Neutral Citation No: [2012] NIQB 106 | **Ref: TRE8692**

Judgment: approved by the Court for handing (subject to editorial corrections)* | **Delivered: 21/12/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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A's Application [2012] NIQB 106

IN THE MATTER OF AN APPLICATION BY A (a minor) by HIS MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW

-and-

IN THE MATTER OF A DECISION OF THE PRINCIPAL OF A.LEARNING CENTRE MADE ON OR ABOUT 5 SEPTEMBER 2011

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TREACY J

Introduction

[1] The applicant is a minor who attends a Learning Centre ("the Centre"), a specialist facility controlled by the Southern Education and Library Board ("the Board") although he is formally registered at a local High School. This application arises out of alleged decisions taken by the Head of Education Otherwise than at School (EOTAS), Ms Pauline Curran, and the Board to remove the applicant from the Centre.

[2] On 7 September 2011 the applicant's mother was informed that he was not to return to the Centre and that he would be educated at home. The applicant alleges that this decision is contrary to the terms of his Statement of Special Educational Needs.

Background

[3] The applicant, A, was born in March 1997 and is currently 15 years old and in Year 11 of his education. He was first referred to the Educational Psychology service in 1999 when he was 2 years old because of speech and language difficulties that he was displaying at that time. The Board conducted a statutory assessment of his educational needs in accordance with Art15 of The Education (NI) Order 1996 ("the 1996 Order"). Advices received

then paint a picture of a difficult and frustrated young child. The Psychology advice noted that he had 'a history of anti-social behaviour (appearing almost to enjoy pain, self biting and head banging).' The report from his P.1 teacher noted: 'Appears to be oblivious to all that is going on around him and has been seen hitting his head off the classroom door (repeatedly).' His first Statement of special educational needs was issued on 30 July 2002 when the applicant was 5 years old. Under this statement he was placed in a mainstream primary school with support from a classroom assistant for his learning difficulties.

[4] A remained in primary school until 2004 when a marked deterioration in his behaviour was noted and his Statement was reviewed. The educational Psychologist noted:

> "A's special educational needs would appear to have evolved to encompass more significant difficulties within emotional/behavioural domains in addition to his learning and speech and language needs."

[5] In view of these changes a placement was recommended in a learning support centre. An affidavit was filed from Pauline Curran, the Advisor for Social Emotional and Behavioural Difficulties (SEBDs) of the Board. She is also Head of Education Otherwise Than At School (EOTAS) service for the Board. Ms Curran explains that the Centre is not a school, but 'a specialist education resource centre which provides for pupils who, for various complex reasons, find it difficult to sustain ....a placement at a mainstream school'. She states that 'the Board operates the Centre as part of its obligations under Art 86 of the Education (NI) Order 1998..... 'to make provision for the education of children/young people otherwise than at school where those children/young people cannot, for a variety of reasons, receive education in school.' She states that in May 2005 A commenced a placement in the Centre while he was still in P.4. This placement was for 4 days a week with the last day being spent in a learning support class attached to his original primary school. This arrangement operated throughout his P.5 year. During his P6 year, he was re-integrated back into his primary school, but his behavioural problems continued and in his P7 year he returned to the Centre. The Centre has been responsible for his education from that time until the date of the occurrence of the present dispute.

[6] Ms Curran makes the following remarks about A's progress during his later primary school years:

> "Concerns about his wellbeing were so substantial that a formal referral to Social Services was made on 7 December 2005' - (ie when the child was eight and a half years old.)"

There is no evidence about what Social Services did for A on foot of this referral, however it seems matters did not improve**.** At para14 of her affidavit Ms Curran states:

> ".....there was a substantial deterioration in his behaviour. Staff at the ....Centre were so concerned about his safety and wellbeing that a referral was made to social services in December 2007. A's mother and aunt made a similar request for support from Social Services in March 2008. This followed a serious incident in March 2008 when A demonstrated violence towards his mother. Concerns at that time included that A had been drinking, smoking and associating with unknown persons for long periods of time."

A was eleven years old at the time when these referrals for social services intervention were made.

[7] In September 2008, he commenced his Secondary education. He was enrolled in the learning support centre of the local High School though in reality he never attended that school. Instead he went to the secondary level facility within the Centre. His statement was amended on 29 June 2009 which was the end of his first year of secondary education. This is the statement that was in place at the time of the events which give rise to the present dispute.

