

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Re C, McD and McG minors

(Statement of special educational needs; provision of speech
and language therapy)

MORGAN J

[1] The minor applicants are children with learning difficulties in respect of whom statements of special educational needs have been made by an Education and Library Board. Each of them challenges the lawfulness of the provision made in respect of speech and language therapy. On 1 May 2007 Gillen J gave them leave to apply for judicial review on the following ground:

"The Respondent has been fettering its discretion in the matter of what should be set out as the special educational provision in respect of speech and language therapy in the applicants' statements of special educational needs by accepting and adopting speech and language therapist advice from a Health and Social Services Trust which amounts to a policy which is contrary to the requirements of the Education (Northern Ireland) Order 1996 and its associated Code of Practice and Regulations".

The Statutory Framework

[2] The statutory provisions in relation to the making of statements of special educational needs are found in the Education (Northern Ireland) Order 1996. Article 15 provides for the assessment of educational needs by

the Board. Article 16 deals with the obtaining and maintaining of statements 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)."

Article 18 deals with appeals against the content of statements and includes wide powers available to the Tribunal.

"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."

It is worth noting, however, that at the time at which this application was first made in February 2007 or leave was granted in this case on 1 May 2007 none of the conditions set out in article 18 (1) were in fact satisfied by any of the applicants and they could not at that time have engaged the appeal provisions. Once the statements were amended they were entitled to engage the appeal provisions and did so. Their appeals are now due to be heard by the Tribunal.

Article 19 provides for reviews of statements and article 20 provides for an appeal mechanism in respect of a child whose parents request a further assessment. The appeal in that case will either be dismissed or an order made for the Board to arrange for the assessment.

[3] Article 4 of the 1986 Order provides for the issue of a code of practice and the duty of boards to have regard to it.

"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."

Considerable reliance was placed by the applicants on paragraph 4.21 of the code in relation to the details which should be set out in the subsection dealing with special educational provision:

"The provisions set out in this subsection should normally be specific, detailed and quantified (in terms, for example, of hours of ancillary or specialist teaching support) although there will be cases where flexibility should be retained in order to meet the changing special educational needs of the child concerned".

The circumstances of each applicant

[4] C is a 12 year old boy. He has an autistic spectrum disorder as well as severe learning difficulties. He uses no speech at all. A statement of special educational needs was made in respect of him on 19 July 2000. One of the objectives of the educational provision in his statement was to develop communication and language skills. The statement provided that his special educational needs and objectives would be met by, inter alia, opportunities, programmes and appropriate experiences to help develop C's communication and language skills. The statement provided for review annually by the Special School which he attends in order to assess his progress towards meeting the objectives specified in the statement, to review the continuing appropriateness of the statement and to set new targets for the coming year. His statement was renewed annually without amendment. His mother became concerned that he was not getting adequate assistance by way of speech and language therapy. She believed that he was seen by a therapist in a group setting of approximately 7/8 children once a week. In November and December 2006 her solicitors contacted the Board requesting an amendment of the statement to show a specific period of time for C's speech and language therapy.

[5] The Board does not retain its own speech and language therapists but relies on therapists employed by the local Health and Social Services Trust. On 1 March 2007 the Board wrote to the Trust indicating that C's parents had requested that the speech and language provision should be set out in an amended statement which specifies a number of hours per week. On 12 March 2007 Mr Quigley, the speech and language therapist in the Trust, wrote

back setting out the programme of work, speech and language therapy intervention and recommendations for C.

"Programme of Work

C's speech and language therapy programme dated 7 February 2007 has three specific aims, which are outlined below.

Aim One-To encourage C to access his tech talk 20 plus within the classroom setting with the single overlay that has been introduced.

Aim Two- To encourage C to take ownership of his communication aid (other children are not to use it) -- he can opt out of using it, just like a verbal child can choose not to speak.

