Neutral Citation No. [2015] NIQB 15 | *Ref:* **HOR9544**

Judgment: approved by the Court for handing down | *Delivered:* **23/02/2015**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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LC's (a minor) Application [2015] NIQB 15

IN THE MATTER OF AN APPLICATION BY LC (A MINOR) BY HIS MOTHER AND NEXT FRIEND LT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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AND IN THE MATTER OF DECISIONS OF THE NORTH EAST EDUCATION AND LIBRARY BOARD MADE ON JANUARY 2013 AND 29 OCTOBER 2013 AND CONTINUING

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HORNER J

A. INTRODUCTION

[1] The applicant, LC, was born on 13 February 2008. He is aged seven years. His mother, LT, has acted as his next friend during these proceedings. The parents of the applicant have endeavoured to ensure that adequate provision has been made for the applicant's educational needs. Indeed, these proceedings relate to the "special educational needs" of the applicant arising out of a number of different medical conditions including epilepsy, severe speech and language disorder/dyspraxia, central hypotonia and Autism Spectrum Disorder ("the medical conditions").

[2] In January 2014, the applicant secured an agreed special educational needs package which included personal assistance from a dedicated classroom assistant. The Board had sought to argue that the court should not grant leave for any judicial review given that the applicant's complaints had been resolved. However, the court considered that there was at least one issue which was of general public importance relating to the approach which the Board should adopt when deciding whether to carry out an assessment of any child's special educational needs under Article 15 of the Education (Northern Ireland) Order 1996. There was also an additional ground which, it was claimed, gave rise to an issue which should also have more general consequences for other children with special educational needs. The court declined

to grant leave on any ground which might have involved the court in making an assessment of the applicant's special educational needs.

[3] The two issues argued before this court and on which leave was granted, were:

(i) Whether a declaration should be granted that the decision of the Board made in January 2013 not to make a statutory assessment in the applicant's case was unlawful, ultra vires and of no force or effect?

(ii) Whether a declaration that the Board's decision about classroom assistance unlawfully fettered its discretion and failed to give individualised consideration to the applicant's special educational needs?

[4] I should at this point record my thanks for the helpful written and oral submissions made by counsel on behalf of both the applicant and the Board. I should also note that the applicant is blessed to have had the full-hearted support of his mother and father in his quest for such assistance as may be required to help him overcome his medical conditions and allow him to fulfil his educational potential. His mother, in particular, could not have done more to look after his best interests. In truth she has fought his corner every step of the way. She realised that delay was inimical to the best interests of her child. She appreciated that in these cases there is an obvious risk that once any child, and especially one with special educational needs, falls behind that he will struggle to cope, never mind catch up with his fellow students. The Board had also recognised this and had provided strict time limits for it to make assessments and statements under the Code of Practice which it operates pursuant to the statute: see paragraphs 3.34-3.37.

B. BACKGROUND

[5] The applicant started at a mainstream primary school controlled by the Board in September 2012. He had a host of difficulties which he had to overcome to access the learning on offer due to his medical conditions. These included a severe communication disorder, reduced core and proximal stability which affected his balance and which caused him to fall easily, and he also had problems with his fine motor skills. During his time at the school he developed absence episodes consistent with epilepsy.

[6] On 30 October 2012 his parents requested a statutory assessment under Article 15 of the Education (NI) Order 1996 ("the 1996 Order"). In support of the request for a statutory assessment, the applicant's mother, LT, drafted a letter dated 30 October 2012. This is a most comprehensive and impressive document. In it LT sets out in detail the applicant's particular difficulties – these include, his inability to concentrate due to excessive tiredness, his speech and language problems, his behavioural and social issues including his inability to interact fully with his peers

and how that affects his ability to learn. Importantly she also drew attention to investigations which were to be carried out for his suspected epilepsy. The letter highlighted periods when the applicant seemed to go into a trance. This had been observed both by his parents and his school teacher. She advised the Board that Dr Macleod, the applicant's consultant paediatrician, had ordered further tests for suspected epilepsy. There are also reports available from Dr Doherty of the Community Health Office dealing with his Autism Spectrum Disorder and Dr McGuckin, educational psychologist, dealing with his educational difficulties.

[7] At that time under his Individual Educational Plan ("IEP") he had contact with his teacher or classroom assistant 1-2 times per day. His mother did not think this was sufficient to meet his needs. Both parents wanted his exact special educational needs assessed so that the plan devised might be tailored to his precise educational needs. This, they hoped, would unlock his potential and "prevent him falling behind as he and his peers moved through the key stages".

