Special education needs – statement – whether Board failed to implement statement – suspension of pupil – whether proper procedures followed.

Neutral Citation no. [2005] NIQB 48 | *Ref:* **GIRC5301**

Judgment: approved by the Court for handing down | *Delivered:* **15/06/05**

(subject to editorial corrections)

2005 No. 7509-01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY L (A MINOR) BY T McM HIS MOTHER AND NEXT FRIEND

AND

IN THE MATTER OF A DECISION BY SANDLEFORD SPECIAL SCHOOL AND THE NORTH EASTERN EDUCATION AND LIBRARY BOARD

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GIRVAN J

[1] The applicant L. D. McM ("L") was born on 27 April 1994. At the age of three he was diagnosed with moderate learning difficulties. When he was somewhat older he was diagnosed as suffering from attention deficit hyperactivity disorder. He now suffers from a range of educational difficulties which have been described as global educational difficulties. This led to the issue of a statement of special educational needs on 13 May 2003 ("the statement"). This sets out the objectives of the special educational provision to be made and specifies the educational provision which the North Eastern Education and Library Board ("the Board") considers appropriate to meet his special educational needs. It includes small group teaching or support followed by a programme of work overseen by a teacher with experience of pupils with severe-moderate learning difficulties. The education plan was to include a consistent programme of behaviour management that sets clear goals and expectations for acceptable behaviour with frequent positive reinforcement. Sandleford Special School

("Sandleford") in Coleraine, Co. Londonderry was specified as the appropriate placement.

[2] Since 26 March 2004 L has not attended Sandleford. He was sent home on that date following an incident where he struck another pupil. That was the third occasion on which L had struck the pupil in that week. On 21 April 2004 a decision was made to suspend the child. Thereafter a series of suspension notices were issued to cover five day periods from 28 April, 7 May, 14 May, 28 May, 4 June, 11 June and 18 June. Three in fact were sent under the cover of one undated letter received in June.

[3] Mr Lockhart on behalf of L argued that the procedure adopted in respect of the suspension of the child was unlawful and that the child was unlawfully suspended for a period in excess of the statutory maximum of 45 days. The Board in a letter of 19 October 2004 accepted that proper notice procedures were not always followed in this case. The school expressed the view that the lapse in procedures was due to a misunderstanding with the Board in relation to the provision of home tuition for the child. The Board indicated that the procedure involved would be reviewed. It was accepted that L was suspended in excess of the legal limit although on the Board's calculation the suspension only exceeded the legal limit by one day. Mr Lockhart stated that the applicant was not pressing for damages against the Board in respect of the unlawful suspension.

[4] In the circumstances the applicant is entitled to a declaration that the applicant was unlawfully suspended for a period in excess of the 40 day statutory maximum contrary to Regulation 3(c) of the Schools (Suspension and Expulsion of Pupils Regulations (Northern Ireland) 1995 as amended by the Schools (Suspension and Expulsion of Pupils) (Amended) Regulations (Northern Ireland) 1998.

[5] Mr Lockhart's second ground of challenge against the Board focused on the question whether the Board acted in breach of Article 86 of the Education (Northern Ireland) Order 1998 in relation to the way it went about making provision for out of school tuition following his suspension. Article 86 provides:

> "Each board shall make arrangements for the provision of suitable education at school or otherwise when at school for those children of compulsory school age who by reason of illness, expulsion or suspension from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.

> 2. A board may make arrangements for the provision of suitable education otherwise than at school for those children over compulsory school age who:
>
> (a) have not attained the age of 19; and
>
> (b) by reason of illness, expulsion or suspension from school or otherwise may not for any period receive suitable education unless such arrangements are made for them.
>
> 3. In determining what arrangements to make under this Article in the case of any child a board shall have regard to any guidance given from time to time by the Department.
>
> 4. In this Article
>
> "child" has the same meaning as in Part II of the Education (Northern Ireland) Order 1996;
>
> "suitable education" in relation to a child, means efficient education suitable to his age, ability and aptitude and to any special education needs he may have."

[6] Faced with the fact that Sandleford has suspended L and felt unable to provide education at the school for him the Board was bound to take steps to provide suitable education otherwise than at school, the education to be efficient education suitable for a child who suffers from global educational difficulties. In its letter of 16 November 2004 the Board sought to justify its decision to provide five hour tuition for the child stating:

> "The provision of five hours per week tuition is that which is allocated to all primary eight in receipt of home tuition."