Aim Three-To expand C's use of his tech talk by introducing another overlay for a single topic such as general school vocabulary or food (for choosing at break time)-only to be introduced when aim one is fully achieved.

Speech and Language Therapy Intervention

The school year commenced these on 12 September 2006.

These have involved:

Reassessment through:

individual one-to-one sessions with C
discussion and liaison with school staff
planning of treatment intervention

Intervention through:

joint sessions with school staff and C
arrange a meeting with parent to discuss speech and language therapy programme and advising on how to implement this at home with C
discussion with educational psychology re C's communication needs
providing and explaining C's speech and language therapy programme to his teacher and advice on implementing in class.

Recommendations

That the speech and language therapy programme of work be followed across home and school environments in order to provide and develop functional communication for C.

To effectively deliver this advice and support parents and school staff in using these techniques across environments.

And C's communication needs develop or change, speech and language therapy reassessment of his needs continues. "

[6] In a letter dated 23 March 2007 the Board asked Mr Quigley why he did not feel it appropriate to provide advice which quantified the speech and language therapy to be provided. In a reply dated 30 March 2007 Mr Quigley pointed out that intervention may involve different options of working according to the child's individual needs and the school environment, supporting individual members of staff or staff groups to make environmental changes, collaborating with staff and parents to review and advise on the child's progress and providing regular and continuing help from a therapist either individually or in a group. He continued:

"When you now refer again to the recommendations contained in C's report, I hope it will be appreciated that they are already specific and to quantify them is not appropriate. Provision needs to be flexible in order to address the child's needs.

Speech and language therapy intervention for C includes reviewing and reassessing his needs, devising and supporting the implementation of the specific aims of his outlined speech and language therapy programme and providing advice and support to the classroom team and his parents. These recommendations refer in particular to his school and home environment and should be used there on an ongoing basis.

It is therefore not possible or appropriate to quantify therapy input as it is adjusted according to C's needs, with the aim of supporting the implementation of the specific speech and language therapy programme, which will benefit C."

[7] As a result of this process on 3 May 2007 an amended statement of special educational needs was made in respect of C. The relevant provision in the statement to meet his special educational needs and objectives included the following:

"A speech and language therapy programme devised by a speech and language therapist which

has specific aims as outlined in speech therapy advice in the appendices to this statement. The speech and language therapy programme of work should be followed across home and school environments in order to provide and develop functional communication for C. The speech and language therapist will review and reassess C's needs on an ongoing basis and support parents and school staff in the delivery of his programme."

The monitoring provisions provided for an individual education plan within two months of the statement specifying short-term targets and approaches to be used in furtherance of the objectives of the statement and a requirement for detailed records to be maintained so that his progress in achieving the targets specified could be considered.

[8] McD is a nine-year-old boy with an autistic spectrum disorder and significant learning difficulties with complex needs who attends the same Special School as C. On 1 July 2002 a statement of special educational needs was made in respect of him. He is non-verbal and communicates by touch and pulling an adult to what he wants. In a familiar setting he can understand instructions containing one keyword. His statement noted that an aim was to develop his reciprocal skills in language and communications. That objective was to be met by programmes and experiences to develop his reciprocal skills in language and communication. Monitoring was to occur annually by the school. His statement was renewed annually but in November and December 2006 his mother retained the same solicitors to pursue the Board to amend the statement to show a specific period of time for speech and language therapy. In his case the correspondence followed the same pattern and a report from a speech and language therapist dated 22 March 2007 recommended the following:

" Summary/Recommendations"

McD's comprehension and expression of language is limited. He continues to benefit from a small group setting and is making good progress within this structured environment.

He should continue to have access to a visual schedule to orientate him in the school day and to provide structure and routine that he needs.

He should continue to have access to his visual schedule at his workstations to orientate him to the tasks that he has been set. His class teacher is working hard to encourage him to develop his independence when working on his own and in the class environment.

