

THE HIGH COURT

Record Number: 2004 No. 18520P

BETWEEN

SOC (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, COC)

PLAINTIFF

AND

THE MINISTER FOR EDUCATION AND SCIENCE, THE MINISTER FOR HEALTH AND CHILDREN, THE HEALTH SERVICE EXECUTIVE,
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 16th day of May 2007

S is a young boy born on the 12th June 2000, and who in the autumn of 2002 was diagnosed as having autism. He has one older sister who is now aged eight, and during the course of this hearing, his second sister was born.

S has reached the age of six years and was due to access primary education starting in September 2006. This case is now concerned partly with what form or model of education that primary education should take for S, and whether what the Department of Education and Science ("the Department") has proposed by way of primary education provision for S in the area in which he resides is a provision of education appropriate to his diagnosis and his deficits, and perhaps also taking into account what interventions have been put in place for S, largely by his parents, albeit with some assistance from the State, since it was first realised that S was not developing normally.

In addition to seeking certain declarations as to the breach by the defendants of the plaintiff's constitutional rights to appropriate education and health care services, and his statutory rights to same under the Education Act, 1998, the Child Care Act, 1991, the Equal Status Act 2000, and the Health Act 1970, as amended and consolidated, the plaintiff seeks damages for these breaches of rights, as well as for negligence and breach of duty, including statutory duty.

Damages are sought also for breach of s. 3 of the Convention on Human Rights Act, 2003, as well as a declaration, if necessary, that the provisions of sections 6 and 7 of the Education Act, 1998 are incompatible with the defendants' obligations under the European Convention on Human Rights.

In addition to those reliefs, the plaintiff seeks certain mandatory injunctions requiring the defendants to comply with their statutory duties to provide for appropriate free education, and in particular to provide the plaintiff with free primary education to be delivered only through the application of Applied Behavioural Analysis (ABA), as more particularly described and detailed in the final Amended Statement of Claim delivered on the 19th May 2006.

A Statement of Claim was first delivered by the plaintiff on the 3rd September 2004. However, an Amended Statement of Claim was delivered on the 22nd April 2005, and a further Amended Statement of Claim as delivered during the course of this hearing, with leave of the Court, on the 19th May 2006. It is by reference to this final Amended Statement of Claim that the plaintiff's claims will be considered. The final version of the Statement of Claim was delivered following a ruling by this Court on the 16th May 2006 whereby certain reliefs were ordered to be struck out, namely those at (e), (f) and (g) of the Amended Statement of Claim delivered on the 22nd April 2005. The final amendments were so that the plaintiff could particularise as best he could exactly what form any mandatory order which the Court may ultimately make might take so as to be sufficiently precise and specific for the purpose of enforcement, if necessary. The need to do this has brought into sharp focus one of the difficulties facing the plaintiff, particularly in relation to the mandatory orders sought, namely to set forth with precision exactly what is being sought from the State by way of education and therapies for S, for inclusion in any mandatory order which might be granted. However, I shall return to that aspect of the case in due course.

I will leave until after I have set out the extensive amount of evidence which has been given by all parties to this action the precise nature of the declarations and injunctions which are being sought by the plaintiff, since they can then be seen in the context of the evidence given.

I will first set out a chronology of events leading up to the point at which in early February 2004 S entered the ABA pre-school at St. Catherine's, Barnacoye. That chronology can be gleaned largely from the evidence given in Court by each of his parents, and the documents referred to by them. In addition, those events are interwoven by communications and correspondence which has passed in both and all directions between the parents of S, various sections of the Department of Education, bodies coming under the umbrella of the HSE, various primary school principals, as well as St. Catherine's, and so on. I will refer to those communications as required in order to assist in the narration of what appears to be the relevant chronology of events thus far. There has of course also been produced to the Court, during the course of all the evidence, many reports of one kind or another from educational psychologists on both sides, clinicians, therapists, ABA consultants and the like, and while I may dwell on those reports quite briefly in this part of the narrative of facts and events, I will come to at least some of them in more detail in other parts of my judgment as required. Finally there has been produced as part of the evidence adduced by each side to support their particular recommended primary education provision, many and varied learned articles from journals and texts of one kind or another and I will refer to these as required in due course.

Having set out a relevant chronology of events up to February 2004, I will then set out as far as seems necessary, a summary of the evidence of the various witnesses called.

These proceedings themselves were commenced on the 10th August 2004 by way of Plenary Summons, when S was just four years of age. At that stage his primary education was not then the primary focus of his parents' attention since he would not be required to access primary education until he reached the age of six some two years later. Rather their focus was on what was seen by them at that time as the lack of adequate or indeed any provision by the State for his pre-school placement, as well as the failure to provide him in any timely fashion with the therapies recommended for him following the multi-disciplinary assessment carried out by the Lucena Clinic in August 2002, namely speech and language therapy, occupational therapy, and physiotherapy.

The diagnosis of autism was formally made in November 2002, and was communicated to the parents in December of that year. Prior to actual diagnosis, the parents had been informed that autism was a possibility and that final diagnosis came as no surprise to them.

Following the commencement of proceedings, an application for certain interlocutory orders was launched, which gave rise to the usual exchange of affidavits. Eventually that application was not proceeded with in favour of an early trial of the action. That trial commenced before me on the 11th January 2006 and continued with necessary interruptions over a period of some sixty eight days of

hearings and submissions until the end of July 2006.

The plaintiff's parents have formed the view that what the State is proposing for S by way of primary education amounts to an inappropriate educational provision, and that as a result the State is breaching S's constitutional right to primary education appropriate to his needs. They go further than saying that what is proposed by the State will not benefit S as much as the particular autism specific education which they wish him to receive, namely one delivered solely and exclusively through ABA. They say that what is on offer for S, as it were, will in fact damage him in the sense that he will regress from where he is presently at, thereby reversing many of the gains which they say he has made as a result of the ABA he has received to date at his pre-school and at home, and that his rate of learning will slow down, if not grind to a halt and regress, should he be required to attend either of the national primary schools proposed for him, neither of which currently provide an exclusive ABA environment. On the other hand each has an autism specific class in which ABA may be provided as one element of a possible range of interventions, depending on the needs of the child. This form of primary education proposed by the State is said by the plaintiff to be not appropriate education such as would vindicate the plaintiff's constitutional right in that regard.

The date by which his parents reached that view, and indeed the basis and advice, if any, upon which they arrived at that view, have been matters of some controversy during the course of the evidence which I have heard and I will come to that. But, certain declarations and mandatory orders are sought.

Apart altogether from the alleged breach of constitutional rights going forward, the plaintiff also claims that in the past his constitutional and statutory rights have been breached by the failure of certain State agencies to provide any or any adequate early interventions by way of both pre-school education provision, and therapies following his diagnosis of autism at the end of 2002, and arising also from what is alleged to be a delay on the part of the relevant bodies to even assess and diagnose S in a timely fashion. This delay of itself is said to have deprived S of his entitlement to early intervention, and that as a result of not being able to access appropriate therapies and education at such an earlier stage, he has lost valuable and irreplaceable time during which his deficits could have been sooner addressed, and that this is time which cannot be made up at this stage, and that permanent loss has resulted. This claim, being in respect of past breaches of constitutional and statutory obligations and duties, is said to give rise to a claim in damages also in negligence.

I will be dealing in more detail in due course, as far as I can reasonably do so in this judgment, with the differences between the so-called exclusive or intensive ABA model of intervention and education which is said by the parents of S and certain experts called by them to be the only appropriate form of intervention and education for S, and the so-called 'eclectic' model or framework of autism specific education (which includes Applied Behaviour Analysis as a core element of provision, where necessary) proposed by the State and apparently available in September 2006 for S at the two primary schools in his area, this latter model having been referred to in these proceedings as "Model A".

The Court is in effect being asked in relation to the claim into the future to decide that Model A as proposed by the State is not an appropriate primary educational provision for S, and not simply that one may be better or worse, more appropriate or less appropriate than the other; and to decide also that the exclusive or intensive ABA model of provision is the only provision appropriate for S, and therefore to make declarations in that regard, as well as mandatory orders to ensure that S receives it (as well as therapies).

It is perhaps worth mentioning at this early stage that S is currently attending, and has done so since the 12th February 2004, an ABA pre-school at Barnacoye, being part of the St. Catherine's complex which provides services generally for children and others with disabilities, and which is itself substantially funded by the State. The Court has heard a good deal of evidence about St. Catherine's generally and I will come to that. The State has provided significant funding for the services at St. Catherine's, but until quite recently, in fact June 2005, and certainly well after the commencement of these proceedings, did not provide education funding specifically for the autism pre-school which was set up at Barnacoye at the end of 2003 and which opened for pupils on the 12th February 2004.

On the other hand, the Health Service Executive provided an annual per capita grant of €15000 specifically for therapies for the cohort of a particular six children in this pre-school, being a sum in total of €90,000 per annum. As will be seen later during the account of certain of the evidence adduced, this sum for therapies has been used by St. Catherine's, with the knowledge of the plaintiff's parents and the parents of the other children concerned, to partly fund the ABA education provision at its pre-school, rather than for the provision of therapies. The plaintiff claims that he has not and does not receive these therapies which he needs, and part of the claim in these proceedings is that the HSE has failed to provide the plaintiff with them.

As I have stated, S was born on the 12th June 2000. Mother has stated that her pregnancy was uneventful except for a minor scare of a miscarriage early on. However by the time S was eight months old some concerns existed about his hearing and eye-contact. It appears that he did not respond to loud noise for example. At twelve months mother and father were very concerned about his language development, and thought that it might result from a difficulty with his hearing. In June 2001, S had his twelve month public health nurse check-up when these concerns were aired, and the nurse in question referred S to his GP, Dr Devereaux, who in turn referred on to an Ear, Nose and Throat Specialist, Mr Don McShane. Mr McShane in turn referred S for an audiology test with a lady at the Lucena Clinic named Sr. Lydia. She saw S on a private basis on the 8th June 2001, and again on the 22nd June 2001. On the latter occasion she noted that his responses were strange, that he ignored sounds, made little eye contact, and was not keen on being held. But she did not find any problem with his hearing. The parents say that the possibility of autism was not mentioned at this stage, and to finally rule out a difficulty with hearing, S was referred by Mr McShane to a paediatrician for a Brainstem Evoked Response test (BER test), which came back normal. Thus a hearing difficulty was finally and conclusively ruled out. The public health nurse again saw S on the 27th June 2001 and noted that his development was normal.

In September 2001, mother had returned to work as a clinical psychologist at the same St. Catherine's referred to earlier, on a part-time basis for four days per week, and she and her husband decided that S should attend a crèche or nursery facility in Arklow called Pixies, close to where they live. She has stated that the reason for placing him in Pixies at this time was partly on account of her return to work, but also to help with what they saw as difficulties which S had with socialisation.

On the 27th February 2002, the public health nurse saw S again for his eighteen month check. She came to their home. She noted at this stage, *inter alia*, that S had no speech, a few simple words, and poor attention span. Curiously, in the notes for this examination, the nurse has written: "Sr. Lydia is reported to have diagnosed autism". It will be recalled that Sr. Lydia had seen S in June 2001, some eight months previously, and mother has said that on no occasion did Sr. Lydia even mention the possibility of autism. It is of some relevance to any blame attaching to the delay in diagnosis or the parents being informed of a diagnosis of autism, to state that in June 2001 Sr. Lydia was being consulted on a private basis as an audiologist, even though she is employed also by the Lucena Clinic. She would not be qualified to "diagnose" autism, even though she may well be in a position to have an informed view on the matter. These notes also make reference to a phone call to be made to the Lucena Clinic, and the nurse notes also: "If child autistic,

referral to be made by GP for clinical diagnosis". Mother says that none of this was stated to her at this examination, otherwise she would have made sure that this was followed up immediately, and that the only referral she recalls being mentioned was for physiotherapy and speech and language. The parents make the point that if professionals were suspecting, as these notes suggest they were, that S was autistic, they should have said so, because by not saying so, valuable time was being lost to S, since in cases of autism, early intervention to deal with any deficits which the child has is so important.

At any rate, S was referred at the parents' request to Ms. Sinead Ni Dhúill, a community speech and language therapist in Arklow, and he was seen within a couple of weeks in March 2002. In her report, Ms. Ni Dhúill described S as having "a severe to moderate language delay and pragmatic disorder" and that in spite of parents' best efforts S was failing to make any significant progress. She recommended that S be referred for assessment at the Lucena Clinic "to investigate his unusual presentation". Mother has stated that as far as she and her husband were concerned, a hearing difficulty had been ruled out, but since he was having difficulty with expressive language, they felt it was a language difficulty, both as far as expressing himself was concerned as well as comprehending what was being said to him – in other words a language difficulty in both directions. But mother states also that it was Ms. Ni Dhúill who for the first time mentioned the possibility of autism, and suggested that S be referred by Dr Devereaux to the Lucena Clinic so that it could be ruled in or ruled out.

Dr Devereaux wrote to Dr Michael, the head of the multi-disciplinary team at the Lucena Clinic by letter dated 2nd May 2002, which is noted as having been received at Lucena on the following day the 3rd May 2002. The letter had requested that S be seen on an urgent basis. However, notes made at Lucena following receipt of this letter state: "Discussed at team meeting on 3rd May. Priority routine multi disciplinary assessment". But between May and September 2002, mother states that she telephoned several times for a date for the assessment but was told that there was a delay of several months and that the assessment would take place in September/October 2002. In fact, the assessment took place starting on the 5th September 2002.

This delay of some months in having S assessed again gave rise to anger and distress for the parents who were concerned that valuable time was being lost in terms of early intervention if indeed autism was to be formally diagnosed. By this time the parents were pretty sure that it was autism which they had to face for their son, and they were naturally most anxious to have that confirmed so that appropriate and urgent steps could be taken in his best interests. Quite apart from that anxiety, S himself was difficult to manage at home for various reasons which I do not need to go into, save to say that these difficulties included how he interacted with his older sibling and her inability, due to her age, to comprehend the problems which were part of family life at home. The parents were most anxious, to put it mildly I suppose, to address the difficulties at all levels, yet could not access the necessary assistance from professionals without a diagnosis of autism, and they could not access a diagnosis because of bureaucratic delays in the system, perhaps due to under-resourcing as they saw it.

In this regard it will be recalled that S was attending Pixies Nursery since September 2001. The parents had explained to the lady running Pixies that S was having hearing assessments carried out and that he had some language difficulties. They felt she should be told about this, because S was presenting there with some difficult behaviours, such as screaming when he was distressed, as a result of his inability to communicate in any other way.

S and his parents attended the Lucena Clinic for assessment on the 5th September 2002, and in October 2002 as part of that overall assessment, S was assessed by a Speech and Language Therapist and an Occupational Therapist. On the 3rd October 2002 as part of this assessment, the Senior Speech and Language therapist at Lucena visited Pixies in order to observe S in that setting. Subsequently, a confirmed diagnosis of autism was communicated to the parents. The report from the Lucena Clinic, which was prepared and signed off on in December 2002 (by which time S was 28 months chronological age) sets forth in considerable detail the information and testing which gave rise to the diagnosis, and there follows a number of recommendations. Part of the assessment process involved the carrying out of a test known as the Vineland Adaptive Behaviour Scales Test which tests the child over a number of distinct areas, such as Communication, Daily Living Skills, Socialisation, and Motor Skills (both fine motor and gross motor). Without going into the results achieved by S in each particular domain and sub-domain, the overall conclusion was reached that S "at 26 months chronological age is showing a significant general delay in most areas of his adaptive behaviour". Under Communication headings he achieved 'low' scoring which indicated a level of communication appropriate for an 8 month old child. As far as Daily Living Skills were concerned the scores achieved were 'low' and indicated a level of 14 months. The score for Socialisation indicated a 'low' score and an age equivalent score of 8 months, and, finally, Motor Skills showed a 'moderately low' score of 20 months.

In relation to what Ms. Burns observed of S at Pixies on her visit there on the 3rd October 2002, the report notes that S's supervisor there had no concerns about S's behaviour while there up to that point, and it is noted also within the report that S at that time was adaptable and was not phased by changes to his routine. These are matters which assume some relevance later, given the parents' concerns now about the difficulty S would face if required to change to another school environment, and given the concerns which later developed about serious levels of what has become referred to as 'challenging behaviour'.

As a general conclusion, the report states that S presented with significant delay and irregularities in the areas of communication, social interaction and imagination and play, and that he has a moderate to severe language delay and pragmatic disorder, as well as difficulty in processing sensory information.

The parents agreed with this conclusion based on their own experiences as parents of S and from living with him. It will be recalled that mother is herself a psychologist and she considered that by the time he was two years of age, S was significantly delayed generally in his development in spite of specific effort put in by them as parents to address the perceived delays and deficits in so far as they could without a diagnosis and therapeutic inputs in place.

The Lucena report contains a number of recommendations set forth as follows:

- "1. [S] requires a multidisciplinary treatment approach. This should include particularly in his preschool years, home programmes and parent education. In time [S] will require an individualised educational programme and regular review by therapists with specialist knowledge in the field of autism.
2. It has been recommended that [S] be referred to Beechpark Services for Children with Autistic Spectrum Disorder. Referral will be made to this service by the Lucena Clinic Team.
3. It is recommended that the Senior Area Medical Officer of the East Coast Area Health Board be informed of [S]'s diagnosis in order to ensure that appropriate services within the Health Board are made available.
4. It is recommended that the Department of Education and Science, School Inspector for children with Special Needs within County Wicklow be informed of [S]'s diagnosis in order that [S]'s special educational needs can be provided for and

planned within the formal educational system in due course."

