Neutral Citation No. [2012] NIQB 18 | *Ref:* **TRE8443**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **14/03/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION BY L FOR JUDICIAL REVIEW

L's Application [2012] NIQB 18

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TREACY J

Introduction

[1] The applicant is a 9 year old boy who has special educational needs (SEN) including dyslexia. He does not have a statement of SEN but is at Stage 3 of the school based stages described in the Code of Practice on the Identification and Assessment of Special Educational Needs ("the Code") which was issued by the Department of Education in September 1998.

[2] In March 2010, when in Primary 4, the applicant was referred to the educational psychology services of the Respondent Board ("the Board") by his School Principal on the basis that he "was experiencing difficulty in his literacy and numeracy skills and had poor concentration skills". On foot of that referral he was assessed by Gabrielle Trinder, an Educational Psychologist employed by the Board on 27 September 2010. Her report noted that "L was provided with individual teaching in literacy during his P2 and P3 years" and that in P4 he "receives four sessions of literacy and numeracy support each week within a small group".

[3] In the course of her assessment Ms Trinder applied a series of tests which established his "verbal, non-verbal and overall cognitive ability is within the average range". She tested his core attainments and found that in word reading and spelling skills his score was in the well below average range and that his reading comprehension was also well below average. In each of the areas she assessed she found this average ability pupil was scoring so poorly that more than 98% of children of his age would have achieved a better score than he did. Clearly there was a startling difference between the results this average ability boy was capable of achieving and those he was achieving in fact. This was despite the very significant help his school had provided in his p2 - p4 years.

[4] Ms Trinder reported these results and made the following recommendation:

> **"A referral will be made to the Board's outreach support service for pupils with specific literacy difficulties. In the interim he should continue to receive a high level of support for literacy and numeracy within the school's own special needs arrangements."**

[5] The applicant's mother swore an affidavit in September 2011 in which she said that as a result of Ms Trinder's report "the Board placed L on a waiting list to receive direct literacy support ... I fully expected that this September (i.e. September 2011) he would be given a place in Cottown Reading Support Unit. It is a specialist facility run by the Board.' The mother's affidavit then exhibits a letter dated 28 June 2011 which she received from the school's Special Educational Needs Co-ordinator (SENCO) in which the latter reported a telephone conversation she had with the Board on the previous day. The SENCO enquired whether the applicant would receive support in Cottown Reading Unit during his Primary 5 year. She reports in her letter "I was told that a letter confirming a part-time place for next year was to be posted out to you and school this week". This information was confirmed in the child's annual school report for Primary 4 which states "L will receive further support in Primary 5 – special needs, numeracy partnership and SEELB reading unit (part-time)".

[6] On 4th July 2011 the mother received a letter from John Shivers, an Education Officer with the Board, dated 27/6/2011. This letter stated that new arrangements had been put in place for the school year 2011-2012 under which it was proposed that a teacher from the Literacy Support Service would go out to the school to "discuss L's previous test scores with the class teacher and offer general advice to the class teacher on teaching strategies that should be adopted ..." This was not the direct literacy teaching the mother was expecting. She sought legal advice.

[7] Her solicitor wrote to the Board recounting the history and asserting that the family had a legitimate expectation that direct teaching support would be provided for L for his P5 year. She pointed out that the child met Board criteria for the provision of this form of support, and asked the Board to review the child's case. She received a substantive reply by letter dated 22 August 2011 from John Shivers in which he stated that "due to the high level of referrals (for direct teaching support) the Board has had to apply criteria to access direct teaching". He restated what the criteria were and noted that their effect which was that L "will be considered as a priority for support in 2012/13". He went on to say that "whilst the Board regrets that L (must) wait another year for direct teaching the Board has a limited budget for the provision of non-statutory support".

