

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered:	23/11/06
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**IN THE MATTER OF AN APPLICATION BY TD (a minor) BY AD, HER
MOTHER AND NEXT FRIEND, FOR JUDICIAL REVIEW**

and

**IN THE MATTER OF THE SPECIAL EDUCATIONAL NEEDS AND
DISABILITY (NORTHERN IRELAND) ORDER 2005**

Before Kerr LCJ, Nicholson LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an appeal from the judgment of Girvan J dismissing the appellant's application for judicial review of certain decisions of Belfast Education and Library Board and North Eastern Education and Library Board. The appellant had sought declarations that the boards had failed to provide age appropriate educational facilities for her contrary to the Special Educational Needs and Disability (Northern Ireland) Order 2005 and that the educational facilities that she received did not meet the statutory minimum period provided for in regulation 21 of the Education (Handicapped Pupils and Special Schools) Regulations (Northern Ireland) 1973. We shall refer to these as 'the Special Schools regulations'.

[2] At the heart of the case is the appellant's claim that Mitchell House, a special school for children with physical disabilities and the establishment where she receives education, discriminated against her by not providing her with at least three hours of "secular instruction" per day and failed to comply with the statutory requirement of the Special Schools regulations as to the minimum period that she should receive formal education. The principal issue on the hearing before Girvan J was whether time spent on speech therapy, occupational therapy and physiotherapy in school counts as time

spent on secular instruction. In a reserved judgment delivered on 3 April 2006 Girvan J held that it did.

[3] The school day at Mitchell House finished at 1.30pm and this obviously restricted the time available for conventional education as well as for the various therapies that TD required. After judgment was given, however, the Board of Governors changed the school finishing time to 3.15pm with effect from September 2006. It is now accepted that the appellant currently receives more than three hours secular instruction per school day. In these circumstances the particular challenge raised in the appeal is academic. We have decided, however, that since the interpretation of the relevant statutory provision is likely to arise in a number of future cases, the appeal should be allowed to proceed.

Relevant statutory provisions

[4] The Special Schools regulations were made under the Education and Libraries (Northern Ireland) Order 1972 but that Order was supplanted by the Education and Libraries (Northern Ireland) Order 1986 and they are now deemed to have been made under article 34 of the later Order by virtue of section 29 (3) (b) of the Interpretation Act (Northern Ireland) 1954.

[5] Regulation 21 (1) provides:

“On each day on which a school is in operation in accordance with the requirements in regulation 18 the school day shall, unless the Department otherwise approves, comprise:

(a) at least three hours of secular instruction in the case of a pupil enrolled in a class composed mainly of pupils who, at the commencement of the school year, had not attained the age of eight years ...

provided that if the school authorities are duly advised by a qualified medical practitioner that it would be detrimental to a pupil to remain under instruction for three hours they may reduce the period of attendance for such pupil.”

[6] There is no question of three hours’ secular instruction being harmful for TD. She suffers from a dystonic quadriplegic form of cerebral palsy but is not intellectually disabled and has the normal mental capacity of a child of her age which is seven years. She is bright, inquisitive and sociable and she enjoys school life and the stimulus of interacting with staff and other pupils.

This she does by using what are described as Mayer Johnston symbols, facial gestures and pointing with her hands. She is able to say 'yes' and 'no'.

[7] Regulation 21 (3) (b) provides that attendance of a pupil under instruction may include, in addition to any time occupied by the pupil in accordance with arrangements set out in the approved timetable of the school:

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“(b) any time occupied by a pupil in undergoing medical or other appropriate treatment or examination.”

[8] The provisions in the Special Schools regulations about the minimum period of secular instruction may be compared with those to be found in the Primary Schools (General) Regulations (Northern Ireland) 1973, (which we shall refer to as the Primary School regulations). Regulation 20 (1) of these regulations provides: -

“Subject to the following provisions of the Regulations an attendance shall mean an attendance on any day under instruction, other than in religious education, for a period of not less than (a) three hours in the case of a pupil enrolled in a class composed mainly of pupils who at the beginning of the school year had not attained the age of eight years.”