He should continue to benefit from a total communication approach, that is, the use of Makaton signing, symbol support and speech. In this way he is provided with lots of clues to aid his understanding of language.

His understanding of language can be variable depending on his mood and motivation, who he is working with and where he is. Generally language should be kept to one keyword level where possible.

A speech and language therapy programme will be put in place in the classroom for him. This will target his attention and listening levels. SLT will liaise with staff to provide advice and support for his skills to develop. His programme and input will be subject to change depending on his development and needs.

[9] Mr Quigley was again asked in this case to explain why he had not specified the precise amount of therapy to be provided and in an answer similar to that provided in respect of C he broadly repeated the same points. An amended statement of special educational needs was made in respect of McD on 3 May 2007 which included the following provision:

"A speech and language therapy programme devised by a speech and language therapist which will target his attention and listening levels. He will continue to benefit from a total communication approach, that is, the use of Makaton signing, and speech so that he is provided with lots of clues to aid his understanding of language. The speech and language therapy programme of work should be followed across home and school environments in order to provide and develop functional communication for him. The speech and language therapist will review and reassess his needs on an ongoing basis and support parents and schools staff in the delivery of his programme."

The monitoring provisions provided for an individual education plan within two months of the statement specifying short-term targets and approaches to be used in furtherance of the objectives of the statement and a requirement for detailed records to be maintained so that his progress in achieving the targets specified could be considered.

[10] McG is a 12 year old girl who attends the same Special School. She has an autistic spectrum disorder and difficulties with language and communication. On 28 March 2000 a statement of special educational needs was made in respect of her. Its aim was to develop her language and communication skills and this was to be achieved by programmes and experiences to develop her skills of language and communication. Monitoring was to occur annually. The statement was renewed from year to year until the solicitors took steps on her behalf to request an amendment of the statement to show a specific period of time for her speech and language therapy. In a report dated 13 March 2007 a Trust therapist made the following observations and recommendations:

" Recommendations

Her interactions are quite socially appropriate and she is able to initiate interaction with others. She has difficulties with more subtle social rules such as turntaking and appropriate eye contact. General advice will be given on encouraging her to improve the skills.

I feel that her needs are presently being met in her classroom environment where she has the teaching support necessary for her to access the curriculum and develop her independence. She will be reviewed at the end of the school year and recommendations will be made at that stage as to future SLT intervention."

The report had earlier concluded that she had reached a plateau in comprehension and expression of language.

[11] Mr Quigley was again asked to explain the absence of quantification of the speech and language therapy to be provided. He replied in broadly similar terms to the comments he made in the earlier cases but included the following:

"When you now refer again to the recommendations contained in her report I hope it will be appreciated that it is already specific and to quantify it further is not appropriate. Provision needs to be flexible in order to address the child's needs. Please consider that ongoing endless speech and language therapy will not reverse the effects of a child's learning difficulty. Speech and language therapy aims at maximising communication at the child's level and reducing any discrepancy between what the child

understands and what they can express-whether by speech or other formal means."

[12] On 3 May 2007 an amended statement of special educational needs was made in respect of McG which included the following provision:

"Advice from the speech and language therapist including reviewing and reassessing her needs, devising and explaining the specific aims of her speech and language therapy work and providing support to the classroom team and parents in using it".

The same monitoring provisions in relation to an individual education plan and detailed records were included.

Each of the applicants also relies upon the fact that 12 children at the same Special School had statements of special educational needs including speech and language provision which was not quantified.

The respondent's evidence

[13] On behalf of the respondent Board 2 affidavits were filed by Mrs Young, the Assistant Senior Education Officer. She explained that the board did not employ speech and language therapists but relied upon the Trust. The children with which this application was concerned all attended the same Special School and all suffered from severe learning difficulties. At paragraph 11 of her first affidavit she set out the practice within the Board where the only speech and language advice available to the Board was that received from the Trust.