These recommendations gave the parents some hope that S was being referred to the agency best able to put in place the appropriate programmes so that his significant deficits would be addressed urgently. They knew that he was significantly and seriously delayed in his development, and now knew that this was as a result of being autistic. They had already by this time been frustrated and annoyed by the time it had taken from May 2002 until December 2002 for the referral to the Lucena Clinic to be turned into a diagnosis and report containing these recommendations. These are intelligent, caring and well-motivated parents who want to do the best for their autistic son and would spare no effort themselves in that pursuit. I have no doubt about this from the evidence which I have heard, and to that extent at least S is very fortunate to have parents with such demonstrated commitment to improving as far as they can his overall situation for the future.

In this context it is worth recording as part of this chronology the fact that in March 2002, Sinead Ni Dhúill, who had at that time and for the first time mentioned to the parents the possibility of autism, had suggested to the parents that they might even at that stage benefit from attending a course run by the Speech and Language department at the Lucena Clinic, for parents of children with language delay, called "Hansen – More than Words" ("the Hanen Course"). This is a course for parents of children who have autism or severe language difficulties, according to mother. The course took place between July and November 2002 and both mother and father attended same. It involved attending the course once a week in the evening after work, and in addition there were three or four home visits by the speech therapists involved on the course where they would discuss their child. It appears that as part of the course there is a handbook given out to the parents which contains suggested measures to be taken to assist the child's speech and language development, depending on the level of impairment and delay in question. The home visits were an opportunity to discuss on a one to one basis the child's progress and how these steps were being implemented, and were the only occasion on which the therapists had any direct interaction with S. But that interaction stopped short of actually providing therapy for the child.

Both mother and father have each described the Hanen course as being a course more for the parents than for the child as such, although clearly the child is the person ultimately intended to benefit from the knowledge gained by the parents from attending the course. Each has said that they found the course very useful. But father in particular seems to have found a perhaps unintended benefit from attending this course over that summer of 2002. In the course of his evidence he very frankly stated that when Sinead Ni Dhúill first raised the possibility that S was autistic in March 2002 he was very resistant and reluctant to accept that his son was autistic, and preferred to think of it in terms of simple language delay which would come right given time. He has stated that the course was a gentle lead-in to an acceptance of the fact that S may well be autistic. The course also put them in touch with other parents whose children had similar problems to S, and with whom they could discuss matters. In addition, according to father, it gave the parents a feeling that they were doing at least something for their son in the absence of anything else yet having been put in place by the State.

I mention the Hanen course as being indicative of the motivation which these parents had and continue to have to help S overcome as best he can the deficits which autism has presented to him. They have later on attended other courses recommended to them such as one called the Early Bird Programme, as well as an Introductory Course in ABA. In the face of such motivation and preparedness to do anything which would assist S in dealing with his deficits, the delays in the system, as they experienced them from March 2002 onwards to the point of diagnosis and thereafter can easily be seen as justifying the extreme sense of frustration and annoyance, to put it no stronger (though they might!), which the parents clearly felt and continue to feel, and which causes them to think that the State does not really treat a child such as S as a priority, and does not take seriously its responsibilities to ensure as far as practicable that a diagnosis is made promptly, and that thereafter the appropriate interventions/therapies are put in place as early as possible so that the benefits of early intervention are not compromised any more than may be reasonably inevitable, and thereby acting in the best interests of the child to ensure that the deficits accompanying the child's condition are minimised to the greatest extent possible, enabling the child to gradually learn to function and integrate into the mainstream as best he/she can during his/her lifetime.

One must always bear in mind that by this time it was some 9 months after the parents had been told by Sinead Ni Dhúill of the possibility at least of autism, and it was about 18 months since, according to the public health nurse's note to the effect that in June 2001 Sr. Lydia had considered autism to be a possibility. So as far as these parents are concerned, the point of diagnosis and the recommendations to be made thereafter, could have been brought forward in time by at least twelve months and that such a period of twelve months constitutes a very long period of time in the life of a child who is at this point only two and a half years of age.

However, I have digressed temporarily from the narrative of events upon which I had embarked in order to deal with aspects of the delay experienced up to this point. It is timely to have done so, because what happened next is even worse from the parents' point of view in terms of delay, frustration and anger. The Lucena Clinic had as part of its recommendations made a referral of S to Beechpark Services for Children with Autism, an emanation of what is now the Health Service Executive – clearly an agency with a specialist knowledge of what was required to be done for an autistic child such as S. The parents were devastated at the extent of S's disability as shown by the Lucena assessment, and were now hopeful that Beechpark would provide the necessary expertise, guidance and support to assist them in dealing with S's needs. As a psychologist herself, mother knew a certain amount about intellectual disability generally but had no specialist knowledge of autism. During the period from May 2002 to diagnosis in November 2002, Lucena had been providing speech and language therapy for S. They had provided sixteen sessions for S and eight for the parents.

However, once Lucena had made its diagnosis and had referred S to Beechpark Services, S was removed from its books, as it were, for services, on the basis that he was now a Beechpark case and came within the services being provided by that body. This is in spite of protest apparently by the parents who were aware from speaking to the parents of other diagnosed children who attended the Hanen course that Lucena had in some cases continued to offer services following diagnosis, and in spite of the fact that there was known to be a sizeable delay between actual referral to Beechpark by Lucena, and S actually being taken on by that body. With regard to the former, mother has stated that Lucena informed her that they continued to offer services for children at the high functioning end of the autism spectrum, whereas S was in the moderate to severe category, certainly as far as his language delay is concerned.

A 'Summary Multi-disciplinary Assessment Report' dated 9th December 2002 addressed 'To Whom It May Concern' states, *inter alia*, the following:

"[parents] have been advised that [S] requires a multi-disciplinary approach which should include, particularly in his pre-school years, home programmes and parent education about autism. He will require an individualised educational programme and regular review by therapists with specialist knowledge in the field of autism.

With [parents'] agreement, [S] has been referred to Beechpark Services for children with Autistic Spectrum Disorder in

order to access the specialised service that he requires. In addition, both the Senior Area Medical Officer of the East Coast Area Health Board and the Department of Education and Science inspector for Children with Special Needs have been informed of S's diagnosis. This is in order that the appropriate services within the Health Board may be made available to S and his special educational needs provided and planned for within the formal education system in due course.

The Lucena Clinic Team will remain available to liaise with Beechpark Services."

By letter dated 13th November 2002, Dr Michael at Lucena appears to have written to Beechpark Services about S, although it has to be noted also that the letter as received by Beechpark bears a "received" stamp bearing the date "3rd January 2003".

Once S had been referred to Beechpark the parents were most understandably anxious to get an appointment to see somebody there in order to get services in place for S. At this point he was in receipt of no therapeutic support, neither Speech and Language therapy nor Occupational therapy, since Lucena had taken S off its books following referral to Beechpark. They had been told that there were in fact two waiting lists – one being for the child's case to be actually discussed, and a second for an actual appointment, and that it could take several months before they were seen by Beechpark.

But from December 2002 they made every effort to try and get this appointment. Mother has said that she tried time and time again on the telephone to make some progress, ending up in tears on some occasions on the telephone. One of her difficulties was that she knew from talking to other parents that they were receiving services and she could not understand why they as parents could not get such assistance for their son. This was a very frustrating and distressing time for them, and once again they were conscious that valuable early intervention time was being lost for S. Little did the parents know at this stage that it would not be until August 2003 before they would be seen by Beechpark, by which time they had resorted to solicitors in order to try and achieve for S what they saw as his entitlement by law.

The parents eventually got an assessment appointment with Beechpark Services for the 12th August 2003, and I will deal with the results of that assessment and the Recommendations made for S in that report when outlining the evidence given in this case by Dr Mitchell Fleming, the Principal Clinical Psychologist at Beechpark at this time.

One of the things which they were anxious to access was a Home Tuition Grant from the Department of Education and Science. They had heard from other parents to whom they had spoken that up to 20 hours per week was paid by the Department in order to put home tuition in place for an autistic child, and they wanted to obtain this for S in order to assist him in his early development and education. It will be recalled that one of the recommendations of the Lucena Clinic was that home programmes be put in place. Having applied to the Department for such a grant, they received a letter from the Department which sanctioned it for the year 2002/2003 school year. It was however subject to a few conditions, one being that it was limited to five hours per week, and another being that no tuition be provided during school vacation periods.

Armed with this Home Tuition Grant, the parents engaged the services of a tutor for S, so that she could attend at Pixies with him and give him one to one tuition in the environment for six hours per week. They of course funded the sixth hour themselves. This tutor had a child care qualification only, since the parents were unable to find any person who had any autism specific qualification. The only other assistance which S was getting at this time was whatever the parents themselves could do for S in the area of his communication deficits as a result of what they learned on the Hanen course already referred to. Not content that a sanction of five hours home tuition grant was sufficient, the parents set about corresponding with the Department of Education and Science seeking to have that allowance increased to 20 hours. It was eventually increased on the 12th June 2003 (by coincidence S's 3rd birthday!) to 10 hours. But this was not without having encountered difficulty along the way in the form of unanswered correspondence to the Department, many phone calls to try and talk to the person whose decision it was, and after one letter in particular which is dated the 15th May 2003 and which, out of a sense of anger and absolute frustration, father faxed to a particular fax number in the Department on at least four and maybe more occasions throughout that day in order to try and evoke some response to same, having failed to receive a reply to previous letters. This repeated faxing of the same letter that day produced a response, according to father's evidence at least, namely what he recalls as being an irate phone-call from a Mr Shields giving out about the fact that father had conducted himself in this way. It is unnecessary to go into the detail of that call as recounted by father any further, except to say that father has stated that the conversation ending by Mr Shields indicated that he would get back to him. Mr Shields did not give evidence to contradict this.

However, yet another month passed without further contact from the Department, and a further letter was written by father, and eventually by letter dated 12th June 2003 (not from Mr Shields but from a Ms. Reilly of the Special Education Section in the Department) the parents were informed of the increase to 10 hours Home Tuition Grant, as I have already mentioned.

The parents are of the view that this increase was given begrudgingly and only as a 'sop' as it were to keep them quiet, and that there was no rational basis for increasing the sanction merely to ten hours from the 5 hours already in place. However, while that might be seen as an understandable reaction given the difficulties which they had encountered, it may be unwarranted since the letter of the 12th June concluded by stating:

"In order to consider additional tuition can you please supply us with the following documentation:

1. The type of programme your tutor(s) is following/intends to follow with your child.
2. The hours involved in the same programme (on a weekly basis)
3. Details of tutor and also indicate if your son is attending a pre-school.

We request that this information be supplied to us in writing by you/your home tutor as soon as possible." (my emphasis)

A further letter was sent to the Department on the 13th September 2003 seeking a continuation of the home tuition grant for the coming school year and informing the Department that in line with the recommendations in a report which was enclosed with the letter, the parents were putting in place home tuition of 23 hours per week and sought funding for that. That report is the report which was eventually obtained from Beechpark after S was seen by them in August 2003, and in which 15 hours home tuition was recommended for S.

The response to that letter was dated the 9th January 2004 and to the effect that the sanction for funding of ten hours previously

sanctioned was renewed for the coming year. By letter dated 15th January 2004, the parents expressed dissatisfaction with this response and asked for details of the criteria used by the Department in arriving at their decision, and other matters, and in addition indicated that they wished to appeal the decision. Eventually a sanction was received in January 2004 for fifteen hours home tuition, and despite their best efforts to extract a higher amount, the Home Tuition Grant remained at this level until it was discontinued at the end of the school year in July 2005 after S became five years of age.

It is clear that the cost of the home tuition which was put in place by the parents in the absence of any assistance coming from the Department or Beechpark was never covered fully by the Grant sanctioned from time to time, except for a relatively brief period from November 2004 when a Ms. Lawlor was engaged as a tutor for fourteen hours per week and the grant was for fifteen hours. Any shortfall prior to that from December 2002 was at all times having to be met by the parents out of their own resources. From September 2005 the parents have funded home tuition completely from their own resources in the absence of any home tuition grant being available. Mother has given evidence that this was something which caused a good deal of pressure on them as a family. Some of the home tuition provided to S was provided by mother herself.

This part of the narrative dealing with the home tuition grant has taken me ahead of other events which need to be detailed in relation to what was happening back in May 2003. It will be recalled that apart from trying to access adequate home tuition funds in the first half of 2003, the parents were desperately trying to get an appointment to see Beechpark.

These efforts by the parents in continuing to contact Beechpark resulted by the end of January 2003 in them being offered some assistance, pending an appointment, in the form of what is called "The Early Bird Programme". They expressed interest in joining that programme. It was May 2003 by the time it was confirmed to them that they were enrolled for that course, and it was not until about September 2003 that the course commenced. They were unaware that in fact their name had been put down for this programme in November 2002 following the referral by Dr Michael of Lucena. It seems that the parents had been unaware of this until quite recently. That course appears to have commenced in September 2003 and ran until December 2003.

Again these delays in progress were very frustrating for parents anxious to make progress fast for their son. Father during his evidence rather cryptically stated in relation to the delay in getting this course that he felt that it was not called "Early Bird" for no reason! Mother has explained that this programme is an education programme for parents following a diagnosis of autism for their child. She stated that it provides information on what autism is, how it can affect the child, and how the parents can try and minimise the effects of autism for the child in the home environment. In spite therefore of the offer of this programme, in fact none of the recommendations made by Lucena at the end of 2002 were being implemented with the exception of the six hours tuition which the parents themselves were putting in place, albeit with the sanctioned five hours home tuition grant. Nothing was offered by either Lucena or Beechpark for S. The parents were, as they see it, doing their best for S in the absence of services, but there were no speech therapists or occupational therapists, nor was their home or Pixies a proper pre-school educational environment. They were most concerned that without the early interventions which S was supposed to be receiving his autism was getting worse rather than improving. Mother has given in her evidence some examples of ways in which S was disimproving from the point at which he was when seen by the Lucena Clinic.

In addition to this fear that in fact their son was getting worse, life at home generally was very difficult during the summer of 2003. It appears that S's sleep pattern was very disturbed and that he would be awake a good deal – in fact to the extent that it was necessary for mother and father to take alternate nights 'on watch' as it were, because one of the features of S at this time was that he had no sense of danger and could, if left unsupervised at night, have come to harm. This lack of sleep for S would have a knock-on effect for how he was during the next day. Another feature of his autism was that he had difficulty with people touching him, and this made things like dressing him, washing him, brushing his hair and so on very difficult to achieve without major distress. These features of his autism are all matters which could have been addressed by therapeutic interventions had they been available to S. Meal-times were difficult also because he resisted having to sit at a table, and also he was extremely particular about what food he would and would not eat. It is easy for any parent to imagine the difficulties that all these matters, and no doubt others, would give rise to.

While the parents as adults could try and deal with these characteristics of S's autism in a rational way, it was not so easy to explain them to S's older sister who was only five at this time. This caused further difficulty within the household. Mother sees this time as a marked deterioration in S from the point at which he was seen in Lucena in September/October 2002. Things were getting so bad that they decided that in the absence of any therapies from Beechpark they would have to try and access therapies privately.

In order to access speech therapy, in view of the difficulties which S had with expressing himself, they were put in touch with such a speech therapist in July 2003, namely Ms. Rosalie Seymour. I will return to that shortly, but first want to cover what was also happening in May 2003 in relation to where S might go to school in September 2003, as the parents, it will be recalled, were anxious that S should start at a pre-school in September 2003 rather than wait, as the Department was insisting to the parents, until he could go to Templerainey National School's autism class in September 2004.

In late 2002 it appears that the parents had heard that St. Joseph's National School in Templerainey, close to where they live were planning to open an autism specific class. One of the things that happened following the Lucena diagnosis of autism for S was that Dr Michael wrote to the Department of Education and Science. Mr Mahon of that department wrote back to Dr Michael telling him that S would be eligible to attend this class in Templerainey when he reached school going age, namely when he was four. That would be in September 2004. The parents were again concerned that S would access no education until September 2004 according to the plans of the Department, and father wrote to the Principal of Templerainey N.S on the 26th May 2003 requesting that he consider S for enrolment in this class commencing September 2003. Father went on:

"It has come to our attention that a precedent has been set by Prosperous NS, Kildare when they opened their outreach classes for children with ASD, in that several of the pupils enrolled were aged 3 years.....We have been advised that imposing an age barrier blocking access to educational provision for a child with ASD is unconstitutional and that therefore [S] is entitled to appropriate educational provision regardless of age..."

It is clear from the text of this letter that some legal advice has by this time been obtained. In her evidence dealing with the events of May 2003, mother has stated that since the previous December 2002 they had been trying to make progress with the Department as far as increasing the amount of hours sanctioned for home tuition, as well as trying to get S enrolled for Templerainey NS for September 2003 instead of 2004. In addition they were finding it very difficult trying to access services from Beechpark or get an appointment to be seen by Beechpark. They knew other parents were receiving services but could not do so themselves, and she has stated that on account of this they sought advice from solicitors in their efforts to assist their son.

