradict the difficulties in developing such a scale based upon “need” referred to by Mr McKeever at paragraph 26 of his affidavit. As Gillen J recorded in Re N the court should be slow to criticise the formulation of a policy for dealing with children with special educational need when such a policy has been formulated with the benefit of expert knowledge and advice. In addition, this case concerns the expenditure of limited funds by an administrative body following the allocation of economic resources by a department of the executive government which is an area in which the court should intervene only after very careful consideration.

[32] In the circumstances of this particular case we propose to allow the appeal.

[33] During the course of the hearing of this appeal we were struck by the absence of any contribution from the Department. This is the third judicial review to have been instituted in this particular area and each of these cases has highlighted delays and difficulties encountered by Boards in seeking to make provision for special educational needs, consistent with the Code and Strategy of the Department, when working within the restricted financial resources made available by the Department. At paragraph 7 of his affidavit, Mr Shivers referred to the failure by the Department to make clear any reasons for the new RAP related to special education need provision and how it was apparently left to the Board to deduce that it was intended to be a mechanism for implementing the objectives of the Department’s strategy. When the inadequacy of funding for places at the reading centres was raised with the Chief Executive of the Board, it appears that additional funding was refused. Education is fundamental to the fulfilment of personal, social and career potential and in any just and fair society every reasonable and practicable effort should be made to ensure that those with special educational needs are not disadvantaged thereby. In the absence of any informative contribution, this court could not presume to express a view as to how a department of the Executive should allocate funds for social/educational purposes but it must be a matter of some concern that there appears to be a lack of communication and rational debate between the

Department and the Board and that is unlikely to inure to the benefit of either the Board or the public.

5]