[8] The Applicant's mother is anxious that the provision currently offered by the board is not meeting her child's needs or complying with Departmental policy on the treatment of numeracy and literacy difficulties. Para 25 of her affidavit refers to

the Department of Education Strategy Document for these difficulties 'Count, Read, Succeed', issued by Circular dated 13/5/2011. This indicates that where a pupil has had a Stage 3 assessment, his needs should be met in line with that assessment. She also refers to evidence given by the Department of Education to the Assembly Committee for Education on 15/6/2011 in which it was said of literacy and numeracy difficulties that:

> **"Research shows .. that where we provide intervention at the age of six to seven, there is an 80% success rate for children with those difficulties. If you leave that intervention until the age of 10, there is only a 20% chance of those children becoming successful".**

Para 26 of the affidavit describes her son's current learning difficulties and the effects they are having on this p.5 child:

> **"He finds his reading, writing and spelling very difficult both at home and in school. He can really only spell words of 2 or 3 letters.... L..... is a good and well behaved child at school but I have noticed a marked deterioration in his behaviour at home which I believe is due to the stress he experiences from not being able to cope with school work and home work. This school term L... has been coming home from school with home works that are simply beyond his capability. L.. is becoming very distressed and aggressive when attempting his home work and I have to return his books to his school bag with the work set incomplete. L.. is becoming very anxious about going to school in the morning without having completed his homework from the night before. Consequently, he is doing all that he can to slow down the journey to school in the mornings and it is clear that he really doesn't want to go to school."**

Para 27 of the affidavit describes the help his school is providing for these difficulties:

> **"In 2010/2011 L..got school based small group support of three half hour sessions for literacy and two forty minute sessions for numeracy.....this year it will be reduced to 2 half hour sessions for literacy and two 40 minute sessions for numeracy. This means that his special educational provision for this year will actually be less than last year. This provision is not in lieu of direct teaching support; L... would have received this in any event."**

For all these reasons the Applicant requests judicial review of the board's delay in providing him with the specialist support identified in the educational psychology assessment**.**

The Parties' Submissions

[9] The applicant avers that when they changed the arrangements to be applied to L the Board actually applied new criteria which had not been ratified by the Board's Commissioners. The applicant asserts that the Board's decision is unlawful for a range of reasons which may be summarised as follows:

- That in reaching its decision:

  (i) The Board failed to consider its duty under Art6(1)(a) of the Education & Libraries (NI) Order 1986;

  (ii) Failed to have due regard to the Code of Practice on the identification and assessment of pupils with special educational needs;

  (iii) Had regard to an irrelevant consideration namely resources;

  (iv) Acted out of an improper motive namely the saving of resources;

  (v) Gave insufficient weight to relevant factors including government reports and policy documents;

  (vi) Fettered its discretion by failing to consider the applicant's individual needs when applying its revised criteria;

  (vii) Failed to give effect to the applicant's legitimate expectation of direct literacy support in September 2011;

  (viii) Breached the applicant's rights under the First Protocol of the European Convention on Human Rights, under the UN Convention of the Rights of the Child and under the UN Convention on the Rights of Persons with Disabilities.

For all these reasons the applicant asserts that the Board's decision was disproportionate, Wednesbury unreasonable and unlawful.

[10] The respondent's skeleton argument asserts that:

(i) The case falls to be decided under the provision of the Education (NI) Order 1996 and an analysis of this legislation indicates that the applicant is not entitled to the relief sought.

(ii) That the Board is not subject to a statutory duty to make the provision for the applicant's special educational needs as he is only at Stage 3 of the school based stages. The respondent is therefore entitled to have regard to resources when deciding what provision, if any, it should make for this applicant.

(iii) That Protocol 1 of the European Convention on Human Rights only entitles the applicant to have effective access to the system of education which is in place in the relevant State and the applicant has not been denied such access;

(iv) That the respondent did not, on the facts, fetter its discretion in the application of its new access criteria in this applicant's case;

(v) That the reports and policy documents referred to by the applicant do not require Boards to provide direct reading support of the type sought by this applicant;

(vi) That there were no sufficient grounds for a legitimate expectation of direct support to arise in the present case or, if there were, that there is a sufficient public interest to justify the respondent in departing from any promise made;

(vii) That the UN Convention on the Rights of the Child can only be relied upon as a guide to interpretation where a domestic statute is ambiguous and that there is no such ambiguity in the present case;

(viii) That the UN Convention on the Rights of Persons with Disabilities does not require the respondent to provide the applicant with any specific quality of education or intervention and in any case there is no evidence to suggest that the interventions made for this applicant were not effective.