[8] The main terms of the Statement are as follows. Part 3 sets out "the objectives which the special educational provision for the child should aim to meet". These include to:

- "Develop his on-task behaviour ... develop his understanding of appropriate social behaviour;
- Provide him with routine and structure;
- Increase his levels of compliance and cooperation;
- Develop his self-esteem and self-confidence;
- Lessen his feelings of frustration;
- Develop his ability to behave appropriately;
- Develop his ability to understand the reasons for his behaviour and take responsibility for it ...".

[9] Part 3 then sets out the educational provision which should be made to meet A's needs and the objectives of his statement. It permits a range of educational responses including placement in a learning support centre attached to a mainstream school or placement in such a centre "in partnership

with an education otherwise than at school setting". The second alternative was the one which actually applied in A's case. He was formally placed in the learning support unit of a local high school but throughout stage 3 his education was delivered entirely by the EOTAS centre. Part 3 of the statement provides:

> "Within the education otherwise than at school setting arrangements should be made to ensure that:
> - Staff ... offer a firm but sympathetic approach;
> - There is emphasis on personal and social education and vocational and life skills as well as literacy, numeracy and ICT;
> - He can access a very high level of adult direction and supervision to facilitate any inclusion in social activities;
> - Multi-agency management of his needs can be facilitated;
> - Close contact is maintained between the educational setting and home so that a unified approach to his education is maintained."

[10] In relation to the curriculum which A should follow the statement provides:

> "A should have access to the Northern Ireland curriculum, as appropriate, given his age, ability, aptitude, attainments and ability to engage.
>
> It is not envisaged that A will require any modifications to the application of the Northern Ireland curriculum.
>
> A should have access to the full range of the Northern Ireland curriculum given his age, ability, aptitude and attainments."

[11] In September 2010, A commenced Year 10 of his education. During this year, there was a marked deterioration in his behaviour, with high levels of defiance and an unwillingness to engage in education. In October 2010 following a meeting with social services, it was agreed with A's mother that if his misbehaviour continued, he would be considered for individualised teaching, outside the Centre. During that year, A's mother was also requested to collect him from the Centre on a number of occasions, due to his refusal to engage in education, his constant demands to go home and his disruptive behaviour.

[12] In January 2011 A's hours of attendance at the Centre were changed from the normal 9.00am–2.00pm to a reduced timetable accessed between 10.00am–12.00pm. His attendance times were then changed to 12.00pm–2.00pm. In June 2011 it was agreed that A would cease attending the Centre altogether and would instead receive limited home tuition until at least the end of that term. It was agreed that this tuition would take place in a local hall. There is a dispute about how long it was intended that this arrangement would persist. The mother avers that she believed it was a temporary arrangement designed to last only until the end of the 2010-2011 school year, and her expectation was that A would resume a normal full timetable at the Centre after the summer holiday. The Respondents state that they intended the home tuition arrangement to remain in place until a multidisciplinary meeting took place at the start of the 2011-2012 academic year which would then decide the way forward for A's education in the new academic year.

[13] It is common case that the applicant's mother received no written communication at any time setting out what the arrangements would be for the forthcoming term. On 7 September 2011 she prepared A for school at the Centre and waited with him for the school bus that normally collected him for school. When the bus did not arrive she phoned the bus driver to enquire about the delay. She was informed by him that the applicant no longer attended the Centre and was to get home tuition instead. The mother states that this was the first time she had been informed the applicant was not to go back to the Centre.

[14] She phoned the Centre to enquire what was happening and A's Head of Year told her that the Centre no longer had any responsibility for him and that his education would now be provided via the Silverwood Centre, which organises home tuition in the area. A's mother rang that Centre and avers that she was informed that the educational arrangements for A had not yet been finalized. Later that day the Silverwood Centre called back to say that home tuition had now been arranged and would start the following day, 8 September in the local hall. A was to receive one hour of tuition three times per week. On 10 October 2011 this provision was reduced to 45 minutes teaching, three times each week.

[15] A's complaint is that this level of teaching is insufficient to provide him with an education and to comply with his statement of special educational needs.