[7] The letter went on to state that in L's case additional provision was being made by providing the support of two adults during this period. The initial home tuition was in fact three hours per week. Since the decision to provide five hours the Board has in fact provided additional tuition, the average being six to seven hours on the last few months. The Board having undertaken its annual review of arrangements relating to the child is offering to provide 15 hours tuition per week pending the reintegration of the child back into Sandleford.

[8] The decision to provide five hours tuition providing two adults during that period was challenged on the basis that the Board has simply relied on its policy of providing five hours per week home tuition in relation to children of primary school age (see the letter of 2 December 2004). It was argued that the proper starting point in determining what home tuition is required in relation to the child was to have regard to his needs taking account of his age, ability, aptitude and special educational needs.

[9] While the Board did make special provision for him by providing additional staff the Board started from the premise that five hours was the appropriate time because that represented the current policy in respect of a child at primary school level. However, this was not the correct starting point. Even if it started from that premise of five hours per week adjusting the situation by the provision of extra staff the Board needed to go on but did not seem to have gone on to pose and answer the question whether that provision would be suitable for the special education needs of this child. In practice it did not restrict the tuition to five hours per week and the system evolved to provide additional hours. The current offer of 15 hours has been made in the light of the Board's analysis of the special needs of the child and it cannot be said that what the Board now proposes to provide shows any misapprehension on the part of the Board of its duties and functions. In the circumstances nothing is to be achieved at this stage in granting the applicant any particular relief in relation to this aspect of the case.

[10] Mr Lockhart's third ground of attack was to contend that the Board was in breach of its duties under Article 16 of the Education (Northern Ireland) Order 1996. Article 16(1) provides:

> "(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."

Article 16(5) provides:

> "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."

[11] Mr Lockhart contends that the Board having made and maintained a statement of special educational needs has fallen down in two respects in respect of its duty under Article 16(5)(i) to arrange that the special educational provision indicated in the statement was made for the child. Firstly, it has failed to ensure proper implementation of the need to provide an individually structured language and communication programme decided in liaison with a speech and language therapist. Secondly, it has failed in its obligation to ensure provision of a consistent programme of behaviour management setting clear goals and expectations for acceptance behaviour with frequent positive reinforcement.

[12] As to the issue of the provision of speech and language therapy the Board's in its letter of 19 November 2004 addressed to the speech and language therapy manager of the Ballymoney Health Centre accepted that there was a concern that he was not receiving the speech and language provision available to him while attending the school. The Board sought the support of the speech and language therapist. It is not apparent why nothing came of this from 19 November 2004 to date. Miss Gibson on behalf of the applicant indicated that a full assessment is to be carried out by the end of June and if a need is assessed therapy will be provided.

[13] In Re ED (unreported 19 May 2003) Kerr J (as he then was) stated:

"The intention of the legislature in enacting Article 16(5) was, in my opinion to require the relevant authority to provide the educational facilities stipulated in the statement where it is practicable to do so. It cannot have been the contemplation of Parliament that the Board or the school should be powerless to modify the educational arrangements for the applicant where change in his circumstances made it unsuitable to continue those arrangements.

> To impose such a literal requirement would lead, in my opinion, to substantial public inconvenience….
>
> In my judgment Article 16(5) requires of the Board and the school substantial compliance with the terms of the statement. They may not ignore those requirements and they are bound to fulfil them unless it is either impracticable to do so or the full implementation of the terms and statement would put staff or pupils at risk. The provisions of the statement must therefore in general be scrupulously observed but the school is not bound to follow those terms slavishly where it is plainly impracticable to do so."

[14] On the issue of speech and language therapy the Board failed to pursue this issue with the requisite degree of urgency once it became clear that the child's return to Sandleford was not going to be resolved for a considerable period. The Board is, however, addressing the matter seriously at this point. The court order will record that the Board, having through counsel, informed the court that it is taking steps to ensure compliance with the requirement to ensure that there is in place an individually structured language and communication programme to be designed in liaison with a speech and language therapist, the court declines to grant further relief on this issue. If the Board fails to follow through the representations made to the court the applicant may bring the matter back before the court.