Before dealing with correspondence emanating from these solicitors, I want to look in some detail at other correspondence in May

2003, and matters developing generally around that time. Certainly I have been left with the impression that the period April – May 2003 was one of mounting frustration, anger and determination on the part of parents not to let matters drag on any longer, and there is developing around this time a certain inevitability about the involvement of lawyers in the struggle to obtain services for S.

That inevitability was not helped I suspect by the fact that the parents received no response to their letter of 26th May 2003 to the Principal of Templaraine NS, even though almost exactly one year later he wrote a letter setting out what was provided by way of autism specific education in his school. What prompted him to write in these terms almost one year after he had been requested for information is something to look at later perhaps.

But at any rate, the parents were invited by the Principal of Templaraine NS to a meeting along with other parents on the 12th June 2003 – again S's birthday and the day on which his home tuition grant was increased to ten hours ! According to mother's evidence, once S reached the age of three he was entitled as of right to this ten hour sanction for home tuition. They went along to that meeting, and, according to mother, it was attended by the Principal, Mr Michael O'Callaghan, the class teacher, Ms. Joyce, and a Consultant in Applied Behaviour Analysis named Ms. Maeve Bracken. Mother has said that if a place was available for S in September 2003 at this time they would have been very keen to avail of it. She has stated in her evidence that even though they were looking at ABA during this summer they still were not sure about it, and father has said that he had just about heard about ABA at this stage but knew nothing about it. They say that they were completely open-minded about the model of education for S at this stage, their concern being that he should be able to access education of some kind as soon as possible in accordance with the recommendations which had been made for S. It would appear that there must have been some discussion of ABA at this meeting, and I presume that such discussion may have been about the degree to which ABA was proposed as a methodology in the autism class, because mother has given evidence of her recollection that Mr O'Callaghan stated to the meeting that the only way to access an exclusively ABA education model was through the courts. It appears that Mr O'Callaghan was open to such a methodology for the Templaraine National School autism class, but stated that he did not have the necessary resources with which to fund it.

At any rate it appears that it was again made clear to them at this meeting that there was no possibility of S being able to join the class at Templaraine NS in September 2003. A curious matter was revealed only during the course of the hearing before me and by virtue of a communication between counsels on Day 4, namely that a letter dated the 26th May 2003 exists on the Departmental file in which Mr Mahon of the Department is writing to Mr Liam Hughes of the Special Education Section of the Department. He asks Mr Hughes whether, if the school is willing to enrol S for September 2003 the Department would sanction it and whether S can be counted for staffing purposes. He also states that since there were places available in the special class, the school should be encouraged to enrol S for that school year.

The parents were never made aware that this was the view at that time of Mr Mahon with whom they were corresponding over quite some period about this very matter. In fact, according to father's evidence, the parents were never aware that Mr Hughes had any involvement in the decision to be made in this regard until they learned of this letter on Day 4 of the hearing.

In fact on the 13th June 2003 father wrote to Mr Mahon at the Department seeking S's enrolment for September 2003 and pointing out that there was a precedent for a child starting at three years of age at the Saplings School in Prosperous, Co. Kildare, and he went on to refer to the fact that if S could not be accommodated in this way, this would be form of discrimination on grounds of where S lived. They received no reply to this letter for some reason, even though Mr Mahon by then at least seems to have been of the view that S should be permitted to enrol for September 2003. Perhaps Mr Hughes was not of the same view. We do not know.

The parents at this point in time are therefore in the position where they have no pre-school placement for S until September 2004. They are in receipt of no therapies from the health service, have in place, thanks to their own efforts, a home programme with a tutor engaged and whose services are paid for to a large extent by the Home Tuition Grant referred to. But the parents are of the view, supported by the recommendations of the Lucena Clinic, that the Department should be increasing the level of this assistance. Their efforts in this regard are still ongoing at this stage, along with their efforts to access pre-schooling at Templaraine for September 2003. At the same time they are also still trying to get even an appointment to be seen by Beechpark, and are still waiting to go on the Early Bird Course for which they had been enrolled.

Two more things happen around this date.

First of all on the 12th June 2003, Mr Harry Cullen who is the Director of St Catherine's Services where mother is part of the management team and where she happens to work as a psychologist, writes to the Department setting out a very detailed proposal for the setting up of an autism specific pre-school within St. Catherine's, and seeks funding for same. The 12th June is the same day as the Home Tuition grant for S was increased to ten hours, and is also the same day as the meeting to which the parents and other parents were invited by the Principal of Templaraine NS, and when they were told again that S could not attend the class until September 2004.

Secondly, on the following day, solicitors on behalf of the parents write to the Minister for Education and Science, the Minister for Health and Children, the Special Needs Section of the Department of Education and Science, as well as the East Coast Area Health Board (now part of the HSE). So there was a lot of activity around this time, but yet little progress on any front from the parents' point of view.

The letter reads as follows:

"Dear Minister,

We have been consulted by [the parents] of the above named.

[S] has a diagnosis of autism, with special education needs. His parents have been attempting to obtain appropriate autistic specific education for [S]. They have been liaising with the Lucena Clinic in Bray, Co. Wicklow (the service which diagnosed S with autism) and were then, on diagnosis, referred to Beechpark Services, which is the body with responsibility for providing the relevant services in the child's health board region. The Lucena Clinic also referred this child's case to Mr Don Mahon, Schools Inspector with your Department. This occurred in November 2002. Once referred to these services, any services which were available to the child from the Lucena Clinic were withdrawn with the result that the child was left with no service.

To date the parents have heard nothing from the Beechpark Services and have received advices from Mr Mahon that the most suitable educational provision for this child would be a place at St. Joseph's Templaraine, Arklow. However, Mr Mahon advised that this child cannot access a place at this school 'until he is of school-going age'.

In the first instance, Mr Mahon has failed to set out what age meets this criteria and in the second instance, he appears to have failed to recognise your obligations, Minister, pursuant to the Education Act, 1998, and in particular your commitment to provide for early childhood services as set out in section 7 thereof.

You, as Minister for Education and Mr Mahon as local schools inspector are well aware of the absolute essential provision of early intervention for children with autism. The stance adopted by your Department in this case, appears to us, to be a bald abdication of your responsibility and commitment to this concept and indeed your constitutional and statutory duty.

It has therefore fallen to these parents to set up a Home Programme to provide appropriate education for their son. It has also fallen to these parents to recruit an educational psychologist who can assist them in their plight to obtain the correct type of programme for their son. That is in the face of what the parents have been advised, a suitable school placement being available to the child to meet his needs as an autistic child, but yet not being offered to the child due to the arbitrary issue of age. This is an appalling indictment on your Department, Minister and we are calling on you to have this matter investigated and a place made available at the school in question in September 2003.

We have advised our clients that you are failing in your statutory and constitutional duty to [S] and the purpose of this letter is to request that you comply with your legal obligations in default of which our clients will be left with no alternative but to apply to the courts.

We are also writing to the Special Education Section, Athlone, the Minister for Health and Children, and the East Coast Area Health Board.

It is not for our client to choose between these various parties and the question of liability.

Please let us have your proposals in writing, failing which proceedings will issue within 21 days."

This letter from Messrs, Ernest J. Cantillon & Co. dated the 13th June 2003 received no response from the Department of Education and Science before proceedings were issued on the 10th August 2004, over one year later.

But it can be seen from the letter that the concerns expressed therein surround the failure to access appropriate autistic specific education for S, and in that context it would appear that such a difficulty would be met at this point by S being enrolled at Templeraíne NS in September 2003, even though Mr Sreenan in his opening of the case stated that by June 2003 the parents were keen that S be educated through ABA, and this is not what was to be provided at Templeraíne, as explained by Mr O'Sullivan on the 12th June 2003. The parents in their evidence however stated that at this stage they were open-minded on the matter and the priority was to get an education provision in place for S starting in September 2003. In fact in their letter to Mr O'Sullivan in May 2003 they specifically state therein that they feel that S would "benefit immensely from the education programme on offer", and mother in her evidence has confirmed that this was their opinion at that time. We know of course as already set forth, that Mr Mahon was also of the view that Templeraíne should be encouraged to take him in September 2003. Nevertheless nothing happened in that regard.

After this letter was written, an appointment for the 12th August 2003 was received from Beechpark Services. The parents suggest that this occurred as a result of their solicitor's letter, but that is denied on the pleadings. What arose at and after that assessment, I will come to in due course, as well as the important occurrence in July and August 2003 when the parents encountered Ms. Rosalie Seymour, a Speech and Language Therapist. I will come back to those matters.

Proposal for St. Catherine's pre-school

But it is important to follow the chronology for the moment by dealing to some extent at least with Mr Harry Cullen's evidence, and other evidence, about what was happening at St. Catherine's during this summer as far as preparing a proposal for setting up an autism pre-school there is concerned.

What is noticeable up to this point, and it is important to mention it, and I will have to come back to it in some detail later on, is that there has been very little mention of Applied Behaviour Analysis up to this point. The parents have disavowed any particular familiarity with ABA as of this time. Father has said that he had simply heard of it, while mother has said that she would as a psychologist have come across more about it than her husband, but nevertheless did not know very much about it as an intervention for children with autism.

Harry Cullen, whose evidence is that he himself knows nothing about ABA itself and defers in all matters to do with ABA to those ABA personnel at St. Catherine's, has said that demand for a pre-school in St Catherine's for autistic children came from parents in the area. Those parents include the plaintiff's parents. Mother in this case works in a senior position in St. Catherine's on the management team. Mr Cullen has also said that it was always envisaged that the pre-school to be set up in St Catherine's would be an ABA school in the sense that has been referred to in this case – in other words an exclusively ABA school such as was set up in other centres around the country such as CABAS in Cork, or Saplings in Kildare, and surprise has been expressed on behalf of the plaintiff that the Department could at any stage have been in any doubt but that what was happening at St. Catherine's was exclusive ABA. The Department of Education and Science on the other hand refers to the fact that nowhere in the proposal for funding or other communication with the Department arising at the time of setting up the school was it mentioned or referred to by St. Catherine's that the model of pre-school education being set up was an exclusive ABA model.

It would appear from the manner in which the case was run by the Department that it is of the view that there was some sleight of hand on the part of St. Catherine's in the manner in which it went about approaching the Department for funding. There is definitely such an undertone in some of the exchanges during evidence. That view is also relevant to the question of how much the plaintiff's parents knew about ABA, or wanted an exclusively ABA model of educational intervention for S, at this point in time. The Department of Education and Science would certainly, judging from the manner in which the parents were cross-examined by Mr McDonagh, be of the view that the parents by June 2003 knew a lot more about ABA than they are saying, and that they had already by then decided that they did not wish S to go to Templeraíne NS, given what they knew of the education provision there, namely one which was known by them not to be an exclusively ABA model. These suspicions on the part of the Department seem, to them at least, to be confirmed by the fact that the only person to be interviewed for the job of Director of the new pre-school being set up, and who is given the job in question, is someone highly qualified in the provision of an exclusive ABA facility, and who espouses ABA as the exclusive methodology, and eschews all else as an appropriate education provision for autistic children.

Mother's involvement in the setting up of St. Catherine's ABA Pre-school

Mother has stated that Mr Cullen's letter dated 20th May 2003 to Mr Liam Hughes, a Principal Officer in the Special Education Section of the Department, was copied to her by Mr Cullen in her capacity as the Senior Clinical Psychologist at St. Catherine's. In that

capacity she is part of the management team there. He is the same Mr Hughes to whom Mr Don Mahon was writing around the same date stating that in his view S should be enrolled if possible at Templaraine NS for September 2003 as the parents had wished since there was a place available.

This letter to Mr Hughes from Mr Cullen expressed the concern that a gap existed in the services being provided at St. Catherine's in that it was not providing services for children diagnosed with autistic spectrum disorder prior to their enrolment in a special class or special classes in national schools. It refers to the preparation of a proposal to set up such a pre-school and to "a recent meeting to examine this proposal" which was attended by Mr Mahon of the Department. The letter goes on to state that the management authority at St. Catherine's proposes to establish "a dedicated class for six students of pre-school age who are diagnosed as being in the autistic spectrum range", and that this proposal would be pursued in the context of the Department's Task Force Report 2001 in relation to education provision for autistic children. The letter seeks sanction for the proposal.

Accompanying the proposal is a document giving details of a meeting held on the 30th April 2003, which is presumably the meeting already referred to, which Mr Mahon attended, and where the proposal was discussed. I will not set out everything which is contained in that document, but apart from setting out in great detail exactly what St. Catherine's does and what it wishes to do in relation to the identified need and gap in services provided, it states as follows:

"An effective programme for ASD will be based on the criteria contained in Recommendation 23 as contained in the report 'Review of Services for Persons with Autism Spectrum Disorder in the Eastern Region EHRA 2002 (copy attached). This programme will be inclusive of a variety of approaches and methods.

We propose that the full team will assess the total need in each case and decide as a team how best to respond to individual needs.

We propose that this team will then constantly monitor progress and will be willing to adapt any approach in the light of current research and effective practices.

We propose the significant involvement of parents and siblings as well as extended family in the assessment of need, the design of programmes and the execution of responses as well as evaluations of progress."

Estimates of overheads necessary for this programme were included under a number of different headings, such as buildings, heat and light, staffing, transport and insurance.

Mother was asked when she first considered that S should attend this planned-for pre-school at St. Catherine's, to which she responded:

"At some stage in 2003, in the autumn of 2003 there was a meeting of a local parents support group, which we attended. Harry Cullen attended that meeting also and outlined the proposals that St. Catherine's had, and obviously in the absence, as we thought, of any other pre-school option being available, we were very anxious that [S] would be enrolled to attend as soon as possible."

She went on shortly after this to say in answer to being asked how she felt at this time about sending S to St. Catherine's:

"Obviously very enthusiastic. It was a specialist pre-school provision and we were desperate to access that type of provision for S. So, yes, we were very enthusiastic and very hopeful on [S's] behalf."

By the 29th December 2003, Mr Cullen was writing to parents, including the plaintiff's parents, offering their child a place in this pre-school even though by then there was no funding in place, except that Mr Cullen was proposing with the knowledge and approval of the parents apparently, to use the funding of €90,000 which the HSE was providing for therapies to these children for the purpose of funding the educational provision. It was proposed that the school would open for business on the 16th February 2004.

It appears that before Christmas 2003 the necessary staff members were sought by advertisement, and recruited as necessary. In that regard, Mr Cullen indicated in his letter dated 29th December 2003 to these parents of the six children being offered places, that he had offered contracts of employment to three people, namely " (A) Director of Services/Head Tutor (autism pre-school), (B) Tutor, and (C) Special Needs Assistant (classroom assistant). He indicated that "all three persons have appropriate qualifications and experience in relevant areas."

If mother, as she was, was on the management team of St. Catherine's and as such involved in meetings where strategic decisions are taken, she must have been in my view, and it should be inferred from the evidence that she was, involved in the preparation of, or at least aware of the contents of, the proposal to the Minister for Education and Science in May 2003. Given that this was always intended to be an ABA pre-school, it is hard, I must say, to accept that mother knew as little at this time in May 2003 about ABA as she has said she did, whatever about father. From her own evidence in answer to Mr McDonagh on Day 42 (qq.54-55) we know that by 2004 she was also in her capacity as a clinical psychologist recommending ABA as an early intervention for children with autism whom she was assessing, although she stated also that she recommended a variety of different placements depending on the particular needs identified. Furthermore she did not seem to disagree with the suggestion made to her by Mr McDonagh at q. 57-58 on the same day that she had been making such ABA recommendations back as far as 2002. She went on to say in answer:

"..... Obviously in my capacity, yes, I would have had a lot more knowledge of ABA [than husband]. So, when I worked, for example, in Kildare, prior to coming to St. Catherine's I would have been aware of Saplings School – it was just up the road from us. So I would have been aware of ABA. I would have had some behavioural training as part of my degree and my Masters, but the focus in psychology tends to be in terms of the management of challenging behaviour. So it is the application of ABA to challenging behaviour, and that tends to be, I am open to discussion on this, but it tends to be how psychologists use behavioural science. That would have been my experience, and my knowledge, and when we were working with [S] at home, yes, we were doing an ABA home programme, but it was really looking at managing challenging behaviour...."

But in fact the home programme referred to by her in this answer is referred to in a letter from their solicitors to the Department in April 2004 as being an educational programme, the same being also referred to by father in one of his affidavits grounding the interlocutory application in November 2004, so again the Court must look with some caution at the suggestion that the knowledge of mother as to ABA was confined to its use in managing challenging behaviour.

On Day 3 when giving her direct evidence, mother agreed that around May/June 2003 when they were writing to the principal of Templeraíney, and to Mr Mahon in the Department of Education and Science, S had had no serious exposure to ABA, and that if a place had been offered for September 2003 in Templeraíney they would have taken it up, and that at that time they made no distinction between types of autism specific education for S., and that she was aware of ABA obviously as a method of teaching children with autism but had no direct experience of it. I am of the view, having considered all the evidence touching upon this matter that this is an understatement of her knowledge about ABA. It may be that Rosalie Seymour was the first professional to actually demonstrate success with ABA with S, but I do not believe that for mother at least, whatever about father, that moment was such a Pauline conversion to exclusive ABA as the way forward, as is being asserted.