Additional Evidence

[16] Evidence in this case indicated that A was frequently absent from the Centre, sometimes for long periods of time, often without explanation. Since the applicant is a young person of compulsory school age the Court sought clarification from the Education Welfare Service in relation to its

involvement in this case. This resulted in further evidence being produced in November 2012. This consisted of an affidavit and supporting documentation from JC, the Education Welfare Officer (EWO) involved in this case. This affidavit and its exhibits disclose the following materials.

[17] The job purpose of the EWO as described in the sample job description exhibited by JC is "to fulfil the Education and Library Board's statutory duties to ensure that all children within compulsory school age receive regular appropriate education ...". Other duties specified include:

- "to implement legislation with regard to non school attendance;
- to identify appropriate legal action in relation to non attendance;
- to work with a multi-disciplinary approach;
- to represent the board at formal meetings ... ensuring the welfare of the child/young person is paramount in line with the Children Order (NI) 1995;
- to contribute to the monitoring of progress during ... alternative provision".

[18] JC stated that the applicant's case was referred to her by the Centre on 23 February 2011 on the grounds of his attendance levels. She states:

> "referrals on this ground usually arise where a child has an absentee rate lower than 85%".

[19] The referral form in the applicant's case shows an absentee rate of "73% or 69% due to adverse weather conditions and no transport". When a referral is made to the EWO she arranges for an initial assessment to be conducted. In A's case this was arranged for 7 March and it was scheduled to take place at A's home. The record of this initial assessment indicates that JC met with A's mother on that day but notes: "A refused to wait and see me and had gone out with his friends earlier".

[20] The record of the meeting notes that A's mother stated she would like A to complete a full day at school "as she feels he is becoming very de-motivated". The mother acknowledged that A could behave poorly at school and stated that "she feels that he manipulates the situation as he knows he will get home if he misbehaves". In the action sections of this assessment form JC records that the mother is "to improve A's attendance and talk to him about the seriousness of this ...". "EWO to monitor attendance ...".

[21] The supervision record from her file includes the following recordings of JC's attempts to supervise A's school attendance. The full dates of these

recordings are not given here as they are not visible in the photocopy provided.

Record of 03/2011:

> "A left the house not wanting to meet me (A's mother) continues to be unhappy about the short time that A is in school. I ... emphasised that school staff had a limit to what they could cope with ...".

Record from 04/2011: call from A's head of year

> "said that A hasn't been to school in some time and she had heard family were going for holiday in Amsterdam. Advised her that I would phone and call to home".

Note 04/2011:

> "Called to home to see A and Mum – no-one in".

Note 04/2011:

> "Family were in Amsterdam for a week but A was off before this ... advised that A had to be in every day from now on as his attendance was so low ..."

Record 04/2011: Call with year head from Centre –

> "year head reported A hasn't been back at school since we last talked and she was very concerned ...".

EWO telephoned the mother to report this and advised that:

> "we would probably be having a school meeting to resolve the situation".

The EWO then organised a multi disciplinary meeting in April 2011. She called A's mother to inform her of the date. Her next note records:

> "(mother) said that this didn't suit as they were going to Ibiza. I advised her that we wouldn't support any holidays during term time never mind two close together".

[22] There is no record of any attempted or actual intervention by the EWO to prevent this child going on a second holiday within a single school term. Instead the EWO then set up a school meeting for 18 May, which suited the child and his mother who had returned from their holiday by that date. At that meeting it was agreed that A would commence attending the Centre again on a full time basis from the following Monday and he did in fact attend for a few days.

[23] A subsequent note also dated May 2011 records a call from A's head of year. It states that A's mother "managed to get him into school but when he got there he wouldn't go in and eventually went home". This note also records the teacher's concerns about other matters including A's sleeping arrangements, a concern that he might have an eating disorder and a concern that he is refusing to attend the Child and Adolescent Mental Health Service (CAMHS) to have his medication reviewed.

[24] There follows a series of recordings relating to incidents in the family home and their impact on this young person's capacity to engage with education. One note dated 6/6/2011 records a call from A's year head saying "A had been very upset and crying and said he was worried about his mother about her drinking. He said she had a party over the weekend and sent A off with friends and he slept in a friend's house. He is also worried that he will go into care and his mother has been telling him that he will. "The next call logged, also in June 2011, was again from his year head who reported that "A was not at school all last week with no reason provided from" (his mother).