The Law

[11] The legislation governing this field is the Education (NI) Order 1996 ("the 1996 Order"). Art 4 of this Order imposed a duty on the Department of Education to issue a Code of Practice giving practical guidance to Education and Library Boards and schools on the discharge of their functions under the legislation. Art 4 also imposed a duty on Boards and schools to have regard to the provision of the Code. The 'Code of Practice on the Identification and Assessment of Special Education Needs' was issued by the Department in September 1998 and it gives detailed guidance on these issues. The legislation and Code together establish and describe the special educational needs system which governs this applicant's case.

Description of the SEN system

[12] The SEN system has five stages. Para2.16 of the Code states:

> **"This Code of Practice, acknowledging that there is a continuum of special education needs, sets out a five stage approach, within which responsibility for pupils within stages 1-3 lies at school level, (with close involvement by the Board at Stage 3) and with both Boards and schools at stages 4 and 5".**

[13] The first 3 stages of the system are referred to as the 'school based Stages' and the remaining 2 stages are the 'Statutory Stages'. The key features of each of the school based stages are summarised in para1.8 of the Code as follows:

> **"Stage 1: Teachers identify and register a child's special educational needs and, consulting the school's SEN co-ordinator, take initial action.**
>
> **Stage 2: The SEN co-ordinator takes lead responsibility for collecting and recording information and for co-ordinating the child's special educational provision, working with the child's teachers;**
>
> **Stage 3: Teachers and the SEN co-ordinator are supported by specialists from outside school."**

[14] The first of the Statutory Stages is Stage 4 which deals with Statutory Assessment. This Stage is governed by Art 15 of the Order which, so far as relevant provides:

> **Assessment of educational needs**
>
> **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 proposes 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..... to the board....'**
>
> **(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.

[15] The second of the statutory stages is Stage 5 which is known as 'Statementing' and is governed by Art 16 of the 1996 Order. So far as relevant this provides:

Statement 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.....

(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.....

(7) Schedule 2 (which makes provision in relation to the making and maintenance of statements under this Article) shall have effect.

Purpose of the SEN system

[16] The legislation and Code set out the general approach to be adopted to the identification of need. This is essentially a process of elimination in which schools seek to identify as early as possible those children who are displaying a qualifying level of difficulty in their learning. These children are identified as having SEN which is defined in Art 3(1) of the Order in the following terms:

"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".

[17] Only those children identified as having SEN go into the pool of children for whom special educational provision is available. Special educational provision is defined in Art 3 (4) of the Order as:

"Educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in ordinary schools".

[18] Children identified as being eligible for special provision are recognised as having a range of needs of variable duration, intensity and effect. The objective of the special needs system is to respond to this "continuum of needs" with a "continuum of response" which is intended to meet the child's needs at the earliest opportunity enabling that child to be eliminated from the pool of candidates for further special educational provision at the later Stages of the system. This rationale for the SEN system is described in para2.17 of the Code with states:

"Progress in response to action taken at one of the first three stages may well mean that the pupil will not have to move on to the next stage. Only for those children whose progress continues to cause concern at any one stage will the school need to move to the next stage."

[19] While elimination of need is the general intent of the system, it recognises that progress is not always linear and there may be cases where intensive action at one Stage only alleviates (rather than eliminates) a child's learning difficulty. The progress and remaining level of need of each child is monitored through a '**cycle of planning, teaching and assessing' [para 2.1 Code]** and this process may lead to backward as well as forward movement through the system, as is illustrated in the various diagrams at pp 22 – 24 of the Code. It is also recognised that children may enter the system at whichever Stage best suits their level of need:

> **"These stages will not usually be steps towards statutory assessment; nor are they hurdles to be crossed before a statutory assessment can be made. They are means of informing decisions..... as to what special educational provision is necessary to meet the child's needs. There may be cases where action at Stage 2 or 3 will be appropriate even if no action has previously been taken at Stage 1." [para 2.18 Code].**

[20] However, it is also clear that the general intent of the Code is that provision should become more intensive and more specialised as the child proceeds through the school based stages. When the child reaches Stage 3 it is assumed in the Code that he may require forms of intervention which are not normally available in ordinary mainstream schools. This is why schools may call in assistance from external specialists at this Stage:

> '**Stage 3 begins with a decision....that early *intensive action* with external support is *immediately necessary*..[Para 2.60 Code].**

Based on the rationale and methodology of the entire SEN system, it is clear that the intervention envisaged by para 2.60 is something additional to what has been provided in earlier Stages, and that this addition should have a more intensive and specialist nature than the provision which has gone before.