[8] In response the Board sought on 1 November 2012 information from the school's Principal, from Dr Doherty, from Ms Bradley, Superintendent III psychotherapist (paediatrics), Dr Macleod, consultant paediatrician, Mr McGuckin, educational psychologist, and the team leaders of MASTS (Multi-Agency Support Teams for Schools).

[9] On 7 December 2012 Dr Macleod had written to the applicant's GP and copied it to his parents in the following terms:

> "Whilst it is reassuring in a way that his EEG is normal, his mum continues to describe on-going episodes of what sounds clearly like absence episodes. In addition, he has been wetting himself. Given the complexity of LC's clinical picture and in light of the most recent NICE guidelines, diagnosis and management of paediatric epilepsy, I think it would be worthwhile if my colleague, Dr Nicola Bailie, were to look at LC."

On 30 October 2012 LT had stated:

> "Investigation in Epilepsy – Recently we have noticed LC experiencing staring/blank episodes. This has also been observed by his teacher, Mrs C. Mrs C explained that she had asked LC to put on his coat and he starred straight ahead – she then decided that perhaps he didn't understand the instructions so she simply said **LC, coat** and he continued to stare with a blank expression on his face – after sometime he did walk to the cloakroom but he continued to stare

> blankly ahead. Our most recent example was at a friend's birthday mid-September. Dr Macleod (consultant paediatrician) has ordered additional tests. (October 2012)."

[10] The Board says that, "it is required by statute to decide within a period of six weeks whether or not to make the assessment". It claims that it was unable to make a decision on whether or not to carry out a statutory assessment of the applicant because it had insufficient information to demonstrate whether the applicant had special educational needs "such that it was necessary or probably necessary that the Board should determine the special education provision which his needs called for." The Board's view was that those needs could be met "within the school environment with access to specialist support from the Board, if required, in accordance with stage 3 of the Department's Code of Practice on the Identification of Assessment of Special Educational Needs". The parents were advised of the refusal by letter dated 10 January 2013.

[11] This letter states that the "evidence presented indicated that LC's educational needs can be met from within the resources (including external specialist support) normally available in a mainstream school". It goes on to advise that:

> "Should further evidence be provided by the school that LC has not responded to the relevant and purposeful measures taken by the school and external specialists and that statutory assessment would appear to be appropriate, the Board may be willing to reconsider the matter".

[12] The parents immediately appealed the decision to the Special Educational Needs and Disability Tribunal ("SENDIST"). Following a meeting between Bernadette Dorrity, special educational advisor with the Board, the principal educational psychologist, and the statementing officer and the parents it was agreed to conduct a statutory assessment. Therefore the appeal did not need to proceed. It was claimed that the tipping point was the letter from Dr Macleod dated 7 December 2012 which has already been referred to and which the Board had not obtained a copy of until after their refusal of 10 January 2013. Thus the appeal was resolved by agreement and there was no hearing before SENDIST.

[13] The Board then commissioned further advice from various bodies, it carried out the statutory assessment and decided to make a statement of special educational needs. The proposed statement was issued by the Board on 26 June 2013. This was not acceptable to the parents. Following further representations from the parents and other experts, a second proposed statement was issued on 5 August 2013. There then followed further representations from the parents. This resulted in a final statement being issued by the Board on 23 September 2013.

[14] The parents considered that this statement was inadequate and it was appealed to SENDIST on the basis that the applicant required 1:1 classroom assistance. Further updated advice was received from Dr Bailie, consultant paediatrician, who had treated the applicant's epilepsy. She said on 21 October 2013:

> "For the time being I can fully support the family's need to know LC is safe in the school setting and achieving educational progress. I do not anticipate 1:1 assistance will be required beyond the short to medium term …"

[15] Mrs Dorrity says that the Board spoke to CM, the SEN co-ordinator in the applicant's primary school who indicated that there already was a classroom assistant and that "provision short of full-time assistance would be adequate to meet the applicant's needs". The parents and the Board then agreed that the applicant should have 20 hours of one-to-one assistance from his own classroom assistant. This was based, the Board claims, on needs not resource allocation. The appeal to SENDIST was resolved by agreement on this basis. Further agreements have subsequently been reached between the Board and the parents. The court was told that at present the applicant enjoys the benefit of a classroom assistant on a one-to-one basis for some 20 hours per week. Consequently the parents are satisfied that the applicant's special educational needs are being properly looked after while he is at mainstream school. However, it has been a bruising experience for LT. Her motivation in continuing with this application for judicial review of the Board's decisions is, she claims, to ensure that no other parent has to go through what she and her husband went through, which she describes as being somewhat akin to a boxing contest. In effect, it is to make sure that the Board complies with its statutory duties towards vulnerable children such as the applicant. This is a laudable aim.