[25] Matters came to a head in June 2011 when A came to school one morning and, according to the report from his year head, "caused a lot of damage to new computers today". As a result the year head consulted Ms Curran, Head of the EOTAS service for direction as to what to do next. The file records that Ms Curran 'has said that A should have teaching at [a local hall] as the current arrangements are not working". There are then a series of notes, some of which relate to the EOTAS arrangement at the local hall. One of these dated 30 August 2011 records the view of A's year head that "A hadn't really been engaging with the teachers at (the hall) and had been demanding 'McDonalds' before he did any work. Unfortunately staff succumbed to his requests ..."

Statutory Framework

[26] Article 3(1)(a) of The Education (NI) Order 1996 ("the 1996 Order") defines someone with special educational needs as having:

> "… a significantly greater difficulty in learning than the majority of children of his age."

[27] Art16 of the 1996 Order provides:

> "16.—(1) If, in the light of an assessment under Article 15 of any child's educational needs ....., 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.
>
> ...
>
> (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, ...
>
> (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."

[28] Art 86 of the Education (NI) Order 1998 ("the 1998 Order") provides as follows:

> "Exceptional provision of education
>
> 86.—(1) Each board shall make arrangements for the provision of suitable education at school or otherwise than 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....
>
> (4) In this Article—.....
>
> 'suitable education', in relation to a child, means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have."

Applicant's Submissions

[29] The applicant submissions may be summarized as follows:

- that although he is formally enrolled at the local High School he has, for 10 years, been educated at the Centre. He asserts that he and his mother perceived the Centre to be a school, and that they had a legitimate expectation that he would continue to be educated there.

- that prior to the commencement of these proceedings his mother received no formal written communication from any source regarding his removal from the Centre, or any plans for his future education. They were not informed of the reason for the cessation of his education at the Centre or of the plan for home tuition and were given no right of appeal against the decision to remove him from the Centre.

- that the change in his educational provision was not consistent with the terms of the Statement that was in place at the time when his educational provision was changed. He asserts that at the time of the decision to remove him from the Centre there had been no amendment to his Statement. An amendment was not made until the applicant had been removed, and indeed, until the present proceedings were commenced.

- that the change to his provision was not made in a procedurally fair manner in that his mother was denied the opportunity to scrutinise the process through which he was removed from the Centre, that she was not informed of the decision in advance of its implementation and that she was not afforded a right of appeal. He therefore submits that the decision to depart from the applicable Statement of Special Educational Needs, was arbitrary, unfair and unreasonable.

- that when he was removed from the Centre there was, in any event, a continuing statutory obligation to educate him. He asserts that the current arrangements for home tuition are deficient, inadequate and inconsistent with his age, ability, aptitude and his Statement of Special Educational Needs.

Respondent's Submissions

[30] The respondent does not accept that the applicant was removed from the Centre. It states that in March 2011 A's timetable was reduced to afternoons only and that this change was agreed with his mother. In May 2011, the applicant resumed the full timetable but he did not cope well. He was absent between 7 – 21 June and upon his return he was very aggressive and disruptive within the Centre, threatening to destroy a computer and demanding to go home. Against this background, it was decided that the best

way to re-engage the applicant with education was to attempt a period of individualised teaching outside the Centre.

[31] Between 21 June 2011 and the end of the school year, the applicant received individualised one to one teaching at a local hall. There is a dispute between the parties about whether or not this provision would continue into the start of the next school year. The respondent states that the arrangements were discussed orally in June between A's mother and his Head of Year from the Centre who believes she explained that the arrangements would continue during September 2011, until the multi-agency meeting had taken place. It concedes that these arrangements were not confirmed in writing.

[32] The Respondent states that throughout the entire academic year of 2010-2011 and following his return to teaching within the Centre, the applicant's attendance was very poor. He failed to attend many of the sessions which had been organised for him and even when he has attended his concentration levels were low and his level of engagement with the teacher was poor.

[33] It submits that at all times it has discharged its duty to provide the applicant with education in accordance with his statement of special educational needs. It notes that this Statement does not require that the applicant be educated within the Centre. It requires that his education should be provided through the Board's EOTAS arrangements, of which the Centre forms only a part. The Board submits that the purpose of naming "EOTAS" within the statement, rather than any particular form of provision, is to ensure that it has flexibility to provide education in a manner which responds to the applicant's ongoing needs.