Legal Powers, Duties & Responsibilities within the Stages

[21] In the school-based stages the legal responsibility to meet the needs of a pupil with SEN lies with his school. This responsibility is framed in the following terms in Art8(1) of the Order:

> **"The Board of Governors of an ordinary school shall-**
> **(a) Use its best endeavours ... to secure that if any registered pupil has special educational needs the special educational provision which his learning difficulty calls for is made, ...".**

[22] The school remains responsible throughout the school based stages and indeed at Stage 4 of the system, which is the first of the "statutory Stages'. Para2.74 of the Code states:

> **"It should be noted that when the Board is considering whether to make a statutory assessment or is conducting an assessment, the school, working in partnership with the parents and support services, remains responsible for the child's education, including his or her special educational provision."**

[23] At stages 1-2 of the Code schools generally discharge their duty towards pupils with special needs by themselves. At stage 3 the school continues to have the legal responsibility to meet the child's needs. The Boards also have a power to intervene and assist schools at any Stage. Boards do this through SEN support services. Para2.41 of the Code under the heading "SEN support services" states:

> **"SEN support services provided by Boards can help schools identify, assess and make provision for children with special educational needs. Boards should notify schools of the services and expertise which they can arrange or make available in order to meet children's needs, with or without statements."**

This power to deploy specialist SEN services is most commonly used at Stage 3.

[24] Para2.61 discusses roles and responsibilities at Stage 3. It states:

> **"The SEN co-ordinator continues to take a leading role, working closely with the child's teachers and sharing responsibilities for the child with the appropriate external specialist services".**

At this Stage therefore, responsibility for the child is shared between the school and the Board with the school retaining the principle legal responsibility to make provision and the Board having a power to deploy specialist services into the school to assist it in making provision. When discharging these shared responsibilities schools and Boards must have regard to the "key principles" of intervention set out in para2.43 of the Code one of which is:

> **"Provision for a child with special educational needs should *match* those needs".**

[25] In addition to the powers available to Boards to intervene in the school based Stages, Boards also have an overlying statutory *duty* which governs the manner in which they exercise all their powers. This duty is contained in Art 13 of the 1996 Order which, so far as relevant, provides:

"General duty of board towards children for whom it is responsible

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."

[26] The present applicant stands at a point in the SEN system where the Board's power to intervene to make provision for him overlaps with its duty under Art 13. His complaint is that the Board has failed or refused to use its power to provide for him, except after a period of delay which, he claims, is unreasonably long in his circumstances. He claims that the Board's undue delay in exercising its powers in his favour amounts to a breach of its duty under Art 13.

Previous case law

[27] The issues of the extent of a Board's duty to make provision at stage 3 and of the reasonableness of delays in making such provision have been considered in previous cases in this jurisdiction, notably in ***Re JG's Application*** [Weatherup J Unreported, High Court, 2006] and ***In Re N's Application*** **[2004] NIQB 87.** The facts in ***JG's Application*** were very similar to those in the present case. There a dyslexic child at Stage 3 was assessed by an educational psychologist in October 2004 and a recommendation was made that he receive additional tuition from the Board's SEN support services for literacy for two terms, after which his progress would be reviewed. Nothing happened for the rest of his 2004/2005 school year. At the start of the 2005/2006 school year his parents were informed that the recommended provision would not be made in that year either. They were advised that it would be made from the start of the following school year, i.e. in September 2006, almost two years after it was recommended by the psychologist.

[28] Weatherup J considered the Board's obligations in the case and noted at para 12:

"Art 13 provides first of all that the Board should exercise its powers with a view to securing that it identifies certain pupils. There is a twofold requirement. First of all the pupils to be identified are those who have special educational needs ... There is then a second limb that applies where it is necessary for the board to determine the special

educational provision which any learning difficulty he may have calls for."

