Neutral Citation No. [2005] NIQB 46 | *Ref:* **MORF5303**

Judgment: approved by the Court for handing down | *Delivered:* **03/06/2005**

(subject to editorial corrections)

JONATHAN NOLAN A MINOR

-v-

SEELB

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MORGAN J

[1] The applicant was born on 28 April 1999. He suffers from an autistic spectrum disorder. His parents contacted the Respondent in 2003 to have a Statement of Special Educational Needs drawn up in respect of him. In September 2003 he started to attend the diagnostic unit of Longstone School. His parents were subsequently advised by an educational psychologist retained by them that the applicant would benefit from a school specialising in working with children with autistic spectrum disorders. No such provision is available in the Respondent Board's area. The parents decided on 17 February 2004 to remove the applicant from Longstone and commence a home-based applied behaviour analysis (ABA) programme.

[2] The process of preparing the Statement was ongoing. The Board prepared proposed Statements on 18 November 2003 and 10 March 2004. Neither satisfied the parents who by this stage were keen to obtain funding for a home-based ABA programme. A further proposed Statement was prepared on 17 August 2004 and was accompanied by a letter from the Board indicating that it did not fund home-based ABA programmes. On 6 October 2004 the applicant launched judicial review proceedings in respect of that decision.

[3] Leave was granted on 25 October 2004 and replying affidavits were filed on 19 November 2004, 3 February 2005 and 14 February 2005. The hearing was fixed for 15 February 2005. On that date the hearing was adjourned to enable the Board to file a further affidavit addressing the issue of whether it had a policy of not funding home-based ABA programmes. The Board was given until 22 February 2005 to file the affidavit and the case was adjourned until 28 February 2005. At that hearing I was advised that the Board had rescinded the impugned decision in a letter dated 25 February 2005. I adjourned the hearing to enable the applicant to explore certain matters within the correspondence. In a skeleton argument submitted on 11 March 2005 the Board accepted that at the time it prepared the proposed

Statement on 17 August 2004 there was a failure to give individualised consideration to the request for a funded home based ABA programme. A new Statement has been or is being prepared which will provide for such a programme. The only issue that now arises is whether I should make a declaration in these proceedings in respect of the unlawful approach to the proposed Statement in August 2004.

[4] The Respondent, for whom Mr McCloskey QC and Ms Gibson BL appear, firstly contends that the applicant has no sufficient interest to make this application as is required by Order 53 Rule 5(3). I have relied upon the decision of Weatherup J in Heather Thelma Elizabeth Murphy a minor's Application for the proper principles:

> "**Standing**
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> [5] On the issue of standing, Order 53 Rule 3(5) provides that the Court shall not grant leave to apply for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates. The respondent contends that the applicant, who is 16 years old, has been chosen as applicant in these proceedings in order to avail of legal aid and therefore to protect the applicant's father, who might otherwise have been the applicant, from an order for costs in the event of an unsuccessful application.
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> [6] In relation to a child making a challenge to a decision on transfer from primary to secondary education the Court of Appeal in Re Anderson and O'Doherty's Application [2001] NIQB 48 approved the approach of Kennedy LJ in R v Richmond upon Thames London BC ex parte JC (2001) LGR 146. In such a situation the rights in issue concern parental preference and as a general rule the parents rather than the child are the party to bring the application for Judicial Review, although there may be some cases in which the child may be the proper party to bring the application. The position stated by the Court of Appeal was that unless there were sufficient grounds for an exception to operate the Court should refuse leave on applications for Judicial Review of governors or tribunals decisions in relation to school admissions brought in the names of pupils. By the same token legal aid should be refused when sought for such applications to be brought in the pupil's

> name unless sufficient cause was shown why the pupil and not the parents should be the applicant.
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> [7] In the above instance the rights in question are generally those of parents. However in a case where the rights in question are those of a minor and the minor is affected by the outcome of the decision then that minor has sufficient interest and will have standing for the purposes of Judicial Review proceedings. That remains the position if the minor was entitled to be an objector to the proposal in question even though no objection was made by the minor. It is not an abuse of process for proceedings to be undertaken in the name of an applicant selected on the basis of entitlement to legal aid, provided that applicant has sufficient interest. It is a matter for the legal aid authorities to determine whether an applicant is entitled to legal aid and whether a proposed applicant represents an abuse of the legal aid system. I adopt and apply the approach of Keith J in R (On the Applicant of Edwards) v Environment Agency and Another (Rugby Limited Interested Party) (2004) 3 All ER 21."

[5] The statutory scheme in the Education (Northern Ireland) Order 1996 makes it clear that parents have a right of representation in respect of assessment and a right of appeal in respect of the Statement. But what is in issue here is not just the place at which the educational provision is to be delivered but the nature of that provision. The determination made in the Statement accordingly establishes the content of the educational provision which the State considers it appropriate to supply for the child. It must follow, in my view, that any unlawful conduct by a public authority in the determination of that provision is capable of giving rise to a breach of the right to education in article 2 of the First Protocol. In those circumstances I consider that the minor has established a sufficient interest in this case.

[6] Secondly it is contended that the applicant had an alternative remedy by way of appeal to a Special Education Needs Tribunal. The short answer may be that the right of appeal resides in the parents rather than the child but there are more pressing reasons for rejecting this submission. The first proposed Statement was issued on 18 November 2003. As a result of parental representation the second proposed Statement was issued on 10 March 2004. The third proposed Statement was issued on 17 August 2004 some five months later. The parental right of appeal arises after the issue of the final Statement. No such Statement was issued by the Respondent prior to the grant of leave on 25 October 2004 and there is nothing in the papers to give

any clue as to the timescale within which the Board would in fact have reacted in this case. In those circumstances I consider that there can be no criticism of the decision to proceed by way of judicial review rather than wait an indeterminate time for an alternative remedy.

[7] The final argument deployed on behalf of the Respondent was that I should not grant a declaration since there was now no dispute in existence between the parties. Mr McCollum QC, who appeared with Mr Sands BL for the applicant, submitted that I had a wide discretionary jurisdiction and in all of the circumstances set out above I should make a declaration to vindicate the applicant's position.

[8] In this case I had the benefit of full skeleton arguments from both parties in preparation for the hearing on 15 February 2005. That hearing was adjourned at the request of the Respondent to enable it to put in a further affidavit in respect of its policy. It was not until 25 February that the Respondent reversed the impugned decision and it was only in the skeleton submitted for a hearing on 11 March 2005 that the Respondent accepted the illegality of its conduct. The policy issue at the heart of this dispute is of general application and in particular may be material to the deliberations of other Boards. Although I have made similar declarations in two other cases I have not had cause to set out clearly the background to those declarations as I have in this case. For those reasons I consider that this is an appropriate case in which to declare that the proposed Statement dated 17 August 2004 made by the Respondent in respect of the Applicant was unlawful on the ground that in making the proposed Statement the Respondent failed to give individualised consideration to the provision of a funded home-based ABA programme for him.