[34] It states that the applicant's behaviour deteriorated during the 2010/11 academic year, with the result that a decision was reached that he was no longer able to cope with education in a classroom environment. This was an exercise of the Board's educational judgment about what form of education was "suitable" for him. The judgment reached was that the best means by which to re-engage the applicant with education was for him to undergo a period of individualised teaching and the applicant's mother appears to have agreed with this judgement at the time.

[35] The respondent claims that A was not and never has been "removed" or "excluded" from the Centre. Rather a decision was taken on educational grounds that he was no longer able to cope with the classroom and that individualised teaching in a different setting was more suitable. The decision was reached, taking full account of his age, ability, aptitude and special educational needs.

[36] The respondent agrees that the events of the morning of 7 September 2011 are unfortunate but asserts that they amounted only to poor administrative practices and poor communication. It states that it did not act unlawfully, did not exclude the applicant from the Centre, and did not fail to provide education to him in accordance with his statement.

Discussion

[37] The first issue to be resolved is whether or not the applicant was removed from the Centre.

[38] I accept at the outset the Respondent's submission that there was no formal expulsion or suspension of A from the Centre. However, this does not answer the question 'was he removed or not'? This question must be considered from a pragmatic rather than a legalistic perspective. We are considering a child's fundamental human right to receive education, and all such rights must be evaluated according to whether or not they are 'effective and real' as opposed to 'theoretical and illusory'. We must therefore consider what happened to A's right to education 'on the ground' as opposed to what appeared to happen 'on paper'.

[39] The evidence in the case shows that A attended the Centre on a full time basis for some two and a half years, after which his hours were reduced from full time to part time. It also records Ms Curran's direction, given in June 2011, that 'A should have teaching at [the local hall] as the current arrangements are not working'. In practical terms this amounted to a decision to change this child's educational provision. It meant he would no longer receive his education at the Centre, as had happened throughout the preceding two and a half years, and instead his provision would be delivered in a different location. This was a *de facto* removal from the Centre which was to operate at least until the end of the 2010-2011 school year and, on the Respondent's case, for an undetermined period beyond that time. For this reason I consider that A was in fact removed from the Centre.

[40] One consequence of the change in arrangements was that the teaching time available to A was also changed. Since the start of his secondary education he had received a full timetable delivered at the Centre between 9.00am and 2.00pm each day. His timetable was subsequently reduced to two hours per day delivered at the Centre and then, after June 2011 to one hour a day three times per week in a local hall - ie he was offered three hours schooling in total out of the full school week. In the 2011-2012 school year this was further reduced to two hours and fifteen minutes per week. Did these changes to A's educational provision comply with the terms of his statement?

[41] A similar question arose in the case of in Re ED [2003] NI 33. This case involved a severely autistic boy whose statement specified that he should be

taught in a small group setting in an environment where staff were experienced in the teaching of children with severe learning difficulties. Affidavits from the staff indicated that E's behaviour had deteriorated, and eventually the school decided that he could no longer be taught in a small group setting because of his propensity to attack other children and his teachers. The school therefore decided to stop providing teaching in school and instead to provide individual teaching to E in his own home. The net issue in the case was the lawfulness of the school's decision that E should be taught in a manner other than that specified in his statement.

[42] In addressing this question Kerr J (as he then was) considered the duty imposed by Art16(5) of the 1996 Order which states:

> "(5) Where a board maintains a statement under this Article— [it]...
> (i) shall arrange that the special educational provision indicated in the statement is made for the child, ..."

[43] He noted that, although mandatory, this duty does not require literal compliance with the provisions of the Statement of Special Educational Needs throughout its currency. Kerr J stated:

> "16. In my judgment, art 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 impractical to do so or the full implementation of the terms of the statement would put staff or other 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."

[44] Where there is a departure from the terms of a Statement Kerr J said the role of the court has two aspects 'first to inquire into whether the conditions that the authorities claim prompted the departure from the statement in fact existed and secondly to decide whether the judgement made by them should be upheld. In the ED case the court stated:

> "The sheer volume of material relating to incidents of E's aggression permit no conclusion other than that this young boy, because of his unfortunate disability, is frequently and unpredictably violent."

[45] On the second aspect of the court's duty of review Kerr J noted:

> 'An area of discretionary judgement must be allowed the teachers in this matter..... It is of course true that a decision not to comply strictly with the terms of the statement must be examined critically but it would be quite wrong for the court to substitute its views of the matter for that of the professionally qualified experts.'