At any rate, it is surprising that ABA as such is not mentioned whatsoever in the proposal which went to the Department in May 2003. The Court is left to wonder why there was such coyness about saying to the Department exactly what was being proposed, and to ask itself, only rhetorically of course, could it be that St. Catherine's and those involved there in this project knew that a view was developing in the Department, or had been formed maybe, that the funding of exclusively ABA centres, such as had occurred in the past (on a pilot basis only according to them), might no longer be sanctioned, and that in making its proposal for funding it was thought advisable to make no mention whatsoever of ABA? One must bear in mind mother's and father's evidence that at the meeting with the principal of Templeraíney NS on the 12th June 2003, the principal is said to have expressed the view that the only way these parents would get an ABA pre-school was through the Courts or words to that effect, and this was at a time when the parents have said that they would have been happy to send S to Templeraíney in the following September 2003 if he could have been enrolled for that year. Father went on to say that they at that point had actually told Mr O'Callaghan that they had consulted solicitors. Father in his evidence has also stated that at this meeting Mr O'Callaghan expressed the view that he was willing to provide "a full ABA programme" if he was to be given the necessary resources to do so, and that in his experience what drew resources from the State was legal action. He stated also that Mr O'Callaghan was, though not in so many words of course, suggesting that if the parents wanted a full ABA pre-school they would have to go down the legal route through solicitors and so on. None of this suggests that these parents were as unaware of ABA as they each say they were at this time.

There is also the existence of a letter from the parents to the Department which is dated 20th February 2003 and in which reference is made by them to the fact that mother is a qualified and registered clinical psychologist with training in the area of Applied Behavioural Analysis, and that she has designed a home programme for S which "currently involves Applied Behavioural Analysis ...". That letter goes on to refer to what is described as current research suggesting that "a minimum of 20 hours to a maximum of 40 hours per week of intensive teaching using Applied Behavioural Analysis is required to help [S] reach his educational potential..." Father has down-played the significance of this reference to ABA in the home programme at this time saying that it was "based largely on the Hanen More than Words programme", but that if his wife had "some familiarity with ABA from her professional capacity, that was incorporated too". Mr McDonagh also referred to a letter from the plaintiff's solicitors dated 13th June 2003 which stated that by the summer of the following year S would by then have been accessing an ABA programme for almost two years, which, in turn, must mean that S had been accessing such a programme since September 2002.

At any rate I am of the view that there is ample evidence from which to conclude that the parents had, well before they met Rosalie Seymour in July 2003, much more knowledge about ABA as a methodology than they have stated in their evidence. That is not to say that they did not gain much more knowledge about how to apply it in practice, but I am completely satisfied that as of certainly May 2003, the parents knew enough about it to be at that stage already of the view that an ABA model of education was what they wanted for S and set about attempting to get it. However, I have digressed somewhat.

It is strange also that a letter containing a proposal to set up a pre-school is sent in May 2003 to the Department, and a letter is sent to Mr Hughes of the Special Education Section of the Department on the 15th June 2003 telling the latter that it was proposed to set up a special class for autistic children, and yet, according to the evidence of mother, it was only following a meeting in December 2003 with some local parents and Mr Cullen that the pre-school was planned for February 2004. We know from Ms. Sinnott's evidence that mother was part of the team which interviewed her for the job of Manager of this pre-school in November/December 2003. Ms. Sinnott had sent in her Curriculum Vitae in September 2003, though mother has said that she did not see that C.V. at that time.

But mother was asked by Mr McDonagh during his cross-examination of her whether Ms. Sinnott had been involved at the time of this meeting or whether her involvement commenced only in February 2004 when the pre-school opened its doors. Mother replied that she thought Ms. Sinnott became involved prior to the school opening, and then went on to say that her recollection was that Mr Cullen had attended the meeting on his own, and that Ms. Sinnott was "certainly not involved at that time". I must say that this would have been an obvious opportunity for mother to have mentioned the fact that prior to Christmas she had herself been part of the team which interviewed Ms. Sinnott for the job, but that did not occur. Mother was also asked if it was always intended during the discussions with parents that the pre-school would be exclusively ABA, to which mother replied:

"Mr Cullen presented that it was going to be an ABA pre-school, and, in fact I know he had – well, I understand that he had liaison with other parents where ABA had been discussed as an appropriate methodology for the pre-school."

Mr McDonagh asked mother if in the autumn towards December 2003 there were meetings of parents in Wicklow in relation to setting up a pre-school (T.42, Qs.59-60). She had referred to such meetings in her earlier evidence on Day 4. She stated in reply that in Wicklow at that time there were two parent support groups for children with autism, which have since joined forces. She had been a member of one of those groups, which was less active than the other – that other being one which was apparently seeking to have an ABA school set up in Bray at the time. She believed that Harry Cullen was in touch with both groups and stated that she would have heard from her group that St. Catherine's were looking at developing pre-school services, and were looking for the names of children who might attend. She had a recollection of a meeting in Ashford which was attended by the early services manager of St. Catherine's and Mr Cullen.

Referring to the fact that in the proposal letter to Mr Hughes on the 20th May 2003 there is no mention of exclusive ABA as the proposed methodology, Mr McDonagh asked her when the proposal changed to being one for an exclusively ABA approach, to which she replied that she did not know. In my view these are other examples of where I feel that mother is for some reason distancing herself from any knowledge of what was being proposed for this pre-school. I find it impossible to accept that firstly as a senior clinical psychologist at St. Catherine's and part of a small management team of twelve persons involved in the strategic decision-making at the facility, and being the mother of a boy whom she wanted to attend such a school, that she would interest herself in the planning for this pre-school so little as to be unaware of when, if ever, there was a change in what was being proposed by way of teaching methodology. I just find that difficult to accept at face value, and again I am unsure why there should be such coyness about her knowledge in this regard.

It is notable that in all of this there is no mention whatsoever of ABA as the exclusive methodology or ethos for the pre-school being

set-up. Clearly the plaintiff's parents knew that this was going to be an exclusively ABA pre-school, and were glad about that. What was never stated by mother in her direct evidence was that she had in fact been on the interview panel which interviewed Ms. Bridget Sinnott for the post of Manager/Director. I will come to Mr Cullen's evidence in this regard but it is worth noting at this stage that the evidence has been that the post was advertised; that there was one person only who responded to the advertisement for this post, and that that person, Ms. Sinnott was, perhaps uniquely in the entire country with the possible exception perhaps of Ms. Olive Healy, perfectly qualified to head up an ABA pre-school such as that proposed, having gained the necessary qualifications recognised by those who espouse the exclusively ABA model to the exclusion of all others, as being appropriate for an ABA Consultant. These are qualifications awarded by what has become known during the course of this hearing as The Florida Board.

The Court has not been shown the text of whatever advertisement was promulgated by Mr Cullen in his search for a Director of Services for what he intended to be an ABA pre-school, so the Court has not been apprised of what job specification was announced. But it certainly seems to have been an extraordinary piece of good fortune that only one person applied for the job, and that she was so uniquely suited and qualified for the position of Director.

Mr Harry Cullen's evidence regarding the setting up of the pre-school

Mr Cullen stated that his first introduction to the idea of an ABA unit at St. Catherine's was in 1999/2000 when a group of parents of autistic children at that time attending St Joseph's National School at Newtownmountkenedy ("NTMK") (not to be confused with St. Joseph's NS at Templarney already referred to) who were, as he stated, campaigning at that time for the Board of Management of NTMK to adopt an ABA model of education there. These parents apparently enquired of Mr Cullen if, in the event of a sanction for an ABA centre at NTMK being unsuccessful, that St. Catherine's might become a vehicle for it. That of course would not be a pre-school but a National Primary School provision. These contacts with this group of parents ceased however, and nothing substantial was done by Mr Cullen on foot of them.

In relation to the idea of an ABA pre-school facility at St. Catherine's, he stated that members of his staff at St. Catherine's who were involved in the delivery of early services (i.e. for children from birth to age 2) were making submissions to him to the effect that once a child needed to be diagnosed as to autism, they had nothing to offer and had to refer such children on to Beechpark Services, and that where such a diagnosis was made St. Catherine's had nothing to offer. This was seen as a gap in what otherwise was a good service for children who had a learning disability. He also stated that in 2002 and definitely in 2003 it was being said to him by Beechpark that where a child had received a dual diagnosis of autism combined with a significant (as opposed to mild) diagnosis of intellectual disability, that it should be St. Catherine's rather than Beechpark Services which should be providing services to such children. He also stated that through parents of such children at this time he was becoming aware of ABA generally.

He recalled that around the year 2000 parents of children who had been diagnosed with autism were coming to him expecting that he could provide a pre-school facility, considering that they provided for the past twenty five years at least, as part of what they do, a pre-school facility for children with a diagnosis of intellectual disability simpliciter but who are not autistic. The parents at NTMK wanted an ABA facility and they could not get one at NTMK apparently. He stated in his direct evidence that the response of St. Catherine's to this request was two-fold. Firstly, he stated that senior management personnel discussed the gap identified in the services being provided, and that they prepared a submission which was submitted to the Department of Education and Science, and that a meeting was arranged at which Mr Don Mahon from the Department attended. This submission is that already referred to and which was sent to the Department by letter dated the 23rd May 2003. However, when cross-examined, Mr Cullen retracted some of that evidence and stated that the submission was not made as part of a response to the NTMK parents, but only as a response to the concerns being expressed by his own staff as to the gap identified in the services being provided by St. Catherine's.

Nevertheless it was put to him that by the time the submission was put to the Department in May 2003 he was familiar with ABA and knew enough about it to know that an ABA facility was what he was seeking sanction for. However, Mr Cullen stated that he simply knew that it was an available model, but would not be able to discuss ABA in any detailed way. He went on to say that it would have been sometime in 2002 that he would have become aware from his dealings with eight or nine parents that ABA was the model being focussed upon for a pre-school at St. Catherine's.

Mr McDonagh also asked if he could recall who among the management team went to visit Saplings School and one other in Dublin perhaps, but Mr Cullen could not recall that except to say that he thought that the speech and language therapist, Ms. Macken had been one of those persons because he could recall having a discussion with her about the outcome of the visits. The impression that he got was that those who visited these schools were impressed at the time with what they saw. Following further discussion with the management team he would have been under the impression that ABA was a model of provision that required further attention. The eight or nine parents who were expressing interest to him in an ABA model were doing so during 2002, but he was not prepared to go so far as to say that at that stage that was the only model that they were considering. He felt that those who visited Saplings and the other school would have to be asked that themselves.

A curious matter was explored during cross-examination, and it is that while this expression of interest in ABA was being made to him, and people were investigating ABA schools and so on, Mr Cullen did not at the end of 2002 see fit or think that it might be a good idea prior to submitting his proposal to the Department in May 2003 to approach the Department and discuss the idea of establishing an ABA pre-school. This was at a time when he did not have available to him Ms. Sinnott or other people with ABA knowledge and expertise to advise him. He stated that he sought advice from nobody about whether ABA was a good thing and whether it was something which he could provide at St. Catherine's. I am certainly left with the clear impression that it was the parents and not Mr Cullen who were providing the main impetus towards the establishing of an ABA pre-school at St. Catherine's. He was in my view just fronting the efforts being made with the Department and the evidence suggests to me that he was doing what the parents wished him to do in this regard, and that members of the management team at St. Catherine's were involved with the planning to a far greater extent than was Mr Cullen personally. I seriously doubt if Mr Cullen, though holding the position of Acting Chief Executive, has any real say in the decision making process in so far as it may relate to the ABA side of the services provided by St. Catherine's. He did his best in his evidence to avoid this impression, but in my view it must be the case. These parents with whom Mr Cullen was in touch from 2002 seem also to be at least some of the parents of the children who were eventually offered a place for the pre-school starting in February 2004.

When asked why the proposal sent to the Department in May 2003 makes no mention whatsoever of ABA as the model of provision intended, he stated that since St Catherine's did not have at its disposal any professional advice or information about ABA it could not have been in a position to have made a decision that ABA was the way forward. In my view there was a striking reluctance on the part of Mr Cullen to venture any description as to the method of education being provided in the pre-school under his command. I refer to passages in the Transcript for Day 10 at questions 230 et seq. At times one had to have a certain sympathy for Mr Cullen when being asked the meaning of certain passages contained in the letter dated 23rd May 2003 and the proposal going to the Department under his name. He displayed a remarkable inability to express any view on the meaning of much of what is contained in these documents, and one inference which it is tempting to make is that he did not wish any answer he might give to compromise any

answer to similar questions which other witnesses coming after him might wish to give.

At the end of his cross-examination I even enquired of Mr Cullen if there could have been a situation in which letters of the kind sent on the 23rd May 2003 and the submission might have been drafted and prepared by somebody other than him, and simply handed to him for signature. This in my view could have explained his inability to answer questions as to the meaning of much of what he had written. But he denied that this was ever the case.

Mr Cullen went on to state that after the submission was made to the Department he felt confident that they would get financial support for the pre-school. He was asked in his direct examination how he went about deciding that the pre-school would be based on ABA methods. He said that local parents had expressed views about it and had expectations about ABA, but he also stated that some of his managerial staff had visited two ABA centres and he thought that these were in Kildare and in Dublin. He mentioned "Saplings" in particular as being a school which had been visited, and that these visits took place before any decision was taken as to setting up an ABA model. He also stated that in the course of recruiting staff for the pre-school they had recruited Ms. Sinnott who had sent in a Curriculum Vitae which described her special expertise in ABA. Mr Cullen is of the view that at the time that the submission was sent to the Department in May 2003 no definite model was in their mind.

He recalled also that after the submission was sent in May 2003, he received no substantive response until some fourteen months later in August 2004. During the intervening period he continued to assume that they would get a positive response in view of what he considers to be the ongoing good relationship which St. Catherine's enjoys with the Department of Education and Science in relation to their other educational activities for children with intellectual disability.

Mr Cullen was asked in direct examination if, by the time he was writing to parents, including the plaintiff's parents on the 29th December 2003 offering their child a place in the pre-school scheduled to open in February 2004, St Catherine's had decided upon a particular model of intervention, and he stated in reply that they had not decided upon a particular model, because at that point they would not have had the necessary staff in place to identify exactly what would be required. He described how when they started it was what he called "a greenfield situation" and that they were reliant upon the expertise of the persons who had been engaged and the recommendations which had been made for the students attending, for the type of provision which was to be established.

I find this evidence of Mr Cullen impossible to accept given the fact that by the time he was writing this letter he had already offered contracts of employment to just the sort of staff required to run the ABA pre-school. In my view it is extraordinary that the parents would not have been made aware by Mr Cullen of the type of education placement being offered to their child, especially since he was clearly aware of how active these particular parents had been in their efforts to obtain an ABA provision. The only inference and conclusion I can draw is that he knew very well that there was no doubt in any of these parents' minds about the fact that what was to be provided in the pre-school to open in February 2004 was an exclusively ABA education such as they had all been seeking for their child. Certainly the plaintiff's mother, as part of the management team, cannot have had any doubt about this since she had actually interviewed Bridget Sinnott for the job, and since the latter had qualifications very specific to ABA alone.

I have had to jump ahead somewhat in the chronology of events in order to dwell upon some aspects of the events described. It must be remembered that as of May/June 2003, which is the point in the chronology which I have reached, the plaintiff's parents had not as yet received any appointment to attend at Beechpark in order to have an assessment and recommendation for S from those best positioned in the State to make such recommendations.

Before dealing with the involvement and recommendations of Beechpark Services, I will mention quite briefly the contact which the parents had with a Speech and language Therapist in Waterford, namely Ms. Rosalie Seymour. This is the person, whom the parents say and maintain, gave them a much more meaningful and detailed knowledge of ABA and exactly how it could benefit S. They point to their involvement with her as the moment in time at which they decided that ABA was the way forward as far as educating S is concerned, since, again according to their evidence, it was she who demonstrated to them how ABA could be used with S in order to manage not simply his behavioural issues at the time, but for a whole range of other areas of his life including his education.

In view of the apparently pivotal significance of Ms. Seymour in the formation in the minds of the parents that ABA was the only way forward for S, it is at least curious that she was not called as a witness for the plaintiff, although her report was provided at the commencement of the hearing to the defendants, and the Court was informed by plaintiff's counsel on Day 3 (Qs.229, 232, 234) that she would be called. I also interrupted a line of questioning about Ms. Seymour's report being put to mother in cross-examination, by saying to Mr McDonagh that if Ms. Seymour was being called it would be better to pursue the matters in question directly with her rather than with mother. I presume that it was on the basis that she would be called that much of the evidence of what she had done with S, and advised, was given by mother during her direct evidence. Over the course of a sixty nine day hearing any inconvenience which might have prevented her from being called could easily have been accommodated by the Court if such was required for the Court to have the benefit of her evidence.

Accordingly the Court in my view is entitled to have some regard to the fact that she was not called, and no explanation given as to why she was not, in assessing when in reality it was that the parents formed their view in 2003 that ABA was the only way forward for S. The pivotal role which Ms. Seymour is said to have played in the decision regarding ABA is not always borne out by the evidence of mother and father. For instance, mother in her evidence stated that Ms. Seymour demonstrated how effective ABA could be with S, that they then commenced a home programme with S. But it was in October 2003 after they started the ten week ABA course for parents organised by Beechpark Services that they got what she described as very specific advice about setting up a home programme and delivering it. That is understandable given that Ms. Seymour is a Speech and Language Therapist and not an expert in ABA. But mother stated also to Mr McDonagh in her cross-examination that at the time they saw Ms. Seymour they had been struggling to provide a home programme for S, and that with Ms. Seymour's intervention at that time they then commenced a home programme.