[15] The second basis of Mr Lockhart's criticism of the Board is that, in his contention, the Board has failed to implement the obligation to have a consistent programme of behaviour management that sets clear goals and expectations for acceptable behaviour with frequent positive reinforcement. When the child was at Kilronan Special School there was in place a behavioural management programme previously implemented by Dr Bankhead. When pressed to state what steps he was contending ought to be taken to implement the provisions of the statement Mr Lockhart argued the Board was under an obligation to draw up in writing a consistent programme of behaviour management that sets clear goals and expectations for acceptable behaviour with frequent positive reinforcement and which would necessarily include training and safe handling techniques for staff, use of a time-out procedure and an appropriate quiet room for the applicant.

[16] As Miss Gibson argued, Mr Lockhart's formulation of the duty of the Board amounted to a re-drafting of what the statement provides. While it may be open to the parents to persuade the Special Educational Needs Tribunal to re-formulate this provision in the Statement, this court in these proceedings must proceed on the basis that the provision in the Statement

stands as it is currently drafted. The question is whether the Board has fallen down in its duty to give proper effect to that provision. Ms Trolan, Senior Teacher (Home Tuition) at Sandleford, in her annual review statement states:

> "In April I decided to try a new reward system, the previous one no longer continues to be a motivator for good behaviour. I introduced a response cost reward system giving L a number of 2p coins at the beginning of the session and then taking one of him for any unacceptable behaviour which we had discussed at the beginning of the session. This proved very successful the first day and L managed to keep most of the coins. Unfortunately it has not worked so well since, his behaviour over the last two sessions has been difficult to manage. His temper tantrums are best managed when L is allowed time to gain control of his emotions and as confrontation usually only exasperates the situation as L likes to be praised he is always given verbal praise for all good and socially acceptable behaviour. We have had the use of all of the facilities at the Millennium Centre and L has experienced a wide range of activities."

[17] The provisions in the Statement fall to be interpreted and applied having regard to the fact that its provisions cannot be intended to be over-rigid or overly prescriptive since they are intended to deal with an ongoing developing educational situation that will change and evolve in the light of prevailing circumstances. In some cases the Statement may require a structured and detailed response to deal with a given educational problem. Thus, for example, under this Statement the educational plan should include an individually structured language and communication programme to be designed in liaison with the therapist. This points to a structured programme worked out with the co-operation of a particular specialist to concentrate on clearly identified matters. Similarly a specific provision is made in relation to a carefully structured teaching programme concentrating on literacy and numeracy. At the other end of the scale in relation to the contents of the statement is a need to include "opportunities to experience success and work to reduce anxiety and improve competence and self esteem." Here the Board has advisedly avoided stating anything other than a broad general approach. The requirement to include in the plan a consistent programme of behaviour management is not formulated as an obligation to produce an individually structured or carefully structured programme as such. It points to a need to ensure that the child's behaviour is managed in a way that is consistent and which sets clear goals and expectations for acceptable behaviour with frequent positive reinforcement. The question is whether the applicant has established that the Board in relation to the out of schools tuition programme

is failing to pursue a course of action designed to manage the child's behaviour in a way that can be described as consistent and setting clear goals and expectations with positive reinforcement at its heart. In a case such as this the court must appreciate that a special educational judgment has to be made by the teacher and by those who are expert in this field. In the circumstances in this case the applicant has failed to persuade me the Board has breached its obligations under (g) of the Education Plan Requirements set out in the statement.

[18] This case like others in the field of special educational needs illustrates that a judicial review process is not really a suitable mechanism for resolving problems which are of a social welfare and educational nature. In this field the proliferation of statutory provisions, powers and duties, some directory and some mandatory, is unsurprisingly leading to a growth in litigation that can only partially solve problems but diverts scarce resources from the provision of education. The establishment of the Special Education Needs Tribunal diverted away from the court a tranche of cases where there is dispute about the contents of special education needs statements but the jurisdiction of the Tribunal is limited. Thought might usefully given to expanding its jurisdiction to cover issues such as arose in the present case in respect of the proper interpretation and duplication of the contents of statements. Many of the cases that end up in a judicial review application arise because of a breakdown of communication between hard-pressed Boards and hard-pressed parents grappling with profound difficulties arising from circumstances giving rise to the need for special educational directions. Policy makers might usefully consider whether in cases such as these there should be available some mechanism for alternative dispute resolution outside the framework of legal litigation.