On the evidence in that case Kerr J accepted that the decision to remove E from the classroom setting was a proper and reasonable one, and for this reason E's judicial review was dismissed.

[46] When comparing ED to the present case, several notable differences are clear. In ED's case there was a persistent history of violent behaviour which was becoming more severe as the child grew older. In that case the violence was unpredictable and beyond the control of the child in question. In the present case there is clear evidence of behavioural problems from the outset of A's secondary education, but this mostly takes the form of absenteeism, disengagement and disruptiveness rather than violence. For two and a half years staff dealt with these behavioural problems within the terms of his statement and no major departure from the statement was considered necessary. There is evidence that A's behaviour deteriorated significantly in the second half of his third year of secondary school and this deterioration included a greater propensity to be aggressive and destructive of school property at the Centre. For this reason I am satisfied that conditions existed at this time which *could* prompt the authorities to consider departing from the terms of his statement, although in the present case an alternative viable approach also existed- namely enforcement of the child's legal obligation to attend school.

[47] The second limb of the exercise this court must conduct is to decide whether the judgement made by the authorities should be upheld. The main issue with A's behaviour was the fact that when he constantly demanded to go home and, if he did not get his way he became disruptive. In contrast to the situation in ED, A's misbehaviour appears to have been purposeful and entirely under his own control: he generally misbehaved in order to be allowed to go home. The Centre increasingly responded to his misbehaviour by permitting him to go home and the arrangements for his education which are now under challenge formally permitted him to stay at home for all but two- three hours in the week. The court must decide whether this response to A's behaviour ought to be upheld.

[48] In this case it is difficult for the court to be satisfied that this arrangement was appropriate since there was an alternative avenue open to the authorities which might have dealt with A's behaviours without requiring

a departure from the terms of his statement. That avenue would have been to commence court proceedings to secure his attendance at school, for example by seeking an Education Supervision Order under the Children (NI) Order 1995. No such effort was made in this case. Instead the applicant's access to education was reduced to a minimal, some might say tokenistic, level.

[49] The Education Welfare Officer in this case states that 'no court proceedings in relation to the Applicant were considered to be appropriate. Such action is generally not taken in cases such as this where a young person suffers from behavioural difficulties and substantial efforts are being made to meet [their] educational needs.' She continues: 'steps were being taken to tailor his education to meet his current needs and re-engage him ... back into education...' For these reasons she says 'it was considered the most appropriate action to be taken by Education Welfare was to....provide support to the other agencies which were attempting to reengage the Applicant into the education system, rather than take any legal enforcement action.'

[50] In critically assessing the reality of the alleged 'substantial efforts ... being made to meet [A's] educational needs' I note the following. First, these efforts occur for only three hours per week. Secondly there appears to be an extraordinary level of official tolerance for this child's non-engagement with the educational provision being offered to him. This tolerance occurs at the class level where his tutors have been shown to accede to A's requests for McDonalds before he will do any work for them. I must say I find this extraordinary and quite inconsistent with the legal fact that education is compulsory for a child aged 4-16 years of age. Given that legal fact I cannot understand why any teacher would allow themselves to be pressed into providing an incentive such as a 'McDonalds' meal by a child of compulsory school age. This tolerance also occurs at Board level. For example the second affidavit sworn by Ms Curran which deals with the progress A is making in the 2011-2012 academic year states: 'there have been several periods of absence and on more than one occasion during the academic year, A has not been available as a result of family holidays abroad during term time.' She does not refer to any action taken by the Board to put an end to this family's clear practice of taking holidays during school terms, a practice which was evidently well known to the board.

[51] Furthermore Ms Curran has prepared a table that shows that between September 2011 and May 2012 89 one hour sessions were made available to A outside the Centre and that A attended only 62% of these. Between January 2012 and May 2012 29 sessions were made available within the centre and he attended only 31% of these. Again, no reference is made anywhere in the affidavit to any form of enforcement action being taken in response to these extremely poor attendance figures for a child who was legally obliged to be in school throughout the relevant period.

[52] The EWO states that her service decided the best approach was to 'provide support to the other agencies which were attempting to reengage the Applicant into the education system, rather than take any legal enforcement action.'