In this respect also, in fact, father stated in answer to Mr McDonagh during his cross-examination that it was not really Ms. Seymour who convinced them that ABA was "a sound educational method for [S]", but rather she suggested it as a way of preparing S for speech therapy, and that it was Dr Tierney and Dr Fleming during the ABA course for parents which started in October 2003 who convinced them that ABA was "a sound educational method for [S]" (T.37, Q. 284) He goes on in this answer to say that he had read somewhere that Ms. Seymour disagreed with this, and that comment may throw some light on why she was not called to give evidence on behalf of the plaintiff.

They first contacted Ms. Seymour in July 2003 in relation to obtaining some speech and language therapy for S in the absence of any such therapy being afforded to them by either the Lucena Clinic or Beechpark. They were offered by her what is called an Auditory Integration Programme. That was a course over ten days starting on the 12th July 2003 and it took place in Waterford. The details of that course do not matter for my purposes, except to say that mother was of the view that it went well, and she felt that S had

improved in terms of his engagement and interaction with his parents was concerned. But it appears that they discussed S generally with Ms. Seymour and she agreed to do some speech and language therapy with S in his home in Arklow, but when she arrived to do the first session, S would not sit down or concentrate on what she was saying. Ms. Seymour, according to mother, stated that if any therapy, including occupational therapy was to be done with S, it would have to be done within what she called "the structure of an ABA environment".

By using ABA techniques on S, Ms. Seymour was, again according to mother, able to gain success with S in about half an hour in relation to skills on which the parents had been working with S for months. She recalled that one of these skills was to get S to sit down, which was achieved by prompting S to sit in a chair and rewarding him with something he liked every time he did so. This was repeated about twenty times. Thereafter S sat down in a chair upon being requested to do so. According to mother this was a great step forward since at meal times this had been a large issue, and it also assisted the learning situation also. A number of other skills were achieved by this means with the assistance of Ms. Seymour. Mother described this as being the first occasion on which anybody had said to them as parents that there was something which was autism specific which would work with S. She also apparently pointed mother to some research in the area of ABA.

Following this meeting with Ms. Seymour, the parents apparently immediately started an ABA programme with S at home. By October 2003 they were doing about ten hours a week of ABA with S at home. Their confidence in the use of ABA for S increased very rapidly from this point onwards, and the course that was provided for them by Beechpark Services greatly increased their knowledge of ABA and it assisted them in the provision of an ABA programme at home.

I would be of the view having considered this evidence that while Ms. Seymour may well have been the first professional to actually demonstrate to the parents exactly how to go about doing ABA with S, and in that way show them the way forward, she cannot be regarded as the person who caused the parents to decide that exclusive ABA was the form of intervention for S, because these parents were already of that view well before they met Ms. Seymour. There is correspondence which confirms this, and as I have already stated I believe that mother by 2003 knew far more about ABA as an exclusive intervention than perhaps she has stated specifically in her evidence.

I appreciate that father in his evidence, in answer to Mr McDonagh, stated that it was not true to say, as was suggested to him, that before S started at St. Catherine's pre-school in February 2004 they as parents had decided already that the only educational provision for S was exclusive ABA, and that what the State was proposing for S in September 2004 was not appropriate. He stated also that after the ABA course run by Dr Tierney and Dr Fleming they had been convinced that ABA was the most suitable intervention for S, and that after S had commenced at the St. Catherine's pre-school in February 2004, they had further confirmation of this, but that the question of it having to be exclusive ABA did not arise at that time. But because ABA was clearly working at that time no other form of intervention was on their minds. He feels that it was not at that stage a matter of actually having decided that the suggested school placement at either Templeraíneay or Newtownmountkenedy was not appropriate as such, but rather that things were going well with S at St. Catherine's and that they therefore wished him to continue there for the year 2003/2004. When he was pressed as to the time at which they had definitely decided that the provision at Templeraíneay was not appropriate, he stated that they would have come to that view "certainly by the end of 2004" after they had spoken with the State's psychologist, Ms. Hughes and after they had seen what has been referred to as "Model A". That of course would be after these proceedings were commenced by way of plenary summons on the 10th August 2004, and as pointed out by Mr McDonagh, it is part of the case being made in those proceedings that the provision at Templeraíneay would not be an appropriate educational provision. Accordingly, it cannot really be the case that they had not decided against the Templeraíneay provision by the 10th August 2004. I cannot accept that. This further reinforces my conviction in the light of the evidence which I have heard and seen that the parents had at a much earlier stage and in my view probably by the summer of 2003, arrived at the view that an exclusive ABA provision was what they wanted for S. I would accept that this view was reinforced by what they experienced and learned of ABA from late 2003 onwards.

Beechpark Services – August 2003

Going back to the delay in getting an appointment with Beechpark Services, it appears that on the 3rd July 2003 the parents were given an appointment finally to be seen by Beechpark Services on the 12th August 2003. From the notes of a meeting of Beechpark personnel on the 2nd July 2003, it appears that their purpose in seeing S and his parents on the 12th August 2003 was to assess whether S was suitable for enrolment in an outreach school run by them at Ballyboden, Co. Dublin. It seems clear that the parents had a broader purpose in mind. They were desperate at this stage and had been ever since S had been diagnosed as autistic in the summer/autumn of the previous year to get advice on early intervention and to be able to talk to the people who had the expertise to assist them and S to address his deficits. These notes state that from the information which was available to them at that time S was not a suitable child for enrolment at that school since he did not meet their criteria. It was considered that his deficits were more severe than met these criteria.

But Beechpark wanted to obtain further information in this regard, and arranged for S and his parents to attend for assessment on the 12th August 2003 when they were able to observe S and carry out some tests. It is interesting to note that at the time of this meeting it was not possible to carry out a psychometric test on S as he would not cooperate. This would have tested his intellectual ability. This meeting took place before the parents had been shown by Ms. Seymour how to do ABA with S and which they found so helpful in implementing ABA in their home programme from August/September 2003. It will be recalled that one of the skills which Ms. Rosalie Seymour had scored a success with was training S to sit down when he was requested to do so. According to the report from Beechpark, and the evidence of mother a test called the Vineland Adaptive Behaviour Test (Expanded Form) was performed with S, in order to assess his adaptive behaviour and his daily living skills. He was observed by the Beechpark team, and the parents also provided information. His scores were low, and indicated that he was at a level generally of a normal child of half his age.

But following the assessment, Beechpark Services were of the view that S did in fact meet the criteria for the pre-school at Ballyboden. However the parents did not regard that provision as practical given the fact that it was so far away from where they lived (about two hours drive), and the fact that there was no guarantee that S could access one to one education which they believed was what is needed at that stage. One to one is what is required for the provision of an exclusive ABA educational provision, and the view adopted for the rejection of Ballyboden not just on the basis of distance, but on the basis that there was no "guarantee" of one to one teaching, is further evidence which I am prepared to take into account in reaching the conclusion that even before Rosalie Seymour had actually demonstrated to them how to implement ABA with S on the 23rd August 2003 they had it firmly in mind that an exclusive ABA provision was what they wanted for S. Again, possibly to repeat myself, I am of the view that while they may not have had any instruction or first hand knowledge in the implementation of ABA with S, they, and certainly mother, knew enough about it and had spoken to enough people about it, to form the view already that this was what they wanted.

In her direct evidence, mother in fact referred only to distance being the reason for rejecting the offer of Ballyboden. Mother was asked in direct examination how they felt about the type of provision available at Ballyboden. She stated that they discussed this with Beechpark and she understood that there was what has been referred to as an "eclectic approach" there and that there was not

one to one teaching available. She stated that despite these factors, if that provision had been available closer to where they lived, rather than in Rathfarnham in Dublin, they "would have jumped at it", as they were desperate to access something for S. She was sure that their main objection was the distance from their home, particularly as S apparently had very severe difficulty being in a car for a long period of time. She stated that if Templeraíne National School had been offered to them at that point in August 2003 rather than for 2004 they would have taken up such an offer for the same reason, namely that they were simply desperate to access something by way of early intervention despite the time which had passed.

It was made clear at the meeting with Beechpark, according to mother's evidence, that the provision at Ballyboden pre-school was the only provision which Beechpark was in a position to offer.

The parents felt that S had regressed from the time he had been similarly assessed by Lucena in the previous September, and are of the view that the delay between diagnosis by Lucena in being seen by Beechpark had contributed to this situation, since Lucena had recommended early intervention, and it is generally accepted that early intervention provides better outcomes for the autistic child than either no intervention or delayed intervention. There seems to be a consensus amongst clinicians and experts that early intervention produces positive outcomes. Certainly these parents are in no doubt that S regressed during this period of delay and that if he had been able to access assistance earlier S would have made improvements instead of regressing. Aside from the help which they themselves accessed privately from Ms. Seymour in August 2003 for speech therapy, they had up to this point received no assistance or advice on possible interventions from any State emanation or service.

I will deal with the detail of the Beechpark report when outlining the evidence of Dr Mitchell Fleming later, but suffice to say for the moment that the report from Beechpark dated 27th August 2003 recommended under the heading "General Learning" that S would benefit from "an intensive Early Intervention Programme". It states also that various options for the provision of early services were discussed with the parents, and it notes that at that point in time (i.e. August 2003) the parents' preference was for S to remain where he was namely in Pixies pre-school for the 2003/2004 school year, noting also that while that school was not then resourced for children with special needs, the parents were nonetheless willing that he should attend that school provided that resources were made available. In this regard the report recommended that S receive "a minimum of 15 hours special tuition (i.e. Home Tutor) a week".

By this time the most that the parents had been able to obtain by way of home tuition grant sanction from the Department was ten hours, and that remained the position until the following January, although they made the Department aware of this recommendation for a minimum of fifteen hours home tutor provision.

In relation to the provision of therapies for S while at Pixies, mother's evidence is that Beechpark Services made it clear that they did not have the resources to provide him with these therapies. In terms of early intervention therefore mother's view is that they were offered nothing by Beechpark Services, given the impossibility, as they saw it, of S attending at Ballyboden.

The other recommendation made by Beechpark Services under that heading in its report was that "a meeting should be held involving his parents, school staff and home tutor to draw up an individual early education plan for [S] for the coming school year".

Mother's evidence is that no such meeting was ever set up, and that nobody contacted her or her husband for that purpose.

The third paragraph under this heading states:

"[S]'s parents have expressed an interest in sending S to an outreach class. Arrangements have been made to put his name down for Templeraíne Outreach Class, Arklow for September 2004"

Mother stated in her evidence that at that stage (i.e. before they had seen the success of ABA which Rosalie Seymour demonstrated to the parents later in August 2003 at their home), they would have sent S to that school if a place was offered for September 2003 rather than 2004, since they were desperate to access any form of autism specific education provision for S. However, I believe in that respect that the parents may well have been simply keeping options open for S, by putting his name down for Templeraíne, and they are not to be criticised for that. But in the light of what I have said earlier about what their level of knowledge of ABA and desire for it for S even at that time, I do not accept that this expression of interest in that school is evidence that they had still a completely open mind on the matter, given the moves afoot at the time by St. Catherine's to have its proposal to set up a pre-school there accepted by the Department.

At any rate, mother stated in her direct evidence that she was told by Beechpark that because Templeraíne N.S was so far away from Beechpark (and the same can be said of Pixies pre-school) they would not be able to provide any therapy services as such for S there, although they would provide some funding for those services.

But to return to the report briefly. Under a number of other headings in the report (Social/Domestic Skills, Language Skills, and Fine Motor) various suggestions are made by Beechpark as to what should be done for S, and mother stated in her evidence that these were all matters which they did with S themselves at home, but that no therapists were provided such as would assist with the language development, or occupational therapist who might have assisted with the Fine Motor Skill development. Mother stated that in effect they did the best they could, but even though they were doing ten hours a week with him at home and had the assistance of his tutor, there was still nevertheless only a limited amount of time which they could give him on their own.

Following upon the assessment and report by Beechpark Services, the parents went on the Early Bird Programme for parents and they found this helpful. This appears to be a course over three months which aims to give to parents a better understanding of autism, as well as information relating thereto, so as to assist parents following diagnosis.

In addition in October 2003 the ABA course commenced, and it appears that father mostly attended this course over a ten week period, since there were difficulties for both parents to attend this and they decided that it would be best for father to attend, and given mother's psychology qualification it was agreed that she would be better able to learn about the course from father than he would be from her were she to be the one attending the course. This course according to mother provided some training for parents on how to use ABA at home. The course was given by Dr Tierney of Trinity College, and Dr Mitchell Fleming of Beechpark Services. They found this course very helpful since following the visit to their home by Ms. Seymour on the 23rd August 2003 they had commenced a home programme using ABA, and father stated that he found it very helpful because it provided a good deal of information on ABA and why and how it could be effective. It also had the added benefit of enabling him to hear other parents talking about their difficulties, and to have contact with teachers who were attending the course. But he never believed that it was a course which was qualifying him to run an ABA home programme as such. But those attending the course could ask questions related to their child and that was helpful. Father stated that while it helped them to refine what they were doing at home with S, it also pointed up

deficiencies in what they were doing. At this point in time they had employed a home tutor (Finola Keogh) who was a Montessori trained teacher. The parents were providing ten hours of home tuition, and the tutor in addition was attending at Pixies pre-school with S, but he was not receiving any therapies.

In November 2003, the parents consulted a Dr Albert Reid, a psychologist and he made certain recommendations for S after he had assessed him following one visit to their home. However, Dr Reid was not called as a witness even though his report was referred to from time to time, and was provided to the defendants. When asked by Mr McDonagh how they had come into contact with Dr Reid, mother stated that they would have spoken to other parents and asked if they could recommend someone with expertise in this area, and that he was one of those persons whose name was given and who she contacted and who was available at the time. She also stated that the reason they sought a report from him was that Beechpark had made no recommendation for any particular form of education model, and that they wanted to obtain an objective assessment and recommendation for an education model. Father stated that they may have got his name from some of the parents or possibly from someone in the office of their solicitors.

The existence of his report is however part of the factual background of this case, and the parents were allowed to state what effect it had on their views and decisions as to the appropriate interventions for S. Dr Reid had advised in his report that S required a minimum of thirty hours of intensive ABA, and he expressed the view also that what the parents had been doing with S up to that point by way of their ABA based home programme should continue. Mother has stated that she did not discuss the Templerainey provision with Dr Reid at that time and that he did not opine as to its appropriateness or otherwise, but that they as parents knew that what he was recommending was not available at Templerainey, and that they could form their own view at that time that it was not appropriate accordingly. At a much later stage while affidavits were being exchanged in relation to the interlocutory application in 2004, Dr Reid expressed the view that what was proposed at Templerainey was inappropriate.

It will be recalled that it was also in November 2003 that Ms. Sinnott was interviewed for the position of Director of Services for the proposed pre-school at St. Catherine's, which opened in February 2004, and that mother was one of those who conducted that interview, and that by letter dated 29th December 2003, the parents were advised that the pre-school was opening on the 16th February 2004 and that there was a place for S.

A letter of sanction issued from the Department by letter dated 15th February 2005, almost one year after the pre-school opened its doors. The details of exactly what the Department sanctioned will be left over for the moment, but suffice to say that what was sanctioned fell short of sanction for an ABA pre-school, and required that the pre-school come within the normal national school system and structures. By this time the plaintiff, S, had been attending the ABA pre-school for one year on a part-time basis due to lack of sanction for the necessary additional resources necessary for a full-time placement, and he is regarded by all as having made very good progress during that year in all areas.

Mr Cullen also gave evidence of their more recent efforts to get a sanction for an ABA school to cater for the educational needs of autistic children between the age of six and twelve. St Catherine's provides such education with sanction from the Department in respect of children with a general intellectual disability, but not for autistic children who may have also an intellectual disability. So far, according to Mr Cullen's evidence they have received no response from the Department as yet.

I intend now to set out the evidence given by other witnesses. Inevitably it is incomplete since there has been so much evidence. Some of that evidence I have not found necessary to dwell upon, particularly some of that given in relation to exactly how ABA is delivered and what is involved. The reason why I have not set that out in exhaustive detail is that, as has been stated many times during this case, this case is not about ABA. In other words, the Court is not required to make any finding as to whether exclusive ABA is or is not an appropriate educational provision. The question is whether an eclectic provision of education is an appropriate provision. It is not a competition between one method and the other in which there is but one winner. There is no reason why both methodologies cannot, if necessary, exist simultaneously side by side as appropriate provisions.

Mr. Alan Willis:

He is an educational and psychological consultant by profession, and has over many years been involved in various capacities in the education of children, both mainstream and in an autism specific unit. He has worked for some time in the mid-1990s in England as an educational psychologist. In that capacity he has assessed children in the 2 to 18 old year range. More recently he has been head of the autism unit at Mill Hill in London. In fact he was approached by the London Borough of Barnet to help set up that unit in 1996. That unit apparently ran as part of a school for children with moderate learning difficulties, and was a specialist autistic unit. He has taught in that unit as well as having a role as an educational psychologist there. Part of his remit has involved him in talking to parents of children with autism about matters such as behaviour management, and language development.

Since 1998 he has been in private practice as an independent educational psychologist specialising in autism and communication disorders.