"In my experience and practice within the Board, where the only speech and language advice available to the Board is that received from the Trust, I believe that it is the invariable practice of board officers to follow that advice and to include within the statement educational provision which accords with the needs recommended by the professional therapists. Accordingly if the advice received from the Trust is not detailed or specific about the quantity of speech and language therapy which a child requires it is not considered to be appropriate for the Board to deviate from that advice and to include a level of detail which may ultimately be inappropriate. In those circumstances the approach adopted by board officers is to follow the advice received and to

describe the speech and language provision, the goals to be achieved or the manner in which different types of speech and language therapy might be incorporated within other areas of the child's education. In this way the approach of the Board is to take account of all the speech and language advice received, to ensure that the statement includes provision which meets the needs of the child and which also leaves an area of discretion to teachers or therapists as to how best to meet the provision identified in the statement. "

She then went on to indicate that in the cases with which this application is concerned the Board had requested Mr Quigley to provide an explanation for the level of detail and specification recommended by him. In her second affidavit she gave examples of specific speech and language therapy provision contained within statements of special educational needs for children within mainstream education. The purpose of this was to demonstrate that there was no blanket policy of failing to specify. She also referred to the appeal provisions to the SENDIST.

[14] Mr Quigley made affidavits in each case which described the variable measure involving support and collaboration with staff and parents and the various mechanisms that might be used to deliver therapy to children either individually or in a group. It was his view that the recommendations in each case were specific and he did not believe that any further quantification was appropriate. He considered that the provision of therapy needed to be flexible in order to address each applicant's individual needs.

[15] In a further affidavit sworn on 17 September 2007 he made it clear that his views were not as a result of any policy but were the professional opinions of the therapists who have assessed the children. He referred to guidance from the Royal College of Speech and Language Therapists in 2006 describing the various approaches that speech and language therapy might involve and noted that such interventions were part of a wider package of support and may change over time. The reports prepared for each of these applicants were appropriately specific. He noted that each of the children suffered from severe learning difficulties and said that the speech and language therapy service provision within the school was designed to attempt to support each applicant's communication in that environment and to advise school staff as to how they may best communicate with each of the applicants to maximise the positive effects of their teaching. He stated that this was an appropriate method of working with children who have complex needs. It is not in his opinion possible to quantify the advice and support which each of these applicants will require. In his view in each case the work needed to achieve a positive outcome can be defined and is defined for each of the applicants.

The submissions of the parties

[16] For the applicant Mr Brian Fee QC who appeared with Mr O'Hare submitted that there is a legal duty on the part of the Board to quantify speech and language provision and where it does not do so the Board should be required to justify its failure or refusal. In this case it is submitted that the statements as amended are not specific, detailed or quantified. He relies upon paragraph 11 of Mrs Young's affidavits as disclosing a practice of blanket acceptance of advice from the Trust. He submitted that the approach of Mr Quigley in essence constituted a policy and did not explain why the specification of a certain number of hours per week was not helpful or necessary.

[17] For the Board Mr McCloskey QC who appeared with Mr McLaughlin submitted that it was entitled to rely upon professional advice it received from the Trust. Indeed in the absence of other professional advice it would be difficult for the Board to depart from it. In each case the Board had written to the Trust requiring an explanation in some detail as to why it was inappropriate to quantify the provision in these particular cases. There was no challenge to that professional opinion. Mr McCloskey also submitted that the applicants should have proceeded in any event by way of appeal to the Tribunal. Mr Good for the Trust broadly supported the respondent's submissions.