[53] The court has reviewed the records of the attempts made by these other agencies to re-engage this child and found that in fact several other agencies had expressed themselves unable to intervene, either because they had no compulsory powers to do so or because A's case did not meet their criteria for intervention. In September 2011 the multi-disciplinary group was made aware that A no longer takes medication prescribed for his attention deficit disorder and he failed to attend appointments with CAMHS to have his medication reviewed. A query was raised about whose role it was to assess A's mental health needs. The CAMHS representative informed the group that 'CAMHS would have that role, but if A fails to attend they are restricted in what they can do'. Social services also attended some of the multi-disciplinary meetings about A and at one point his social worker had written to Education Welfare raising a concern that the educational provision being offered to A was insufficient to meet his needs. However, in a meeting in May 2102 when A's school attendance was still extremely poor, Social Services stated that they were closing their file on A because there was no police involvement in his case.

[54] A review of the multi-disciplinary management of A's case generates an impression of a young person who is quite beyond the control of anyone, but who avoids any form of enforcement action by the simple expedient of not engaging with any service. Unfortunately this non-engagement is collectively tolerated and no individual within the multi-disciplinary team steps up to take any responsibility for making this young person comply with his legal obligation to attend school. All this went on while this young person was flagrantly violating his legal obligation to attend school regularly, yet the agency which did have compulsory enforcement powers arising from this non attendance chose not to exercise those powers, preferring instead to support the efforts of other agencies, even when those efforts were plainly ineffectual. The net effect was that this young person was permitted to absent himself from school and engage in all the personally and socially damaging behaviours which are recorded in the multi-disciplinary meeting notes, and that this was done without challenge by any authority.

Conclusion

[55] In E Kerr J was satisfied on the facts that the authorities had come to a proper and reasonable decision which he must support. I am tempted to reach a similar conclusion in the present case but for one outstanding concern. That is the fact that in this case, unlike E, the authorities had a choice of actions available to them. One choice was to offer the reduced, individualised and

segregated timetable which was in fact provided in this case. The second choice was to commence or even threaten A and his mother with legal enforcement of the duty to attend school regularly – an obligation required of all children of compulsory school age.

[56] The first choice necessarily involved a departure from the terms of A's statement in that it reduced his access to the Northern Ireland curriculum and amounted to a modification of the curriculum in his case, contrary to the requirement of the statement that modification of the Northern Ireland curriculum ought not to be necessary in his case. The approach taken by the authorities meant that the curriculum offered to A was modified at least in that any class requiring specialist equipment such as a science lab, an I.T. suite or catering facilities was no longer available to him. Similarly any class requiring a collection of pupils would also be unavailable- so for example P.E. and drama classes would no longer be possible. The choice the authorities made also necessarily departed from the objectives of this child's statement, one of which was to 'provide him with routine and structure'. In fact the effects of the decision taken were so significant that the bulk of the provision specified in the applicable statement had, in effect, been taken away. I cannot see how this approach can comply with the duty imposed by Art 16(5) of the 1996 Order as elucidated by Kerr J as follows:

> "In my judgment, art 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 impractical to do so or the full implementation of the terms of the statement would put staff or other pupils at risk."

[57] Was implementation of the statement impractical in A's case and would it have put staff and other pupils at risk? The evidence in this case is that A did attend school fairly regularly for the first two and a half years of his secondary education and there was then a notable decline in his willingness to engage. At this point his disruptive behaviours increased and the evidence recognises that this tended to occur when A was anxious about what was happening at home and that it was done for the purpose of being released from school to go back home. There is no evidence that it was ever made plain to him that non-attendance would attract legal consequences for him and for his mother. There is therefore no basis for deciding that this statement compliant approach might not have been enough to terminate his purposive disruptions and so protect the interests of staff and pupils at the Centre.

[58] The second choice, i.e. the threat or use of compulsory powers in response to A's non attendance at school, might have secured the objective of

reducing any risk to other pupils and to staff without departing from the terms of the statement and in my view the authorities were obliged to at least try the statement compliant route before resorting to measures which involved departure from the terms of A's statement contrary to the requirements of Art16(5) of the Education (NI) Order 1996.

[59] The affidavit of the Education Welfare Officer involved in the case states that: "No court proceedings in relation to the applicant was considered to be appropriate". The reason she gives for this approach is that "such action is generally not taken in cases such as this where a young person suffers from behavioural difficulties and substantial efforts are being made to meet A's educational needs".