[16] It is important to recognise the limits of judicial review. It is not intended to be and cannot be a merits-based appeal. Judicial review is concerned primarily with whether a process is lawful. It proceeds on affidavits and the averments in those affidavits cannot be tested on cross-examination. It is singularly ill-suited to determining whether a child should have a special educational needs statement or whether the appropriate support offered in a statement meets that child's particular needs. There is a statutory scheme designed specifically to deal with such issues. Lying at its heart is the SENDIST. It is best placed to deal with such issues. It has the necessary expertise to test the evidence so as to enable it to reach a measured judgment. This court does not intend, if at all possible, to trespass on its domain.

[17] The case was made that the Board's decision was budget driven and that it had a policy to refuse statutory assessments in the hope that parents would not appeal. There is no doubt that budgets are tight in these days of austerity. Ms Dorrity has been frank and open about this. However she has expressly stated that the Board's behaviour is not driven by budget considerations and that it does

not refuse appeals in the hope that will discourage parents from seeking such assistance to which their child is lawfully entitled. I have no reason to doubt that the Board and its representatives have acted in what they believe is a fair and lawful way. The applicant has decided, wisely in my view, not to proceed with the claim that the Board operates a policy to refuse claims for assessments in the hope that such recalcitrance would put off prospective parents from seeking a statutory assessment. Further, the court is not equipped on the basis of one case and limited statistics to make any findings on such an issue. This court is impressed that the Board, through its servants and agents, has tried and continues to try to find out how the special educational needs of the children for whom it has a responsibility can have their educational needs best dealt with in a fair and lawful manner.

C. STATUTORY PROVISIONS AND CODE OF PRACTICE

[18] It is necessary to set out as briefly as possible the relevant statutory provisions and those paragraphs from the Code of Practice ("the Code") which provide the framework for this application.

(i) Article 3 defines the meaning of "special educational needs". It is straightforward. It states:

> 3. - (1) For the purposes of the Education Orders, a child has "special educational needs" **if he has a learning difficulty which calls for special educational provision to be made for him.**
>
> (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.**
>
> (3) A child is not to be taken as having a learning difficulty solely because the language (or form of, the language) in which he is, or will be, taught is different from a language (or form of a language) which has at any time been spoken in his home.

(4) In the Education Orders, "special educational provision" means-

(a) 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, and
(b) in relation to a child under that age, educational provision of any kind.

(5) In the Education Orders, "special school" means a controlled or voluntary school which is specially organised to make special educational provision for pupils with special educational needs and is recognised by the Department as a special school.

(6) In this Part, "ordinary school" means a grant-aided school which is not a special school.

(7) In this Part, "child" includes any person who has not attained the age of nineteen years and is a registered pupil at a school.

(8) For the purposes of paragraph (7) a person who attains the age of nineteen years at any time during a school term at any school shall be deemed not to have attained that age until the day after the end of that school term.

(9) In this Part, "the Tribunal "has the meaning assigned to it by Article 22(1)."
[*emphasis added*]

(ii) Article 4 requires the Department to issue a Code giving practical guidance to, inter alia, the boards. It provides:

"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 the Boards of Governors of grant-aided schools of their functions under this Part.

(2) It shall be the duty of-

(a) boards and Boards of Governors of grant-aided schools exercising functions under this Part, and
(b) any other person exercising any function for the purpose of the discharge by boards and Boards of Governors of grant-aided schools of functions under this Part,

to have regard to the provisions of the code.

(3) On any appeal, the Tribunal shall have regard to any provision of the code which appears to the Tribunal to be relevant to any question arising on the appeal.

(4) The Department shall publish the code as for the time being in force."

I will come back and look at the Code which has been produced in a little detail.

(iii) Article 13 deals with the duty of the Board to children with special educational needs who require special educational provisions. It provides:

"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."

(iv) Article 15 sets out how the assessment of educational needs should take place. It states:

"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."

(v) Article 16 deals with the Statement of Special Educational Needs. It states:

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."

(vi) Article 17 deals with an appeal against a decision not to make a statement. This appeal is determined by SENDIST whose lay members have a special expertise in this particular area.