[9] In so far as is material regulation 22 of the Primary School regulations provides: -

“22. The minimum time specified in paragraph (1) of Regulation 20 may include any time occupied by a pupil:-

(a) in undergoing inspection or treatment under arrangements for medical and dental inspection, etc. of school children and young persons; or

(b) in attending an examination; ...”

[10] In both sets of regulations, therefore, a minimum period of three hours instruction is prescribed but in both provision is made that this may be composed of periods in which the pupil is receiving care of a different nature from formal, conventional teaching. The difference in wording in the two sets of regulations is important, in our judgment, not least because they were

made within two days of each other, the Primary School regulations on 26 September and the Special Schools regulations on 28 September 1973. Thus in the Special Schools regulations the minimum period may consist partly of “*medical or other appropriate treatment or examination*” whereas in the Primary Schools regulations it may comprise “*inspection or treatment under arrangements for medical and dental inspection, etc. of school children ... or attending an examination*”.

The arguments

[11] For the appellant Mr Treacy QC submitted that regulation 21 (3) (b) of the Special Schools regulations was intended to cover time in attending general school dental and medical examinations and in undergoing treatments found to be necessary as a result. The proper interpretation of the provision should be to confine it to those examinations and treatments that were medically required, as opposed to treatments such as occupational therapy or physiotherapy which were considered necessary to facilitate access to the curriculum.

[12] Alternatively, Mr Treacy argued that the regulation should be interpreted in such a way as to avoid discriminating against the appellant for if her three hours secular education could be encroached upon by such therapeutic treatments, she would be placed at a disadvantage not only *vis-à-vis* children of similar age to the appellant who were not disabled but also those children within Mitchell House who did not require as much therapy as did TD.

[13] For the respondent Ms Gibson QC argued that the ordinary and natural meaning of regulation 21 (3) clearly favoured the construction that the learned judge had adopted. Any medical or other appropriate treatment, whether as part of a general dental or medical examination or otherwise was, she suggested, covered. The difference in the wording of the regulations was deliberate and indicated the intention to afford a greater breadth of treatment in the Special Schools context than was available under the Primary Schools regulations.

[14] Ms Gibson refuted the claim that to give the Special Schools regulations their ordinary and natural meaning discriminated against the appellant. She pointed out that TD received a different form of teaching from other schoolchildren who were not disabled at all or who were not as severely disabled as the appellant. The teaching regime for her was tailored to her individual requirements. She is taught in a small group of seven children where she receives an intense level of individual teaching and learning support from the teacher and classroom assistant. It was quite erroneous, said Ms Gibson, to claim that the quality of her education was inferior simply

because the period of formal instruction was less than other schoolchildren received.

Conclusions

[15] We consider that the difference in wording in the two sets of regulations is both deliberate and significant. It is inconceivable that the Ministry of Education (which made both regulations on behalf of the Secretary of State) could have intended that exactly the same factors might be included in the calculation of the three hours' minimum of formal education but used strikingly different language in the two sets of regulations.

[16] The greater degree of latitude available in the Special Schools regulations reflects the fact that disabled children may require more intensive and longer medical treatment. It appears to us to be plain that the use, in particular, of the expression "or other appropriate treatment" was intended to cover a wide range of treatments going well beyond that which is necessary to ensure the general good health of schoolchildren who are not disabled. We have concluded, therefore that the judge's interpretation of regulation 21 (3) as including periods of speech therapy, occupational therapy and physiotherapy was correct.

[17] We accept Ms Gibson's argument that the mere fact that TD's period of formal instruction was less than some other schoolchildren cannot without more be taken as establishing that the level of education that she received was inferior. It is clear that the manner in which she was taught was geared to her particular needs and it is quite impossible on the available evidence to say that she was not being educated as well as other children. We have concluded therefore that it has not been shown that the reduction of the formal period of instruction on account of her receiving speech therapy, physiotherapy and occupational therapy discriminated against her.

[18] The appeal must be dismissed.