[29] The Judge went on to consider the respondent Board's evidence about how it approached its Art13 duties. That evidence was given on behalf of the Board by a Mr Irvine. Mr Justice Weatherup states at para21:

> **"The review of the pupil's needs has established, according to Mr Irvine, that the applicant's disability is not so serious as requires a statutory assessment for the purposes of Art15. Following from that conclusion, the respondent has decided that it is not necessary for the Board to determine the special educational provision which the learning difficulty calls for. In other words, the Board's position is that the second limb of the Art13 requirement to identify children is not satisfied as this disability is not sufficiently serious for the Board to intervene."**

The Judge continued at para24:

> **"I accept the respondent's position that in this case the Board is in a position to make an Art13 determination, that is they are able to determine that the pupil has special educational needs and further that it is not necessary for the special educational provision to be made by the Board. The Board has made a negative assessment in this case by accepting that the second limb of Art13 has not been satisfied and therefore has not identified the applicant as a child under Art13. ..."**

The Judge is fortified in his conclusion at para22 by the following consideration:

> **"I have already indicated that in circumstances like this where a decision has been made not to require statutory assessment which is the position the Board has taken, the parents have the right to require an assessment to be undertaken, and indeed the parents did so require in this case. Further, the parents have a right to appeal against the refusal of the statutory assessment although that is an exercise that they did not pursue ...".**

[30] The second case in the field, *In re* ***N's Application,*** involved a dyslexic child at a slightly earlier point in the SEN system. The facts of this case are given in an earlier judgment by Gillen J in ***In Re N's Application*** **[2004] NIQB 65.** The facts indicate that in ***N's*** **case** a child with dyslexic difficulties had received support from his school at stages 1 and 2 and was then referred to the Board for an educational

psychology assessment of his needs at stage 3. This was an assessment to determine what additional support, if any, the child should receive from the Board's SEN support services while he was on stage 3. The parents were advised that he had been placed on a waiting list for a stage 3 psychology assessment and that "it would not take place for at least 18 months". Faced with this delay the parents procured a report from a private educational psychologist and submitted that to the Board. The Board refused to act upon the findings in the private report and stated that it would be considered as part of the material in the child's case when that case came to the top of the list for consideration by their own educational psychologist in due course.

[31] The applicant sought to judicially review this decision and Gillen J found against him in order to maintain the fairness of the waiting list and to avoid conferring an undue advantage on a child whose parent happened to be able to afford to procure a private psychology report.

[32] In the course of argument in ***N's*** case the applicant pressed one point which is relevant to the present application, namely that there was a particular need for early intervention and early action in cases of dyslexia. Gillen J rejected that proposition and in doing so was influenced by the evidence of the respondent Board given by Mr Irvine. Speaking of the comparative need for urgency in different types of learning difficulties Mr Irvine said:

> **"It is difficult to conceive any condition where early identification and intervention would not be considered as urgent. The Board is obliged to assess carefully and accurately all cases referred. It is impossible to prioritise any particular category of disability as being more important and more urgent than any other."**

Discussion

[33] The legislation and Code set up a unified system targeted at "the identification and assessment of special educational needs". The process of "identification" operates through repeated cycles of "planning, teaching and assessing" – as described in para2.1 of the Code. In stages 1 and 2 of the school based stages the usual practice is for the school to deliver the child's special educational provision from within its own resources and expertise. The assumption is that significant numbers of children will have their needs met by provision made by the school:

> **"A relatively large proportion of children may be helped by the Stage 1 procedures ..." (para2.17).**

[34] Those children whose difficulties persist despite school based intervention are reviewed. New more intensive action is planned and delivered and the effect of this level of action is assessed again. Each cycle of planning action and monitoring eliminates some individuals from the pool of children who require further action.