"17. - (1) If, after making an assessment under Article 15 of the educational needs of any child for whom no statement is maintained under Article 16, the board does not propose to make such a statement, it shall give notice in writing of its decision, of the reasons for making it, to the child's parent.

(2) In such a case, the child's parent-

(a) shall have the right to receive, on request, a copy of any advice given to the board on which the decision is based; and

(b) may appeal to the Tribunal against the decision.

(2A) A notice under paragraph (1) shall inform the parent of the right of appeal under paragraph (2) and contain such other information as may be prescribed.

(2B) Regulations may provide that where a board is under a duty under this Article to serve any notice, the duty must be performed within the prescribed period.

(3) On an appeal under this Article, the Tribunal may-

(a) dismiss the appeal,

(b) order the board to make and maintain such a statement, or

(c) remit the case to the board for it to reconsider whether, having regard to any observations made by the Tribunal, it is necessary for the board to determine the special educational provision which any learning difficulty the child may have calls for."

(vii) Article 18 deals with any appeals against the contents of a statement. It provides:

"18. - (1) The parent of a child for whom a board maintains a statement under Article 16 may appeal to the Tribunal-

(a) when the statement is first made,

(b) if an amendment is made to the statement, or

(c) if, after conducting an assessment under Article 15, the board determines not to amend the statement.

(1A) An appeal under this Article may be against any of the following-

(a) the description in the statement of the board's assessment of the child's special educational needs,

(b) the special educational provision specified in the statement (including the name of a school so specified),

(c) if no school is specified in the statement, that fact.

(2) Paragraph (1)(b) does not apply where the amendment is made in pursuance of-

(a) paragraph 11 (change of named school at request of parent) or 13(4)(b) (amendment ordered by Tribunal) of Schedule 2; or

(b) directions under paragraph 2 of Schedule 13 to the 1986 Order (revocation of school attendance order);

and paragraph (1)(c) does not apply to a determination made following the service of notice under paragraph 3 (amendment by board) of Schedule 2.

(3) On an appeal under this Article, the Tribunal may-

(a) dismiss the appeal,

(b) order the board to amend the statement, so far as it describes the board's assessment of the child's special educational needs or specifies the special educational provision, and make such other consequential amendments to the statement as the Tribunal thinks fit, or

(c) order the board to cease to maintain the statement.

(4) On an appeal under this Article the Tribunal shall not order the board to specify the name of any school in the statement (either in substitution for an existing name or in a case where no school is named) unless-

(a) the parent has expressed a preference for the school in pursuance of arrangements under paragraph 5 of Schedule 2, or

(b) in the proceedings the parent, the board or both have proposed the school.

(5) Before determining any appeal under this Article the Tribunal may, with the agreement of

the parties, correct any deficiency in the statement."

(viii) Article 18A deals with unopposed appeals. This is what happened in the instant case. In this case Article 18A provides that the appeal is to be treated as having been determined in favour of the appellant, here the parent when, it is unopposed.

(xv) Finally, Article 20 deals with the assessment of educational needs at the request of a child's parents. It states:

"20. - (1) Where-

(a) the parent of a child for whom a board is responsible asks the board to arrange for an assessment to be made in respect of the child under Article 15,

(b) such an assessment has not been made within the period of six months ending with the date on which the request is made, and

(c) it is necessary for the board to make an assessment under that Article,

the board shall comply with that request.

(2) Paragraph (1) applies whether or not the board is maintaining a statement under Article 16 for the child.

(3) If in any case where paragraph (1)(a) and (b) applies the board decides not to comply with the request-

(a) it shall notice in writing of that decision and of the reasons for making it to the parent of the child, and

(b) the parent may appeal to the Tribunal against the decision.

(3A) A notice under paragraph (3)(a) shall inform the parent of the right of appeal under paragraph (3)(b) and contain such other information as may be prescribed.

(4) On an appeal under paragraph (3) the Tribunal may-

(a) dismiss the appeal, or

> (b) order the board to arrange for an assessment to be made in respect of the child under Article 15." [*Emphasis added*]

[19] Those are the statutory provisions which affect this judicial review. The Code of Practice emphasises the importance of the parents and the need for them to be involved in the process. Paragraph 2.21 states:

> "The relationship between the parents of a child with special educational needs and their child's school has a crucial bearing on the child's educational progress and the effectiveness of any school-based action."