Conclusion

[18] Article 16 (3) (b) of the 1996 Order requires the statement to specify the special educational provision to be made for the purpose of meeting the child's needs. I consider that assistance in understanding what was required is found in the judgment of Hale LJ in *R(IPSEA LTD) v Secretary Of State for Education and Skills* [2003] EWCA Civ 7 where she said:

14. *"The legal obligation of the LEA and of the SENT is to write a statement which 'specifies' the matters laid down in the Regulations. If Parliament had meant specification to mean numerical quantification no doubt it would have said so. (It is worth noting that, in contrast to the other matters referred to in the schedule, departures from the national curriculum have to be specified out 'in detail'.) However, the statement clearly has to spell out the provision appropriate to meet the particular needs of, and objectives identified for, the individual child. It must be addressed to the needs of the child rather than to the needs of the system. As Laws J (as he then was) said in *L v Clarke and Somerset**

County Council [1998] ELR 129 'in very many cases it will not be possible to fulfil the requirement to specify the special educational provision considered appropriate to meet the child's needs, including specification of staffing arrangements and curriculum, unless hours per week are set out.'

15. *It follows that any flexibility built into the statement must be there to meet the needs of the child and not the needs of the system. But the needs of the child cannot be seen in a vacuum. They may fluctuate for a wide variety of reasons. Some of these will be related to the child's own state of fitness or health. Some of these will be related to the interaction between the child and his environment.*

17. *The Code requires precision as the general rule, but provides for flexibility where this will best meet the needs of the child. In our view, as expressed in E v Newham London Borough Council and the Special Educational Needs Tribunal, that is what is contemplated by the obligation to specify the provision to be made for him. It remains the case that vague statements, which do not specify provision appropriate to the identified special needs of the child, will not comply with the law."*

I consider that this approach accords with the statutory purpose of these provisions which is to ensure that parents in particular are able to determine whether the special educational provision required is in fact being delivered.

[19] The level of detail in respect of each of the applicants varies. In the case of McD there is specific reference to the use of a visual schedule, the use of MAKATON, signing support and speech and language being kept to one keyword level. In the case of C the aims are clear in relation to access to his tech talk but there is no attempt to specify the periods of time in respect of either reassessment or intervention. Mr Quigley's opinion is that specification or quantification is inappropriate because of the need to retain flexibility depending upon the boy's circumstances. In these proceedings there was no application to cross-examine Mr Quigley nor was there any contrary view from any other therapist about these matters. In the case of McG it is assessed that her comprehension of language is at the 2 information carrying word level which is now equivalent to her expression of language. She has no emerging skills at the next level of understanding. Although the advice records that further investigation is required to fully establish if her level of comprehension has reached a plateau it appears that those investigations are not to occur before the end of the school year. Although the provision for her

appears to be very modest indeed the advice suggests that this is because there is no indication of emerging progress.

[20] Children with severe learning difficulties are just as entitled as other children with learning difficulties to have specification of the educational provision which is necessary to meet their needs. I accept that the complex nature of the needs of such children may impact upon the degree of specification and that it is appropriate for the Board to obtain expert advice and assistance in relation to that issue. I consider that the original statements in respect of each of these children and the practice of the Board as described in paragraph 11 of Mrs Young's first affidavit strongly suggests that the Board was not inclined to pursue issues in relation to specification or quantification until the solicitors on behalf of the applicants began their correspondence. Thereafter I am satisfied that the Board did make appropriate inquiries in relation to those issues and I accept in the absence of any contradictory evidence that the approach advocated by Mr Quigley was an appropriate professional opinion upon which the Board were entitled to rely rather than the making of a policy decision by him.

[21] In those circumstances I consider that the ground on which leave was granted has not been made out and I must refuse this application. When the matter proceeds before the Tribunal there will be an opportunity to test the opinion evidence of Mr Quigley and, if appropriate, to call rebutting evidence. I want to make it clear that nothing in this judgment should inhibit the Tribunal from reaching its decision on the merits of the evidence and arguments before it.

[22] Finally I would not have been prepared to dismiss this application because of the availability of the alternative remedy by way of appeal to the Tribunal. That remedy was not available at the leave stage and there was no application to set aside the leave once it became available. Where the case has been prepared for hearing it is likely to be detrimental to the interests of good administration not to proceed.