[35] Each elimination *also* operates as part of the identification process. As children with less severe difficulties are eliminated from the pool, so those children who remain behind come closer to being identified as the group most likely to require statutory assessment. This dual aspect of the identification and assessment cycle is reflected in the provisions of the Code:

> **"Only for those children whose progress continues to cause concern will the school need to move to the next stage ... Only where children do not progress even with support at Stage 3 ... should the school consider referral to the Board with a view to statutory assessment." (para2.17)**

[36] In summary, the planning delivery and monitoring of increasingly intense interventions at each of the school based stages has two functions and two effects. First, it eliminates those children with less severe difficulties from the pool of children who may require statutory assessment. Secondly, through these eliminations it identifies the set of children with more intractable and severe special needs for whom statutory assessment may be necessary. The children left at the end of Stage 3 of the Code are recognised as having more severe learning difficulties and as being "likely candidates" for intervention at Stages 4 and 5. This fact is reflected in para3.6 of the Code which states:

> **"Boards have a duty to identify, among those children in their area with special educational needs for whom they are responsible, those for whom they must make statements. To help fulfil this duty, each Board should obtain information from schools about registered pupils who live in its area and who have special educational needs *at Stage 3."***

The gathering of this information is a necessary preliminary for the Board prior to the discharge of its statutory duties under Arts15 and 16.

[37] It is important to note the legal significance of each cycle at the school based stages. Each intervention has two possible outcomes for each child. First, it may meet his special needs, proving that they can be met by school based support at the level he is on and incidentally disqualifying him from consideration for any higher level of support. Alternatively, it may *prove* that his needs cannot be satisfied at that school based Stage, and thereby 'qualify' him for consideration for the next level of support. For children on Stage 3 the 'next level' is statutory assessment. In such cases the necessary Stage 3 intervention must be delivered and its effect monitored ***in order that*** evidence of this child's candidature for statutory assessment can emerge.

[38] The extent to which completion of Stage 3 intervention is a ***qualification*** for access to Stage 4 is confirmed by a consideration of the criteria for deciding to make a statutory assessment. These criteria are set out in paras3.20 and 3.21 of the Code. Para3.21 states:

> **"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".**

[39] In other words a statutory assessment can only be made when the Board is satisfied **by evidence** that all available school based intervention**, *including intervention with support from Board specialists***, has been tried and has failed to remedy the child's difficulties sufficiently. If a board does not use its power to provide specialist support at Stage 3 the effect will be that no evidence will emerge to indicate whether or not the child belongs to the group of 'insufficiently remedied' children who are likely to require statutory assessment under Art 15. This deficit of evidence actively **impedes** the identification process.

[40] This system places Boards in an unusual position. They have the power to give (or withhold) specialist services which will grant (or deny) a child the opportunity to complete all elements of the school based Stages and therefore to qualify for consideration for Stage 4 intervention. At Stage 4 Boards have a statutory duty (under Art15) to consider whether or not the child meets the criteria for statutory assessment. Under para3.21 of the Code these criteria involve being satisfied that despite "relevant and purposeful action" with the help of external specialists the child's learning difficulties have not been remedied sufficiently.

[41] Under this system the public authority which has the statutory duty to decide whether or not a child meets the criteria for statutory assessment, also has the power to supply or deny the assistance the child needs in order to prove whether he meets the criteria or not. Essentially therefore there is potential within this system for Boards to "regulate" the flow of cases which are likely to qualify for statutory assessment by controlling the pace at which they provide access to specialist expertise at Stage 3 of the SEN procedures.

[42] This is the situation the present applicant faces. The question for this Court is can the Board lawfully delay his access to specialist intervention when assessment of the effects of that intervention is the only way he can ever become 'identified' as a child in need of statutory assessment?

[43] This is the very point that was considered so carefully by Weatherup J in *Re **J's Application***. I have reviewed that decision anxiously and repeatedly and arrived at the following conclusions. Weatherup J placed some reliance on the evidence of the Board employee Mr Irvine. At para21 of the judgment he states:

> **"The review of the pupil's needs has established, according to Mr Irvine, that the applicant's disability is not so serious as requires a statutory assessment for the purposes of Art15. Following from that conclusion the respondent has decided that it is not necessary for the Board to determine the special educational provision which the**

> **learning difficulty calls for. In other words, the Board's position is that the second limb of the Art13 requirement to identify children is not satisfied as this disability is not sufficiently serious for the Board to intervene."**