Mr Willis stated that in the Mill Hill facility where he worked, the TEACCH approach to the education of children with autism was implemented. He had himself undergone a 5 day course in TEACCH as part of his training. Subsequently, in his private practice he has undergone "some ABA training", and says that he is "familiar" with that approach to education. When cross-examined by Mr McDonagh, he stated that his training, as such, in ABA consisted of being in California in 2002 for a week with a family whose children were undergoing intensive behavioural training, and he went with them and underwent training himself during that week. But he also stated that he had spent two days with Ms. Bryna Segal at the University of San Francisco where he was able to go through with her what he referred to as "assessment protocols and ABA structures" which were in place there. In addition he has attended various workshops and conferences run by organisations referred to as PEACH and CABAS and others involved in ABA. He says that he has accumulated a considerable amount of knowledge about ABA programmes as a result of these factors.

The main focus of his practice is on the special needs of children with autism. In cross-examination, Mr McDonagh pointed to the fact that TEACCH was part of what is proposed for S in the eclectic Model 'A', and Mr Willis confirmed that he had no difficulty was TEACCH as such, and that in the unit where he worked, PECS was also used, as well as other strategies and language programmes. Mr McDonagh suggested to him that what was provided in that unit was in fact an eclectic programme, but Mr Willis could not agree. He described TEACCH as a structured system in which the learning and teaching environment is adapted as best as possible to address the deficits of the child, and to give the child the best possible situation in which to develop skills and develop as an independent person. But he confirmed that he had recommended TEACCH rather than ABA for children with autism whom he has been asked to assess, though this was in the United Kingdom rather than in this country.

As part of his work he has also given expert evidence and has prepared expert reports for the Special Education Needs Tribunal, which hears appeals there in relation to the nature and level of provision for particular children. He has also given expert evidence in Court in cases similar to the present one. He is a member of a number of professional bodies, including the British Psychologist

Society.

In relation to children in Ireland, he has assessed many hundreds both in the context of litigation, as well as in the context of authorities addressing the needs of particular children. Mr McDonagh cross-examined him about how he might decide whether ABA or some other provision was appropriate for a particular child. Mr Willis stated that he would make an assessment of the child's needs, and would look at any assessments which had been made of that child already, and would then choose what interventions were appropriate and necessary, those being perhaps ABA or TEACCH or other interventions named as "Sunrise, Options, Daily Life Therapy etc." Mr McDonagh was anxious to ascertain for how many of the hundreds of Irish children Mr Willis has made recommendations for here, he had recommended a provision other than ABA. He was unable to say how many hundreds of children he had assessed, but he expected it was in excess of four hundred. But he was even less able to say how many such children he had recommended anything other than ABA. Mr McDonagh suggested that the figure must be so small that he cannot recall, but Mr Willis did not accept that.

During the course of his work he has become very familiar with what provision there is here in terms of specialist ABA provision for children. He is aware of facilities here such as the so-called CABAS schools in Cork, Drogheda and Dublin, as well as other specialist ABA centres such as Saplings in Kildare, Ábalta in Galway, the Cottage School in Wexford, as well as another in Kilkenny. There are other such facilities which he is also aware of here in other parts of the country. Mr Willis has visited many of these schools here for the purpose of assessing some of the children attending there. He told Mr McDonagh during cross-examination that he had never had occasion to recommend that a child be withdrawn from one of these ABA schools because ABA was not working. It was suggested to him also that he would have either assessed or reviewed the majority of the two hundred children who currently attend these ABA schools, and he agreed that this was possibly so, but resisted the suggestion that he was in some way part of what has been referred to in this case as 'the ABA community' here. He stated that he simply does the work that he is asked to do, and refuted the suggestion that it was a foregone conclusion that he would make the same recommendation as had been made by Dr Reid.

CABAS is an acronym for "Comprehensive Application of Behavioural Analysis to Schools", and the Court has been informed that it is a model of provision designed by a Professor Greer in the United States. Indeed CABAS appears to be a registered trade mark of which he may be the owner.

He has provided reports for children which have been submitted to National Education Psychology Service (NEPS) here, and he believes that his reports have been accepted. These reports have included in some cases a recommendation for an exclusively ABA model of educational provision, and that such children have received a placement in such a school.

Mr Willis was asked by the Department of Education and Science to prepare reports on six children with autism who might have been going to the Ábalta school in Galway.

Mr Willis described the intervention requirements of children on the autism spectrum. Those at the high functioning end of the spectrum were for the most part educated within a mainstream setting or in a specialist setting with access to mainstream, whereas those lower on the spectrum and who had some degree of learning difficulty would be taught through a range of different approaches or methods of which, he said, ABA was one possible method. He outlined a number of educational methodologies for children on the autism spectrum, and that these ranged from what he called "mainstream supported packages, through to specialist units using the TEACCH method, through to various other interventions, including sensory integration therapy and other types of intervention." (T5, Qs. 71-72)-

Some approaches had a stronger research base than others. What approach was appropriate depended on the needs of a particular child in his view, and it was not the case that one particular approach would be appropriate for all children [Day 5, Qs. 69, 70]

For the plaintiff, S, Mr Willis in his report has recommended an ABA approach, but he has recommended other approaches for other children, such as, inter alia, TEACCH, and sensory integration therapy. Mr McDonagh explored this in cross-examination, and Mr Willis stated that he had at times at the Special Educational Needs Tribunal in the United Kingdom argued against the provision of intensive ABA for a child where he felt that it was not the appropriate method of education. Mr McDonagh also noted that within a short time after the withdrawal of Dr Reid from the case, due to work commitments, Mr Willis was on board and in his report dated 25th January 2005 recommended precisely the same ABA provision that Dr Reid had recommended in his reports, and he asked if that was simply coincidence. Mr Willis in response was that this was his assessment and his judgment.

What is autism?

Mr Willis was asked to describe what autism is. He stated that it was a development disorder affecting in particular what is often described as a triad of disorders or impairments. That triad consists of language impairment, social interaction and communication, as well as imagination. He went on to say that children with autism were often quite rigid and inflexible thinkers. These features can manifest themselves in the child's behaviour, and in particular behaviour characteristics such as hand flapping, hand flicking, self injurious behaviour, biting, head banging and other behaviour which is aggressive against other people. There can be difficulty also in the area of eye-contact, taste, texture and sound. He made it clear however that not every child with autism will exhibit all these features, but rather that these are typical of a range of features to be found in children who are autistic.

What is ABA?

Mr Willis was asked to describe what an ABA education was (T5, Q.78). He stated that his understanding of it is that it involves direct one to one teaching using behavioural techniques. Each task required of a child is broken down into very small steps, and then each step is taught, with each success being rewarded in some way. When each step in the task has been learned, it follows that the ability to perform the task has been achieved. He stated that fundamental to the ABA approach is that the delivery of the child's programme is monitored and supervised so that a degree of quality control is established. This monitoring enables problems to be identified, and appropriate adjustments to be made to the programme and its delivery.

He gave evidence also of what his understanding of the training requirements are for the delivery of an ABA programme. His understanding included that ABA is provided by tutors who are trained in ABA but who themselves are under the supervision of a person who has been trained to a higher level of qualification or experience in ABA.

He is of the view also that ABA properly run and properly constructed and delivered is effective in delivering appropriate education to children with autism. He has seen such systems in place in schools he is aware of such as those CABAS schools already referred to.

Individual Education Plan

He gave evidence also about the Individual Education Plan (IEP). This is a document prepared for each individual child which highlights particular objectives for the child in the areas of need which have been identified in the child's assessment. In that way, any professional who is working with any particular child can see what the needs and objectives are, what interventions are necessary,

and how they are to be delivered. There would also be timeframes built into an IEP, and these would be reviewed from time to time, maybe every six months or a year.

His experience has shown him that the implementation of ABA in the schools which have been referred to is very effective for the majority of children in those schools.

Another feature of these ABA schools is that they operate in the main a forty eight week school year, and Mr Willis is of the view that this is an important feature since one of the difficulties encountered by children with autism is not simply that they have difficulty learning in the first place, but have difficulty retaining what is learnt. For this reason, the longer summer break taken in schools can slow down learning rates and even cause regression.

As to the length of the school day Mr Willis stated that a minimum of 30 hours per week of ABA education was desirable, and that this view was formed both from his own experience and from having worked with ABA professionals, and he thought that this was supported by research, whereas other schools had a school day from 9am to 3.20pm/3.30pm. He did however say that in stating these hours he was thinking of the UK model.

Early intervention

He believes that there is general acceptance among professionals in the area of autism that early intervention is of paramount importance, and that this can take place as soon as a diagnosis has been made. The importance of early intervention is that an autistic child has development deficits, placing him or her in a position significantly behind normally developing children of the same chronological age, and the research shows that the best results in reducing the level of deficit is where appropriate interventions have been undertaken at the earliest possible time after diagnosis. Mr Willis has stated that children are more receptive in neurological and physiological terms at a very young age, and early intervention gives a better chance of narrowing the gap between the autistic child and his/her normally developing peer, thereby equipping the child with sufficient functional skills to enable him/her to integrate into a school setting.

Towards the end of his direct evidence Mr Willis was asked to opine as to the extent of the harm to S by his not receiving early interventions at an earlier stage. Specifically, he expressed the view that an earlier intervention is likely to have meant that his behaviours would have been addressed earlier, and that his learning skills would have developed sooner, resulting in him reaching a greater level of development than at present. (T5,Qs. 364-365)

Parental involvement

Mr Willis stressed also the fundamental importance of parental involvement in the both the decision as to which educational methodology is adopted for their child but also in the actual delivery of that education. The reason for this is that when the child learns or is learning skills outside the home i.e. at school, it is important that this approach and process continues at home, so that there is consistency in terms of managing behaviour as well as in terms of helping the child with living skills as they are built up. It is important that the parents are aware of how the child is being taught to perform tasks, so that this process continues at home along the same lines. This assists the child in transferring these skills across different contexts and environments. He stated that children with autism frequently find change difficult to cope with. This involvement of the parents in what is happening outside the home means also that the parents are familiar with what is in the IEP in terms of objectives and strategies for intervention. This parental involvement policy is, according to Mr Willis, standard practice in relation to teaching children with disabilities, and it is not confined to ABA schools.

Multi-disciplinary support

It is usual for children on the autism spectrum to require assistance in a number of areas, such as physiotherapy, speech and language, and occupational therapies. This multi-disciplinary support is therefore essential to the child's needs, and for this reason the multi-disciplinary team and the education providers should be liaising with each other, so as to ensure that all needs are addressed.

Mr Willis' view is that where early intervention has occurred, where there is good parental involvement, and where there is the consistency and the multi-disciplinary support referred to, then best outcomes can be achieved both in terms of the school and home environments.

Behavioural problems

The evidence has been that some children, and it has been the case with S, find it very difficult to communicate their needs, and that this inability to communicate manifests itself in what is euphemistically called inappropriate behaviour. Such behaviour can, and did for S, include self injury in the form for example of head banging or hitting out at others, including his elder sister, as well as head-butting her. It goes without saying that such behaviour if not managed appropriately can have devastating effects on the home and school environment. Managing this so-called challenging behaviour can often be the main focus of early and other interventions with a child on the spectrum. It is often only after these behavioural issues are successfully addressed that the child can advance to learning. Mr Willis believes that the learning environment and the teaching environment need to be properly structured in order to alleviate such behaviour.

Mr Willis' Report – 25th January 2005

In relation to the time which passed between the diagnosis of autism, the assessment which identified his specific needs and the recommendations for intervention, and the actual time at which these were put in place for S, Mr Willis has stated that while there must inevitably be some delay while therapies and interventions are organised and put in place, the delay in the present case was excessive. It might, he felt, be reasonable to expect that a few months would pass before things could be put in place, but that the need for early intervention with an autistic child would have been something which those involved with S would and should have been aware of in 2002. It would have been important that once a plan had been decided upon that it be put in place as soon as possible. Before completing his Report, Mr Willis had been made aware of the various reports of other consultants for S, such as Deirdre Muldoon (speech and language), Catherine Milford (occupational therapy), and the assessments of Clare Mangan and Marie Louise Hughes (educational psychologists). In relation to the latter two, Mr Willis was aware that Ms. Mangan was recommending the Department of Education and Science's so-called 'Model A' education model, notwithstanding that she had not actually assessed S herself, and that Ms. Hughes was in agreement with that recommendation. He had been provided also with reports from Dr Reid, an educational and psychological consultant who had previously assessed S, but who, according to Counsel, was unavailable due to other professional commitments to give evidence on the plaintiff's behalf.

Model A

Mr Willis was familiar with Model A, as well as Model B and Model C. But in relation to Model A he stated that the model itself describes it as being appropriate for children who have a diagnosis of mild to moderate autism, with mild educational needs. He is of the view that S does not fall into the category of a child with a mild educational needs, or mild to moderate autism. He expressed his

agreement with Ms. Hughes' opinion in relation to S that he has moderate to severe autism with strong evidence of sensory seeking behaviours and tactile defensiveness. He agrees also with her view that S has delayed and deviant verbal and cognitive skills. But he feels that if the totality of the reports of Dr Mitchell Fleming, Dr Reid, and Ms. Hughes are looked at, it is clear that the child being described therein is one with educational needs which are greater than mild, even if in some respects, such as well-developed non-verbal skills he is in the low average/average range. He stated that he found it difficult to understand how Ms. Hughes could be of the view that Model A was an appropriate form of intervention for S. (T5, Q. 137)

In cross-examination about this aspect of his evidence, Mr McDonagh referred to the fact, as would be deposed to by Ms. Hughes in due course, that the banding system used in this country brings children who achieve scores of 50 to 69 on the Vineland Adaptive Scale within the category of children with mild educational needs. But Mr Willis stated that he would not base his opinion on just cognitive ability, and that he would look at the whole profile of the child, of which cognitive ability would be just one element. His view is that S has moderate to severe autism with moderate to severe learning difficulties, albeit with non-verbal ability in the low to low average range.

Mr Willis takes issue with Dr Fleming's categorization of S as "mild" after he had carried out the Vineland Adaptive Behaviour test where S had achieved a score of 58. Mr Willis states that if he was administering that test and the child achieved a score of 58 it would place the child in a category of much greater need than mild. He went into some detail about the various bands for the purpose of categorisation. When he administered that test his conclusion was that S had significant delays in the areas of communication, daily living skills, and socialisation, in comparison to his normally developing peers, while his motor skills on the other hand were relatively well developed.

Dr Fleming had an opportunity of commenting on this evidence on Day 61. In relation to Mr Willis's comments, Dr Fleming stated that he had spent over twenty years working in the area of intellectual disability, and is very familiar with the categorisations of intellectual disability; but that having seen Mr Willis's comments on his report he went and checked whether he had correctly used terminology in his report or not, according to the Vineland Manual. He referred to Table 6 on page 227 of the Manual and to the reference there to the classification of scores between 50-70 being 'mild deficit'. He accepts that Mr Willis may use a different classification system in the U.K. but believes that his own placing of S in the 'mild' level of learning disability is in accordance with the Vineland Manual.

Mr Willis also administered a test called the Gillian Autism Rating Scale the results of which he described as high, meaning that S was at the borderline of moderate to severe autism. His difficulties with communication and socialisation contributed to this score level. His autism quotient score under this test was 112, and this score was in Mr Willis' view consistent with the results achieved under the other testing methods used, and indicated a moderate/severe autism for S. S also achieved an IQ score of 68. Mr Willis stated that his view, based on S's entire profile, and not just on his adaptive behaviour score and his IQ score is that S had moderate rather than mild educational needs (T8, Q.15). I should add that when Dr Fleming was cross-examined in relation to this view on Day 61, he had great difficulty with the notion that in assessing an educational need for a child, one could in some way average out the degree of autism, the degree of intellectual disability, and the level of adaptive behaviour, and arrive at a view as the overall level of disability (T.61, Q.92). He feels that it is important to be precise about the level of intellectual functioning, and that this is done in accordance with an internationally recognised classification system, and that according to that system words like mild, moderate and severe have clear definition and meaning, and that terminology should not be confused by the sort of averaging taken from different areas of assessment (T.61, Q.92). Dr Fleming was aware also that in some parts of the U.K. a different classification system is used.

Albeit in a different context of whether S has a dual diagnosis of autism and moderate learning disability, Mr Willis described S's difficulties, in answer to Mr McEnroy as follows:

"...[S] has non-verbal cognitive skills that were assessed as being within the average range. What that would tell us is if you, as best you can, take language out of the equation, he is actually quite capable of learning. He does well on those tasks which are visual. What he really struggles with are tasks that are verbal, language based. That is probably one of the most significant impacts upon his ability to learn as does his behaviours (sic) " (T8, Q.313)

Mr McDonagh during cross-examination brought Mr Willis through the text of Model A itself in order to clarify what it is about Model A that Mr Willis regards as inappropriate for S. It emerged during this questioning that in the United Kingdom the degree of learning difficulty is not assessed only by reference to cognitive ability or IQ, and that it is based on an analysis of the child's needs, language skills, cognitive ability, adaptive behaviour and so forth, whereas Mr McDonagh stated that there would be evidence in due course that in this country there is a banding system used and that children with mild educational needs are those who come within the range of 50 - 69 of cognitive ability. Mr Willis said that this would be contrary to best practice as described by his professional body, the British Psychological Society.

Mr McDonagh suggested to him that Model A was simply a guideline and that it provides an education framework appropriate for children who have the sort of cognitive abilities which S was shown to have, especially given his nonverbal cognitive skills score of 87, being in the low/low average range, a Vineland Adaptive score of 57 and an IQ score of 68. Mr Willis disagrees that this is the profile of a child with mild learning difficulties.