Paragraph 3.14 goes on to say:

> "In some instances, a parental request for assessment may reflect dissatisfaction with action taken in the school-based stages. The Board must follow the same procedure, regardless of the background to the request, investigating evidence provided by the school and parents as to the child's learning difficulties and evidence about action taken by the school to meet those difficulties."

[20] The Code stresses the importance of the school seeking at all times to foster the active participation and involvement with parents. At paragraph 3.20 he states:

> "In considering whether a statutory assessment should be made, Boards should pay particular attention to evidence provided by school and parents about the child's learning difficulties, taking into account the action already taken by the school to overcome these. Decisions must be made in light of all the circumstances of each individual case, in consultation with parents, schools and where appropriate the child concerned."
>
> "3.21 The central question for Boards is whether there is convincing evidence that, despite relevant and purposeful action by the school, with the help of external specialists, the child's learning difficulties remain or have not been remedied sufficiently. Boards will always wish to see evidence of the school's assessment of the child's learning difficulties; to obtain evidence of the child's academic attainment in the school; and to examine that evidence to understand why the child has achieved the levels shown. Beyond that, the evidence Boards should seek and the

> questions they should ask will vary according to the child's age and the nature of the learning difficulty."

Finally it is important to note that paragraph 3.13 requires the Board to "comply with a request from a parent to conduct a statutory assessment, unless one has already been made in the previous 6 months **or the Board concludes, having examined the available evidence, that one is not necessary"**. [*Emphasis added*]

D. DISCUSSION

Issue 1

[21] The applicant through his Senior Counsel abandoned any claim that the Board had a policy of refusing outright to carry out any assessment of children with special educational needs and then giving in when the parents appealed to SENDIST. However, the applicant does say that the Board acted unlawfully, and even though this issue is past history so far as the applicant is concerned, there is a point of general public importance, namely how the Board should approach such applications from parents for statutory assessments.

[22] The Board in the first affidavit from Ms Dorrity set out in detail the approach the Board adopted towards such applications. She says at paragraph 31:

> "In the light of the short timescale within which the decision on a statutory assessment must be made, if the necessary evidence is not available, the Board will normally refuse to carry out statutory assessment. Where this occurs, the decision does not necessarily mean that the Board has made a considered and informed judgment about the child's needs, rather it is a reflection of the lack of evidence available at the time the decision must be made to suggest that a statement is necessary or probably necessary. Like this case, the evidence may indicate to the Board that the child's needs are capable of being addressed within the school, with specialist help from the Board, in accordance with stage 3 of the Code of Practice. In other cases, very little evidence is available at all. In many cases, these decisions by the Board are appealed to the SENDIST. The Tribunal's procedures require the Board to prepare a case statement setting out the basis for its decision. However, the absence of available evidence will inevitably impact upon the Board's ability to provide a substantive response to the appeal. The Board frequently finds itself left in the

> somewhat invidious position of having to choose either to defend its position without clear supporting evidence or agree to carry out the statutory assessment. It is the experience of the Board over many years that where it has chosen to defend the appeal in the absence of clear evidence, the outcome was that SENDIST simply directed the Board to carry out the assessment. Consequently, in recent years, the Board frequently takes a pragmatic approach and elects not to defend the appeal and agree to an assessment. It has been the experience of the Board that with the increasing number of appeals it was not an efficient use of resources to offer a substantive defence. When faced with this situation, the Board has simply opted in many cases to carry out assessments. This is not a blanket policy on the part of the Board to fail to assess unless a SENDIST appeal is lodged, rather it reflects the pragmatic response to the circumstances in which the Board finds itself."

[23] If SENDIST was acting unlawfully in its approach to cases where the parents had appealed the Board's refusal to make a statutory assessment, then the Board should have sought judicial review of SENDIST's unlawful approach rather than make itself a complicit party to such unlawfulness. The Board was unable to offer any explanation as to why it did not seek a judicial review of SENDIST if it concluded that SENDIST was not acting in accordance with its statutory duty.