He continues at para24:

> **"I accept the respondent's position that in this case the Board is in a position to make an Art13 determination, that is they are able to determine that the pupil has special educational needs and further that it is not necessary for the special educational provision to be made by the Board. The Board has made a negative assessment in this case by accepting that the second limb of Art13 has not been satisfied and therefore has not identified the applicant as a child under Art13 ...".**

[44] I consider that the practice of the board as described by Mr Irvine was legally flawed. The duty of the Boards under Art13 is quite different from its duty under Art 15. Art 13 does no more than what its heading indicates: it imposes a "general duty" on the Board "towards children for whom it is responsible". This duty is framed in the following terms:

> **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 para2 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.'**

Art 13(2) reproduces the two statutory conditions that appear in Art15. They are the conditions which must be satisfied before a Board can conclude **under Art15** that it should conduct a statutory assessment of a child's special educational needs. I have called them "the statutory assessment conditions".

[45] When exercising its statutory functions under Art15 the Boards have a duty to make a determination whether or not these conditions are fulfilled. However, in Art 13 the appearance of the statutory assessment conditions performs a different function. In Art13 these conditions are used as descriptors. They identify the set of children which is the target of the "general duty" created by Art13(1). In Art13 the statutory conditions act as nothing more than a label or target which should guide the Boards in the way they discharge their statutory duty to ***identify.***

[46] Art 13 does not call for the application of the statutory assessment conditions to anyone. It does not require a 'determination' of any kind. If it did it would merely duplicate Art15 and I do not believe it was the intention of Parliament to create a system with two provisions in one statute each of which required the same exercise and the same outcome. If that were so one of these provisions would be redundant. I do not believe that Parliament intends to make redundant provisions in legislation. I therefore consider that in Art13 the sole purpose of the repetition of the statutory assessment conditions is to guide Boards as to the manner in which they should exercise their general duty to identify children.

[47] The duty in Art13 is no more than a duty to use the Board's powers "with a view" to ensuring that children who meet the statutory assessment conditions are identified in due course. "Due course" will arise if and when the candidate children – generally those at Stage 3 – arrive at the point in the system when the Art15 duties become operational.

[48] In ***JG's Application*** the Court accepted that the Board "made an Art13 determination" against the applicant and proceeded to its judgement on that basis. In my view the Board has no power to make any "determination" under Art 13. That article is not directed towards "determinations" at all. Determinations, with the procedures and conditions for making them, are dealt with fully and explicitly in Art 15.

[49] Weatherup J was fortified in the conclusion he reached by the following consideration:

> **"I have already indicated that in circumstances like this where a decision has been made not to require statutory assessment which is the position the Board has taken, the parents have the right to require an assessment to be undertaken and indeed the parents did so require in this case. Further, the parents have a right to appeal against the refusal of the statutory assessment although this is an exercise that they did not pursue ...".**

[50] It appears to me that had the parents in ***JG's Application*** brought an appeal to the Special Educational Needs and Disability Tribunal ("SENDIST") it would have had little prospect of success. The appeal would have been taken when the child was still at Stage 3 and before he had received specialist intervention from the Board's literacy experts and had had the effect of that intervention measured. A child in that position cannot possibly satisfy the criteria for statutory assessment set out in the Code: he cannot do so because he cannot produce -

> **"convincing evidence that, despite relevant and purposeful action by the schools, *with the help of external specialists*, [his..] learning difficulties remain or have not been remedied sufficiently." [para 3.21 Code]**

Had the parents appealed the Board's refusal of a statutory assessment it is likely that the SENDIST, being aware of these criteria, would have refused the appeal because of this lack of evidence. In short, an appeal to the SENDISTin ***JG's case*** is likely to have led the parents into an administrative cul-de-sac. The catch 22 would be that they could not satisfy the Board that their child fulfilled the criteria for statutory assessment because the Board had not provided the specialist help he needed in order to generate the proof.

[51] It appears to me that the Board's approach to its powers and duties, as described in *Re JG's Application* created a frustrating circularity which is damaging to the interests of children. For this reason I conclude that it is not the correct approach to apply in the current Applicant's case.