Dr Mitchell Fleming's comments on S's level of general learning disability:

Later on in this case, Dr Fleming was cross-examined by Mr Holland in relation to these matters. That was because he is not of the same view as Mr Willis that S's general learning disability should be described as moderate to severe, even though he is happy to describe S's level of autism as moderate. Dr Fleming's view is that S's general learning ability profile falls "well within the group of children that we would customarily provide a service to" (T.61, Q.82). That would be in the category of mild general learning disability, although Beechpark will also accept children at the borderline between mild and moderate (T.61, Q.69).

Re: Ms. Hughes's report

He was asked by Mr McDonagh about matters referred to in the Report of Marie-Louise Hughes such as the fact that S needed a behavioural programme in order to deal directly with his challenging behaviour, a structured classroom environment and structured daily schedule, and an Individual Education Plan in addition to a differentiated national curriculum, including the recording of targets and achievements. He had no difficulty with matters such as this being recommended for S. He had reservations about a statement in Ms. Hughes's report where she states that "...the extended curriculum incorporating physical education, Drama, Art, Music and Movement is also important ensuring appropriate breadth of experiences for [S]. The range of intervention strategies to take account of [S]'s profile, age and preferences for learning. These should include, but not be limited to, behavioural, educational, communicative, play-based and sensory approaches". While he believed that the ABA programme which S was being provided with contained these elements, he had a difficulty with the idea that "a range of intervention strategies" would be recommended because

he considers that from a consistency point of view this can cause conflict.

'Floor-Time'

Mr McDonagh asked him about an activity which is part of S's activity in St. Catherine's, namely "Floor time". He suggested to Mr Willis that this was an intervention which was not delivered in an ABA way, in that it is a child-controlled activity, rather than being teacher-led, as suggested that this meant that what was provided in St. Catherine's was not in fact an exclusive ABA provision, but rather an eclectic programme (T8, Qs. 63 et seq.). However, Mr Willis does not see it that way, based on what he saw in St. Catherine's when observing S there. He is aware that floor time exists as an intervention in ABA schools, but cannot say, because he is not trained in Floor-time and is not an ABA expert as such, how it is delivered in an ABA way; but is aware also that within an ABA environment it is possible to deliver Speech and Language Therapy and Occupational Therapy, even though, like Floor-time, these are not ABA interventions as such. He stated that it would be up to the ABA consultant to be responsible for setting up and delivering the ABA programme. Mr McDonagh then referred to a portion of Ms. Hughes's report in which she included play activities such as Floor Time as part of her recommendation for S.

Ms. Muldoon, speech and language therapist, when she gave evidence did not agree that Floor Time was the opposite of ABA in that it is child led, but did agree that it was not ABA. She stated that it was sometimes simply a good "way in" to the child, and that when she was assessing S she had found it difficult to engage his attention, and that some Floor Time activity which she described had enabled her to engage with him. (T7, Q. 470)

Mr Willis did not have any particular difficulty with what she stated in her report about the need for monitoring, and the use of IT, provided it was used to meet a particular need in the child, but without being specific about it he said that there are some issues about IT with S (T8, Q82). However, he disagrees with what she recommends for a placement for S, and also has a problem about her recommendation for a Special Needs Assistant, because it would be important that such a person has the requisite training in relation to autism. In relation to her requirement that a trained teacher oversee the curriculum, Mr Willis does not regard it as a pre-requisite that a national teacher overseeing the delivery of the differentiated national curriculum, because it does not follow that such a teacher has autism-specific training (T.8, Qs. 90-99). Mr McDonagh pointed out that Ms. Hughes had specified a number of attributes and skills which would be required in such a teacher and these are autism-specific as set out in page 21 of her report, but Mr Willis was concerned that a trained teacher would not necessarily have the requisite skills without additional and specific autism training. He also emphasised that actual experience as opposed to knowledge was also required. Mr McDonagh suggested to him that what he would only be satisfied with is someone who would have "a somewhat one-track approach as to the benefits of ABA", but Mr Willis stated that he simply believed that for S an ABA approach has been proven to be effective for him.

Mr Dignam, when questioning Mr Willis by way of cross-examination at the conclusion of his evidence (T8, Q. 548) suggested to Mr Willis that his objections to the eclectic model of provision had more to do with the manner of its delivery than to its content. But he did not agree, and stated that he had problems with it on both of these grounds. He stated:

"I have problems with both of these in terms of how it is structured and the consistency. I have problems with the lack of any real research or validation of that model. I have a problem with potentially the use of bits and pieces of different methodologies without any clear definition of what that means and how that might be implemented and indeed what level of training a person might have in any or all of those approaches."

Lack of Early intervention

Mr Willis commented also on the educational provision which S was availing of at St. Catherine's, when he assessed S. in January 2005. He noted that he was at that time attending that school on a part-time basis only, for about three hours a day, and that there was no speech and language therapy in place for him. He stated that this provision was wholly inadequate for S's needs at that time. That was at a time where S was exhibiting significant behavioural difficulties including self-injurious and head-banging behaviours, and he was concerned at the frequency of these behaviours. He was informed that there were up to 100 such incidences per each half day.

He feels that S was under stress at this time and that what was in place for him was not structured to deal with his needs. He also stated that if appropriate early intervention had taken place, this could have been reduced, and this was backed up by the fact that when Ms. Sinnott began to put in place behaviour interventions at St. Catherine's, the incidence of challenging behaviours reduced very quickly to something like three or four incidents per half day. He referred to the fact that by this time, the diagnosis of autism was already over two years old, and yet there was still inadequate intervention was in place. He considers that this delay in providing appropriate education for S had adverse implications for the development of skills, his ability to use skills, and also his rate of learning and his behaviours.

Mr Willis was asked to express a view on the basis of a probability as to whether the level of deficit in S at this stage of his life would have been less if he had received appropriate educational intervention two years earlier i.e. three months after diagnosis. He answered as follows:

"Certainly what I can say from my experience of monitoring and measuring children's progress on ABA programmes, particularly in the schools in Ireland, is that many children can make quite radical changes to that kind of profile over time. Indeed some have made such progress that they are no longer in the school and are in mainstream. But others are at various paths along that developmental process." (T5, Q.167)

He went to say that the sort of radical progress that he referred to in that answer can be seen after a period like two years, and that given the progress S has been seen to make in the year or so following his commencement at St. Catherine's on a full-time basis, and what he called the predictors at the time, he would have expected S to have been able to make that sort of progress if he had started such a programme two years earlier.

Based on the needs which Mr Willis identified in S, he made certain recommendations in his report as to what S needed by way of educational provision. This was in the light of the level of S's deficits in communication skills, daily living skills, socialisation and so on, and stated that S's difficulties with language, as well as his autism and behavioural difficulties were his greatest barriers to learning (T5, Q.174). He had earlier stated that his non-verbal cognitive abilities were in the low/low average range – in other words the level of deficit was not so severe.

He recommended an intensive early educational programme on a full-time basis, based upon autism specific educational approaches, and in particular that he required teaching on a one to one full-time basis. In the light of his deficits and the time which had passed since diagnosis without appropriate interventions being put in place, Mr Willis was of the view that S needed an intensive structured

programme in order to start to close the gap, as he put it, and develop skills. He stated also that the need for one to one teaching was that he felt that S was unable to learn in a group situation at that stage, because he did not have the skills to imitate others and learn from other children and adults. He had not yet learned how to do these things.

He recommended an ABA programme as an appropriate education provision for S in view of the specific needs which needed to be addressed and he was of the view that such a programme properly delivered would address those needs. In addition, the provision had to be behaviourally based in view of the behavioural difficulties which S presented with. Those behaviours represented a barrier to learning for S, and therefore addressing that issue had to be a priority.

He was asked if it was his view that ABA was "the most appropriate model of intervention for [S], and he confirmed that it was in view of the particular profile of skills which had to be addressed. (T5, Q. 182)

He was asked also if there was any other model of intervention which would have been appropriate. He answered: "I felt at the time that ABA was the appropriate model for him. I wasn't aware of one that could provide that level of intensity and one to one structured teaching." (T5, Q. 183)

This was his view based on his assessment of his needs, and regardless of the fact that by this time S had already been receiving educational provision under ABA to some extent. In relation to this recommendation, Mr Willis stated that at the time he was speaking of, it had been necessary to target behavioural issues so that they could be reduced thereby enabling S to access the teaching of skills which he needed in order to learn. It will be recalled that between May 2004 and September 2004 challenging behaviour had become a large issue, and that in an effort to deal with this, S ceased his attendance at Pixies around November 2004, and had increased his attendance at St. Catherine's to fourteen hours, and that thereafter the incidents of challenging behaviour were reported to have greatly diminished. In addition, home tuition of ten hours was in place with Ms. Lawlor who had some ABA training.

Mr Willis recommended a minimum of 30 hours ABA per week for S., on the basis of research carried out by Glen Sallows in 1997. In his view that evidence showed that a minimum of thirty hours was "significantly effective" and that once that level was not reached, the intervention began to be less effective. This level of intensity also accords with his own experience of seeing various ABA programmes, both home-based and school-based, where this 30 hour input is seen as a minimum, but with some having up to forty hours of intervention per week. He has also spoken to many ABA consultants who have confirmed that level of input as being effective. He went on to say that in relation to other children in Ireland, he has recommended a thirty hour per week minimum provision, and that if S happened to reside in the catchment area of any of these ABA schools to which he has referred, S would fit into the range of child being accepted into those schools.

Mr Willis also made recommendations in relation to Occupational Therapy and Speech and Language Therapy. Because of S's speech and language deficits, Mr Willis included in his recommendations a communications programme called PECS or Picture Exchange Communication System. That programme, as well as others to address daily living skills, and social skills, would, according to Mr Willis all be delivered through the methodology of ABA, as would the Speech and language and Occupational Therapies.

In his report dated 25th January 2005 and in his evidence, Mr Willis has stated that given S's needs as identified by him at that time, S required an intensive teaching programme based upon autism-specific teaching approaches and structuring of the teaching environment, and that he required 1:1 direct teaching of skills at all times. He went on in his report, and it is borne out by his evidence also that S required at that time a "systematic and consistent management of his behaviours as a foundation to teaching". He concludes in that report: "...given this clear information from a range of assessments it is clear to me that an intensive early intervention programme using Applied Behavioural Analysis (ABA) would seem the obvious intervention strategy for [S]" and it is his opinion that such intervention should be on a full-time basis so that at least thirty hours of ABA is available.

Mr Willis stated that he had wished to visit both St. Joseph's Templaraine and St. Joseph's Newtownmountkennedy in order to assess the capacity of these schools to provide appropriately for S's needs as he sees them, but facilities for such inspections was denied. He was however able to visit St. Catherine's in Barnacoyne and he visited there in February 2005, and his report dated 24th February 2005 outlines what he saw and his views on that provision for S. He was able to observe S in that setting, and he was able to speak to Ms. Sinnott, the Director, and he had a discussion also with S's mother. This visit occurred at a time when S was accessing ABA at St. Catherine's for about fifteen hours per week, as well as having about ten hours home tuition, and one hour per week of occupational therapy. Mr Willis notes that at this time S was not in receipt of any Speech and Language Therapy.

Having observed S in this environment, Mr Willis reported that he was receiving an intensive early education programme on a part-time basis using ABA, that he receives 1:1 direct teaching, in addition to ten hours of ABA at home, and he recommended that the placement at St. Catherine's should become full-time. He was also impressed by the quality of the IEP in place for S. He regarded the activities of S as being appropriate for S's development and cognitive ability, and also noted that incidents of challenging behaviours had reduced, although he noted also that S continued to present with such behaviours which would require management over time, and he expressed the view that the effectiveness of the interventions in place was reduced by the fact that the provision was part-time only, and that S needed a full-time placement there. He concluded this report by stating that he did not believe that S was able "at this moment in time" to access a mainstream educational setting, and that he needed instead a fulltime placement at St. Catherine's. In his oral evidence Mr Willis explained this by stating that this view was based on the level and severity of his needs, and in particular his language needs and his behaviours. He felt that he would not cope with a mainstream school and the curriculum which would be on offer there, and that it would be too difficult an environment for him.

Mr Willis was in no doubt that the provision at St. Catherine's, enlarged to twenty three hours and twenty minutes, as it was soon after this report, was approaching an appropriate educational provision for S, given that he was recommending a minimum of thirty hours, although he noted that there was still no Speech and Language Therapy or Occupational Therapy being provided for S at St. Catherine's. He is of the view that Ms. Sinnott is an appropriately qualified ABA consultant to supervise an ABA programme, and he has met her previously in Stepping Stones School where she had been Director of Education also.

In answer to Mr McEnroy for the HSE, Mr Willis stated that on this visit he had not visited the wider campus of St. Catherine's, but had simply observed S in his class with his tutor. He had observed a morning session, but was unaware of who the tutor was on that day or what were his qualifications, but Ms. Sinnott had described him as being able to deliver the ABA programme.

Mr McDonagh cross-examined Mr Willis about what he felt the recommended thirty hours of intensive ABA should consist of for S, and in particular how many of those hours should consist of what is sometimes referred to as 'discrete trial training', i.e. taking a particular skill such as washing hands, and breaking that task down into a number of separate actions to be each learned before moving to the next action and so on until the task of washing hands is achieved. But Mr Willis made it clear that this would be a question only for those ABA personnel actually working with S, but he stated that there were "lots of different kinds of ABA" and that some "do not

particularly follow a discrete trial method, they use a different approach in terms of its delivery of ABA" (T5,Qs.533-534) He went on to say that the amount of discrete trial would vary from child to child depending on the elements of the ABA programme which have been set up for that child, and that for some the ABA provision might involve no discrete trial therapy at all. In relation to S specifically, he was not prepared to express a view as to how much of the thirty hour provision should consist of 'discrete trial', since he was not an ABA expert, and because the delivery of an ABA programme was a matter solely for such an expert or ABA consultant. He does not see it as part of his role to advise on how an ABA programme should be run.

Mr McDonagh also explored with Mr Willis what methods could be used to teach daily living skills such as washing hands, other than by discrete trial methods, since Mr Willis had stated that not all ABA consultants used discrete trial methodology. Mr Willis had some difficulty articulating any other method to which he was referring, but accepted when it was suggested by Mr McDonagh, that discrete trial methodology is at the core of ABA, although he stressed that it was not the only element of it, and stated also that the so-called Lovaas model involving discrete trials, was not the only model available and that CABAS had its own model, and that the Saplings school in Kildare has now developed its own particular use of ABA (T5,Qs.566). Mr McDonagh was anxious to find out, given the variety in the methods of delivery of ABA which Mr Willis was describing, what the ABA programme for S should consist of, given that he was recommending a minimum of thirty hours. Mr Willis stated again that it was not for him as an educational psychologist to tell an ABA Consultant how to deliver an ABA programme. When asked by Mr McDonagh what was so special about the ABA provision which he was recommending for S if it did not have discrete trial methodology as part of it, Mr Willis stated that it would provide structured 1:1 teaching in an appropriately structured environment, data collection, appropriate reinforcements and rewards to ensure that skills are learned, generalisation of those skills, teaching of skills directed to deficits such as language and socialisation, as well as academic and daily living skills. In addition it would provide structure and consistency, as well as a foundation for behaviour management.(T5, Q.572) Mr McDonagh suggested to him that each of these matters identified in his answer to the question are attributes covered under the Model A provision recommended for S by the Department, but Mr Willis did not accept that.

Felix McEnroy SC also cross-examined Mr Willis on behalf of the Health Services Executive. In relation to the engagement of Mr Willis on behalf of the plaintiff for the purpose of preparing a report for the interlocutory application, Mr McEnroy suggested to him that he would have read all the reports obtained by that time, and the affidavits of S's parents and that he would have been well aware that they wished to have an exclusively ABA education for S at St. Catherine's, and that in effect he was continuing on where Dr Reid had left off, as it were. Mr Willis did not accept that he was just carrying on in that way, and that he did his own assessment, even though he had available to him everything that had been done up to that point. At a later point in his cross-examination (T8, Qs. 395-41 and questions leading up to same) Mr Willis agreed that when making his assessment and recommendations he had not spoken to professionals who had dealt with S, such as Speech and Language Therapist, Occupational Therapist, but had relied on what those professionals had recommended in terms of input. For example, he recommended an intensive language programme twice per week on the basis only that Ms. Muldoon had made that recommendation. He has not spoken to Ms. Muldoon, and was not able to say what exactly he meant by the recommendation. For example, Mr McEnroy suggested that it might mean that S should have two sessions on a one to one basis with S, simpliciter, or was it meant to mean that the sessions should take place in an ABA context so that those administering the ABA programme would guide the therapist as to the way in which Speech and language therapy should be delivered. He replied that it was not for him to tell a Speech and Language therapist how to deliver their programme, and that where Ms. Muldoon had made a certain recommendation in that regard, it was proper that he should refer to that in his report.