[24] The Board is bound to take into account the representations of the parents: see Articles 15(1) and 16(1). In this case the Board maintains that the critical evidence which tipped the balance in favour of carrying out an assessment was the report from Dr Macleod. This is dated 7 December 2012. No explanation has been provided as to why the Board was unable to obtain this information before it refused to carry out an assessment. But in any event Dr Macleod in his report did not tell the Board anything that the applicant's mother had not set out in detail in her submissions of 30 October 2012. The paragraph of the submission of the mother entitled "Investigations into Epilepsy" is a rather fuller account than that given by Dr Macleod. The Board was duty bound to take into account those representations, unless the Board had some good reason to ignore them. No good reason has been advanced. This was not a case in which a statutory assessment (or even a request) had been made within the previous 6 months. Consequently the Board on the basis of its own Code was duty bound to examine the available evidence in order to determine whether an assessment was necessary. The Code emphasises the importance of the parents' input and of the parents' involvement in the process. It seems to this court that in this case the Board paid lip service to the parental involvement and that the information provided by the applicant's mother was ignored. It is important to stress that the Board has to take into account all of the

information available to it in deciding whether or not to make a statutory assessment. The Board is not entitled to reject or ignore the representations made by parents unless there is good reason to do so. It may be that SENDIST does order the Board to carry out statutory assessments in this type of case because the Board has failed to pay adequate attention to the representations of the parents and thus to the all the available evidence. Indeed, very often it is the parents who are best placed to make representations on behalf of their offspring as they are the ones who will spend most time with the child and they are the ones who will observe the child most closely. To ignore their contribution as not worthy of consideration or to attach a little importance to it, is to do them a grave disservice. In this case the Board, by ignoring the representations of the applicant's parents, failed to carry out their statutory duty and thus acted unlawfully. It is important to stress that the Board, to comply with its statutory duty in the future, must act on all the evidence it has available to it at the time and this should include any representations made by the parents.

Issue 2

[25] This issue relates to the Board's failure to offer a personal classroom assistant for the applicant's personal use for a minimum number of hours. This has now been resolved by agreement as is set out earlier in this judgment. When leave was granted, the court made it clear that the court was not in a position to make any assessment in respect of this child's special educational needs. Having now had the benefit of detailed argument, the court declines to make any finding on this issue. It became clear during the course of argument, that there was no point of general public importance involved. There was nothing to suggest the approach of the Board to this assessment was unlawful except insofar as it was suggested that the Board had acted wholly unreasonably in the light of all the evidence. In any event the application in respect of this issue is now academic and any decision of this court can have no practical effect or serve no useful purpose between the parties. In R v Secretary of State for the Home Department, ex parte Salem (1999) 2 All ER 42 Lord Slynn said:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or anticipated so that the issue will most likely need to be resolved in the near future."

[26] In A Matter of an Application by Daniel Hughes (A Minor) (2006) NIQB 27 Deeny J was asked to carry out a judicial review which attacked the final statement of special educational needs made on 7 June 2005 on the grounds that the statement did not set out sufficiently specific detailed and quantified occupational therapy, an application which it might be thought is similar to the present one. He said:

> "I am not persuaded in any way that this is a matter in which I should grant leave to bring judicial review proceedings. Firstly it seems to me very much a matter that can be considered by the Special Educational Needs Tribunal. It has the necessary expertise, information and opportunities for examination to reach a conclusion about that. It seems to me that it would be quite wrong of the court to intervene in that matter where an alternative remedy is available. See Regina (Pepushi) v Crown Prosecution Service 2004 EWHC 798 (Admin) and also Regina v Special Educational Needs Tribunal ex parte F 1996 ELR 213 where Popplewell J held that it was only in exceptional circumstances that judicial review would be granted where a statutory right of appeal existed. I respectfully agree with that view which finds repeated echoes in the decisions of the court."

[27] I also note the comments of Kerr J in Re Nicholson's Application (2003) NIQB 30 where he said:

> "Generally, it will be necessary to demonstrate that such a ruling (on an academic issue) would not require a detailed consideration of facts; it should also be shown that a large number of cases are likely to arise (or already exist) on which guidance can be given; that there is at least a substantial possibility that the decision-maker had acted unlawfully and that such guidance as the court can give is likely to prevent the decision maker from acting in an unlawful manner."

[28] Having heard arguments from both sides I conclude that:

(i) There is no point of statutory construction arising in this issue.

(ii) A decision on this issue will not provide any help to other children with special educational needs whose cases will be based on their own particular circumstances.

(iii) Insofar as this case gives rise to public interest, it does so only on the particular facts which relate to LC, a minor.

(iv) Any dispute is academic, the parents and the Board having reached an agreement about the level of personal support to be provided to the applicant by a classroom assistant.

E. CONCLUSION

[29] On Issue 1, I grant the necessary declaration. On Issue 2 the court declines any relief given that the issue is academic and the circumstances of the application are such that it will not assist in the resolution of any other cases, which will fall to be considered on their own particular facts.