Conclusions

[52] The effect of Art 13 is to require Boards to use their powers with a view to securing that they identify the children likely to require statutory assessment. The mechanism for such identification, built into the entire SEN system, is a process of elimination that operates via cycles of purposeful intervention and assessment of its effects. By the repeated use of such interventions, the Boards automatically identify the children targeted by Art 15. Accordingly, Art 13 requires boards to make the interventions needed to enable the child to move forward towards 'identification', which comes when the evidence shows that no school based intervention is capable of meeting his needs. If the board refuses a school based intervention that it has power to supply, the refusal automatically stops the process of identification from progressing any further. For this reason outright refusal of such an intervention is unlawful and contrary to the Boards duty under Art 13.

[53] It follows from the above that Art 13 requires boards to exercise their powers in favour of the child at ***some point*** in the assessment process. The question is ***when*** must they do so?

[54] In answering this question it is vital to remember the legal position and its effects. Boards have a power to deliver specialist input at the school based stages, coupled with a duty to use their powers with a view to identifying children likely to need statutory assessment. It is well known that in the exercise of its ***powers*** a public authority may take resources into consideration. Had Parliament intended Boards always to make specialist provision at Stage 3 regardless of the resource implications, it could have imposed a statutory duty to do so. It did not chooses that option. Instead it imposed a duty on Boards to use their powers *with a view to* identifying the target children.

[55] It appears to me that Parliament intended Boards to use their powers to move **all** children in the direction of identification, but, to allow them a margin of discretion as to the time frame within which this would be achieved. The duty is reflected in the direction of travel; the power is reflected in the speed of the journey. And the question for children is how long is too long - or - when does a delay amount to a refusal?

[56] In *Re N's Application* Mr Irvine gave evidence on how his board approached this issue in that case. He said:

> **'It is difficult to conceive any condition where early identification and intervention would not be considered as urgent. The Board is obliged to assess carefully and accurately all cases referred. It is impossible to prioritise any particular category of disability as being more important or more urgent than any other.'**

[57] I sympathise with his dilemma, but cannot agree with his conclusion that no learning disability can ever be regarded as more urgent as any other. I consider that action on a child's learning difficulty is sufficiently urgent to require prioritisation in any case where a failure to act will make the difficulty more severe or more entrenched than would otherwise be the case. Where this would be so, the failure to use a power of intervention actively contributes to the seriousness of the learning difficulty and ***increases*** the likelihood that it will eventually require statutory assessment. Such a result is inconsistent with a SEN system which continually promotes action designed to minimize or eradicate learning difficulties, and which reserves statutory assessment for the small minority of children whose learning difficulties have failed to respond to every intervention available in the school based stages.

Findings

[58] For all the above reasons I conclude that the SEN system does require boards to find some fair way to prioritize demands for specialist support for children at Stage 3.

[59] Applying the above to this Applicant's case I must conclude as follows:

1. The board has a statutory duty to exercise its powers with a view to identifying all those children who require statutory assessment.
2. In exercising these powers it is entitled to have appropriate regard to the resources it has available to it to meet non statutory obligations and therefore to prioritize its interventions in a fair and appropriate way.
3. The rationale and objectives of the SEN system require that boards use their power to make non-statutory interventions within a reasonable time i.e. a period of time consistent with the objectives of the system.
4. What is a 'reasonable time' is context specific and will depend on all the facts of the individual case. In considering what is 'reasonable' the decision maker should have regard to evidence about the effects of delayed intervention on the condition and on the prospects of success of the intervention when made.
5. In the present case, evidence from the Department of Education indicates that intervention for numeracy and literacy difficulties have an

80% success rate if provided at the age of six to seven, but only a 20% chance of success if delayed until the age of 10. This Applicant is fast approaching the end of the time frame for optimal success of intensive intervention, therefore the intervention must be delivered for him without any further delay.

6. The intervention proposed by the Board under its new criteria and outlined in Mr Shiver's letter of 27th June is not sufficiently intensive to satisfy the requirements of para 2.60 of the Code. The intervention to be delivered to the Applicant should be direct literacy teaching from a literacy specialist as indicated by the Educational psychologist.