[60] It is concerning that the agency charged with enforcement of the obligation of children of compulsory school age to attend school should state that enforcement action "is generally not taken in cases ... where a young person suffers from behavioural difficulties".

[61] A's age is a relevant consideration in relation to the question of whether the educational provision offered to him was suitable. At the time the disputed adjustments were made to A's educational provision he was just 14 years old – well within the age band during which school attendance is legally compulsory. The fact that A had behavioural difficulties and might be difficult to manage in school did not exempt him from his legal obligation to attend and does not exempt the education welfare service from its duties to enforce his compliance with that legal obligation.

[62] If the Court were to accept and condone this apparent policy of non-enforcement the consequences would be grave and in my view unacceptable. First, such an approach would effectively undermine the right of young persons with behavioural difficulties to receive education by way of regular compulsory school attendance enforced in the usual way. The right to a minimum level of education was hard won by social reformers in the past. That right is now universal in this country and is, or ought to be, available to all children of compulsory school age including those whose learning difficulties and/or social circumstances make it hard for them to handle school environments.

[63] It would be quite wrong for this Court to endorse an effective exemption from the duty to attend school for children affected by a learning difficulty which makes compliance harder for them than it is for other pupils with no such learning difficulty.

[64] Secondly, the effect of the Court condoning this policy of non-enforcement would be to support and encourage educational authorities to allow children with behavioural difficulties not to attend school if those

children chose not to do so. I believe that most reasonable people expect all children of compulsory school age to be in school or in some other form of regular compulsory and enforced educational provision during normal school times. I believe it would come as quite a surprise to members of the public to learn that enforcement action is "generally not taken" by the educational authorities in cases where young person suffer from behavioural difficulties and that such young persons are therefore likely to be at large in the community at times when most people expect them to be in school.

[65] I am aware that the Educational Welfare Officer justified the non-enforcement decision on the ground that "substantial efforts are being made to meet the applicant's educational needs". However, the evidence on file at the time indicated that these efforts were not effective and were recognised at the time as being ineffective. So, for example, the Educational Welfare Officer's file note of 30 August 2011 records A's year head's view that "A hadn't really been engaging with the teachers at (the hall) and had been demanding 'McDonalds' before he did any work. Unfortunately staff succumbed to his requests". In view of this evidence that the authorities were aware that their efforts were having little or no effect on the applicant, it is open to this Court to question how substantial the efforts genuinely were to meet A's educational needs.

[66] Later evidence indicates that this young person has continued to treat school work as an option he is free to reject and there is no evidence anywhere that the authorities have made genuine efforts to have him recognise that education is in fact legally compulsory for him. So a file note of a multi-disciplinary meeting dated March 2012 records that "A isn't really engaging with (his tutor) as regards formal education. A has been happy to do artwork for example but does not engage when the tutor tries to introduce more formal work. Sometimes A does not come to see (the tutor) when he comes to the home and (the tutor) has to wait for him to appear.' All this evidence indicates that throughout its dealings with A the education authorities have followed A's agenda in relation to education. There is no evidence anywhere that the authorities have attempted to make him aware that education is a compulsory legal requirement for a child of his age and insist that he attend as the law requires him to do.

[67] The second affidavit by Miss Curran illustrates graphically how cavalier this young person has been permitted to be in relation to his attendance for education. It shows that since the reduced arrangements were put in place for A he attended only 62% of the home based sessions offered to him and actually engaged in these for only 18.5% of the time allotted to him. This is consistent with the behaviour of a young person who believes that non-attendance and non-engagement will have no negative consequences in his case.

[68] This case raises the issue of whether a young person who is difficult to engage in education can be placed on a reduced timetable and left the choice of whether or not to take up the educational provision offered to him without any threat or act of enforcement being taken by the respondent authorities against him. In my view it is not permissible for the education authority to take this approach where a child's statement says he should have access to the entire Northern Ireland curriculum without modification. This child had previously shown himself capable of attending for tuition in the full curriculum. When he showed signs of voluntary disengagement it is my view that the education authorities ought to have at least tried to use compulsory enforcement mechanisms in his case before resorting to reducing the curriculum being offered to him.

[69] Their failure to attempt enforcement in a case where unlike E the young person had some control over his own behaviours was a legal flaw in the approach used in the present case.

[70] For this reason the Court declares that the decision to reduce A's timetable was inconsistent with the requirements of his statement of special educational needs and wrong in law.