Moving from that, Mr McEnroy suggested that while a number of schools adopt an ABA approach to education for children with autism, there is not just one single method of delivery and it can vary from school to school, even though at its core it is an ABA approach. As an example he suggested that in some schools the personnel involved did not want to include Speech and Language Therapy and Occupational Therapy as part of the programme. Mr Willis agreed that it varied from school to school, but it was his view also that where there was no Speech and Language Therapy or Occupational Therapy provided, it was sometimes because the school had not been able to obtain the services of such therapist, as opposed to not being willing to do so. He also agreed with Mr McEnroy that there were different models of ABA, such as the CABAS model already referred to, the Behavioural Intervention Association model from California, and the London Early Learning Programme ('LEAP'), as well as another called PEACH (Parents for the Early Intervention of Autism in Children). He agreed that it was possible for an expert in the area of ABA to prefer one model to another. He also accepted that it was important that the parents be involved in the decision, and that the child would not be looked at in isolation. Mr Willis views parental preference as very important, since it is more likely that the child will benefit if the parents are supportive. In re-examination on this question, Mr Sreenan referred Mr Willis to an extract from the Department's Task Force Report on Autism at p. 34 thereof which states that the partnership between parents and professionals is central to the success of all intervention", and with which Mr Willis agrees; and also to other passages in that report where the role of parents in all aspects of the child's welfare is emphasised. Mr Sreenan also referred him to passages in that report, including some quotations from the U.S. Surgeon General's Report which speaks of the efficacy of applied behavioural methods of intervention for children with autism.

In answer to Mr McEnroy, Mr Willis agreed that he had not visited nor seen the need to visit any HSE premises for the purposes of his report on S, such as Beechpark Services, and neither had he included any reference in his report to any services from the HSE which the parents of S had availed of, such as the Early Bird programme for parents, or the Hanen – More than Words programme, or a parent-training programme in Trinity College run by Beechpark Services but using Dr. Kevin Tierney. He had not been made aware of particular courses and programmes which the parents had attended, and he was unaware of what benefit, if any, the parents had derived from these courses.

Mr Willis also agreed that it was likely that over a period of time, S could, with appropriate interventions, make progress with his deficits to the point where he would be no longer categorized as being in the moderate to severe category of learning disability, and would move into a milder category, and that his current assessment was of necessity merely a snapshot frozen in time, as it were. Mr Willis felt that on an annual basis there should be a review which would be an annual reassessment of S in order to see what progress he was making. He felt that such a review annually would be good practice. In answer to a question from the Court (T8, between Qs. 489 and 490), as to whether it would remain appropriate to continue S in an exclusively ABA environment in the event that he had made progress and entered the 'mild learning disability category', Mr Willis replied that this was a difficult matter, but stated that it may be that other provisions would be appropriate, and that he may by then have acquired skills which would enable him to access a different provision. For example he may have acquired much better language skills where he could learn in a group situation, or even be able for a mainstream class. He stated that these were possibilities which would need discussion at the time. The Court went on to ask even more specifically whether in such a situation it might even be inappropriate to leave him in the intensive ABA environment. However, Mr Willis could not be definite about the answer to that. He stated that he had experience of children with a mild learning disability who were accessing effective exclusive ABA, and others who were in non-ABA situations.

Academic basis for ABA

Mr Willis gave evidence also in relation to the academic research basis for ABA as an intervention for children with autism. I will come back to that in due course when dealing to some extent with that research. But he emphasises that his recommendation of ABA for S is on the basis of S's individual needs as identified by him and others who have assessed him.

Changing from ABA to Model A

He also has expressed the view in his evidence that it would be detrimental to S if he were to be placed in a mainstream environment. He is concerned that if placed in such an environment there would be a return to challenging behaviour, since that is a response to being stressed. He is also of the view as stated by him in his evidence that changing S now from an ABA environment to another school placement where the level of intensity and exposure to ABA would be less would be detrimental to him, since change is difficult for any autistic child to cope with, and where S in the past has demonstrated that he finds change difficult. He described taking S off the ABA programme in place at St. Catherine's as being a "high risk strategy", and that the aim should be to reduce potential triggers for reversion to challenging behaviour. He is also concerned that moving S from St. Catherine's to another school is not something with which the parents are in agreement, and he regards parental involvement as very important for successful outcomes. He considers it important that what is being done in school is consistent with what is done at home, and that parents have confidence in the educational provision for S. He would not recommend a provision for S which would be imposed against the wishes of parents, and feels that S's parents are entitled to have their concerns about the proposed eclectic model of education at Templaraine for S taken seriously.

Mr Willis is of the view that if S's education were to continue to be provided through the ABA model, as currently, then the likelihood is that his skills will continue to develop, and that his behaviours will reduce to the point where he can learn effectively and functionally, and use also his functional skills. While Mr Willis has not seen S since his last report, he understands that S has made good progress from that time. I have already referred to some of his answers to questions relating to the progress S might be expected to make over the years and to how that might impact on a decision as to his educational provision, but Mr McEnroy explored also the question of the effect of change on S. in another way. He put it to Mr Willis that it would be common for a tutor with whom S was used to dealing in St. Catherine's to leave that school for any number of reasons, and how would that be dealt with, given Mr Willis's view that it would be undesirable to move S from St. Catherine's to the Model A environment at Templaraine. Mr Willis stated that it was his experience that tutors work with a child on a rotating basis so that the child works with a number of different people, and in that way they do not become reliant on just one person, and that this rotation of staff is seen as a way of minimising the effects of transition and change, and that the departure of staff is just as much a feature of an ABA school as it is for any other school.

Mr McEnroy suggested that the problems of change for any autistic child is something which would be planned for and would be part of what is done with the child in the school.. Mr Willis added that the child would be taught to generalise skills with different people and in different situations. He was unable to say how change is managed in St. Catherine's and suggested that Ms. Sinnott would have to give that information. Mr Dignam for the Department asked Mr Willis if he was aware of what was done in St. Catherine's to achieve the objective of social integration with non-autistic children or non-autistic communities for a child like S, and he stated that he was not aware of what particular programmes were in place for that, but he was anxious to state that this did not mean that there were none such in place. But he stated that an objective is that integration should take place when the child is ready (T.8, Qs.535-536).

Ms. Deirdre Muldoon – Speech and Language Therapist

She qualified as a national teacher in 1987, but within a year or so moved to the United States where she took a Master's Degree in Science and Education, which qualified her as a speech and language pathologist there, which is a qualification which includes what is more familiarly known here as a speech and language therapy. While in New York she obtained a scholarship with the New York State Department of Mental Health. This required her to work for an eighteen month period in a pre-school for children with developmental disorders, including autism. After she returned to this country in 1997 she began to work as a speech and language therapist - as it happens, in St. Catherine's. She moved some months later to a post in Stewart's Hospital, Celbridge, Co. Kildare. Her work included assessments, and by 1999 she had left that post and re-commenced working as a teacher in a special class for children with learning difficulties. She worked also as a private speech and language therapist, and in that capacity carried out an assessment of S in March 2004. In the autumn of 2003 she commenced an ABA course in Trinity College coordinated by a Ms. Rita Honan, clinical psychologist. She stated in her evidence that she was motivated to attend that course because her experience of working with children with autism at a school in Blackrock, Co. Dublin called "the Red Door" had convinced her that providing speech and language to children by withdrawing them from the classroom into a therapy room was not the best way, and that the best way was to integrate that therapy into the programme which such children were receiving on a daily basis. She stated that it became apparent to her that her time was not best spent in a 1:1 session with a child, and that thence her role changed to a more consultative role in which she observe a class tutor implementing certain goals which she had designed for them. She saw results from this method and states that parents of such children were pleased about progress and in fact sought speech and language therapy from her on a private basis also, but she found herself saying to such parents that this traditional one to one method of delivering such therapy was not in fact the best way to do it.

She did the one year ABA course at Trinity College and found it very beneficial, and in fact she has changed in many ways the way she does things as a result of the course. She described how she found ABA, as a science, something which could be used in many different situations in order to develop communication and language skills and change behaviour.

Her Report dated 15th March 2004

Assessment

She stated that on the occasion when S visited her with his mother for assessment, he was happy to enter her house, but displayed some unwillingness to be in the therapy room itself. She saw some challenging behaviours during the assessment, including a slap to her face from behind. This is behaviour which is not uncommon in children with autism. He took some time to settle into the assessment, but her skills assisted in developing eye contact and gaining his attention. She was able to do her assessment and reach her conclusions. At this stage S was aged three years and nine months (45 months), and Ms. Muldoon concluded that in terms of his receptive language skills he was at the level of 21 months. In the areas of memory and auditory response he was at the level of 18 months. His expressive language skills were at the 18 month level also.

Early intervention

She described also how he had poor muscle tone in the face, mouth and jaw areas and how for S this difficulty militated against him being able to form words and express himself as other children can. These oral motor difficulties can also impact adversely on the child's capacity to chew food properly, though she could not recall specifically if S had a chewing difficulty. But she opined that if S had received early speech and language interventions following his diagnosis of autism in December 2002, he would by the time of her assessment in March 2004 have had much greater functional communication than he in fact had, and that this would have given him a much improved quality of life. Later in her evidence she stated that early intervention was important because studies speak about what she called "the plasticity of the brain of children at a very early stage", and that this is what is taken advantage of in early intervention. (T7, Q.105)

She recommended in her report that S receive an intensive programme of speech and language therapy at least twice per week in order to address his speech and language delay, and the deficits identified by her in her report, such as vocabulary, ability to make requests ("mands"), the ability to receive commands, to mention but some of the deficits referred to.

ABA as best practice?

She stated in her report that "the principles of Applied Behaviour Analysis, ABA, are now acknowledged to be best practice for the education of children with autism". McDonagh explored the basis on which she makes this statement as to best practice, since she was not an expert in ABA. In her direct evidence she had explained that "applying the principles of behaviour analysis to education has been researched I think for 20 or 30 years and has been found in many cases to be the most effective way of teaching children with autism." (T7, Q.68) He put to her a number of extracts from journal articles which questioned or disagreed with her view, such as one by Rita Jordan et al. entitled 'Educational Interventions for Children with Autism'. Ms. Muldoon was unaware of this article.

Mr McDonagh asked her about aspects of ABA. First of all she confirmed that her report was written at a time before she had completed her one year ABA course in Trinity College. However, she emphasised that ABA was a science and that the first principle of ABA is what she called "reinforcement" (T7, Q.114). She gave as an example that if a child says the word 'open', and this is followed by the child being given something such as a crisp from the opened bag, it is more likely that the child will say the word 'open' on the next occasion on which he/she wants a crisp. The giving of the crisp is the 'reinforcer', and this means that if the child does not say the word 'open' he/ she will not get the crisp. She went on to say that this principle of reinforcement can be used in every single educational setting whether it is with children with autism or other children, and that it increases the probability that something desired will happen again. Mr McDonagh suggested that rather than this being a principle of any science, it was more like common sense. She naturally did not accept that, and went on to refer to the concept of punishment in ABA terms, as being a device aimed at eliminating or reducing unwanted behaviour. By way of example, she referred to S's inclination to slap, and that a functional analysis of S's slapping revealed that he did it in order to get attention. This behaviour was addressed by removing what made him do it, namely getting attention when he did it. It became part of his ABAS programme therefore that whenever he slapped he was to be ignored, and in this way the behaviour decreased because it was not rewarded when he did it. Another ABA principle which she described was that of 'extinction'. This is the method of getting rid of a previously learned behaviour. Again Mr McDonagh suggested that what she was describing by these principles was simply common sense, but Ms. Muldoon was firmly of the view that this was an oversimplification and that while it may be akin to common-sense it was nevertheless something which had to be actively pursued and practised in the classroom, and that data had to be kept as to how it was working in order to see its efficacy. She described reinforcement, punishment and extinction as being among the three most important principles of ABA. The collection of data and analysis of that data is also very important to ABA so that progress can be examined in order to see what is working with the child and what is not, and so that adjustments can be made to the programme where necessary.

Mr McDonagh also suggested to her that another core methodology of an ABA programme is the use of 'discrete trial methodology'. She did not agree with that, and stated that it was not the only way of implementing principles of behaviour, and referred to another method as 'precision teaching'.

What training in ABA is necessary?

She is not of the view that in order to implement ABA effectively it is necessary to have an accreditation from a particular body, such as the Florida Board. She is of the view that provided that some training has been undertaken, there is nothing about ABA that would preclude a national teacher or a Montessori teacher who has done a course in ABA, from implementing these ABA principles as successfully as a psychology graduate who does the same course, and that what differentiates such people from those delivering an intensive or exclusive ABA programme is the intensity with which the latter deliver ABA principles.

SALT through ABA

She stated that the best way for speech and language therapy to be delivered is as part of an overall programme for children with autism, and she sees the therapist as someone who would oversee what was being done by others with the child and could see if particular goals had been achieved before recommending moving on to other goals and objectives. She sees that therapist as being part of a team, and that she would liaise with others in the team such as the psychologist, occupational therapist, physiotherapist and so on. She also stated that she is of the view that it is best if the child is familiar with the person doing the therapy, since such children have difficulty dealing with change, and this fits with her idea that the therapist should oversee the therapy delivery by the class tutor, rather than actually do it. She has delivered speech and language therapy herself within an ABA model of intervention, but she has also designed a programme for delivery by a tutor, so that her involvement is to supervise progress. But one way or the other, best results are in her view achieved where the child is familiar with the person delivering it, and this would be somebody with whom the child is working on a daily basis.

When Mr McDonagh cross-examined her, she agreed that she as a qualified speech and language therapist is qualified to deliver that service herself without involving any psychology graduate. But it would be wrong to take from that answer that she resiled from her view, previously expressed, that speech and language therapy is best delivered in the classroom setting by the tutor with whom the child is familiar. In this regard she stated again by reference to S himself that a child with autism has a need for functional communication, and that it is questionable whether there is any point in her seeing S for an hour in private session, as it were, for one hour per week, unless everybody else involved in his education is doing the same thing, and that "... there isn't much point in being able to communicate functionally for one hour a week and then going out for the rest of that time and not being able to communicate with your mother and with your tutor or with your teacher or whatever" (T7, Q.171)

But she did confirm nonetheless that for example if she was in a school which was not one of those referred to as an ABA school such as the CABAS schools or Saplings, she would be able to provide "appropriate speech and language therapy.." (T7, Q.180-181)

But she believes that speech and language therapy can be delivered through the medium of ABA., and that she has seen children gain two months in one month through the use of ABA.

Early Language Intervention School

Currently she supervises children on ABA programmes in a language pre-school called Early Language Intervention. She described this as a play group and ABA setting for children with speech and language difficulties, including children with autism.

She has seen children make significant progress, even to the point where their diagnosis has been changed, and where children have come from having a speech deficit to the point where they have no deficit. The rate of progress would be related to where on the autism spectrum the child is placed.

But she stated also that what she provides in Early Language Intervention is not exclusively ABA, but there is an element of ABA which she added to her programme after she completed her course in ABA. In addition to that she provides speech and language

therapy as well as sensory integration therapy. She agreed with Mr McDonagh's suggestion that the ABA was a core element in her programmes, though not for all the children. In her centre there are seven children on an ABA programme, and she stated that each has an individual programme and that she uses a precision teaching programme, rather than discrete trial methodology. She stated that at the start she used discrete trial as a method since it was a method where it was very easy by the collecting of the data to determine whether the child has done the exercise correctly or not, but she feels that there are other ways of collecting of the data. She explained that her data collection methods collect the data in a way which indicates fluency, whereas data collection in discrete trial data collection demonstrates competence. This was explained more clearly by her stating by way of example that under her method the data collected would show not just the number of occasions on which the child did the task correctly, but the number of occasions in a given time that the child did the task correctly. This eliminated the possibility that even though the task was done a given number of times, it may have been achieved only with large intervals between each – in other words without fluency.

She also uses other interventions with some children such as a visual timetable which would be a feature of TEACCH, though Ms. Muldoon stated that it was exclusive to TEACCH, and in fact neither she nor her tutors have training as such in TEACCH.

She also uses PECS (Picture Exchange Communication System). She does not provide occupational therapy due to lack of funding for that. She also attempts to achieve integration with non-autistic peers. This is attempted through the use of an ABA integration piece. She has two children in her centre who have integrated well into a mainstream Montessori classroom for one and two days per week respectively. It appears that on those days a tutor from her centre goes to the Montessori school in order to assess how the child is faring. These are two children who were on an exclusive ABA programme at her centre and she was able to make a professional judgment that at a certain stage an attempt at integration was appropriate. It would appear that they were assessed as having a mild level of autism.

The tutors working in her centre have received some ABA from Ms. Muldoon herself, and she stated that she herself is supervised by an ABA consultant, who happens to be Ms. Bridget Sinnott who is the Director at St. Catherine's. She said that his supervision takes place twice per month for an hour or so each month, and commenced only a few months prior to her giving her evidence when she went back to study behaviour modification. This supervision was required of her by the Florida Board. Curiously, when Ms. Sinnott was asked whether she consulted for Ms. Muldoon, she expressed herself as being "shocked" at being told that Ms. Muldoon had stated that this consultancy was in place and that they regularly meet (T.15. Q. 319-320). She described in some detail the contact that there had been between them in relation to her providing a certain number of supervision hours so that Ms. Muldoon could sit the Florida Board exams in order to achieve Board certified analyst status, but that there was definitely no arrangement in place as far as supervising her pre-school is concerned.

She stated that she was not trying to replicate in her centre what was being done by Ms. Sinnott in St. Catherine's, because she feels that the programme which she has is successful, and she just needs some supervision for that programme. She feels that to change what she does would involve her in what she thinks would be needless paperwork in relation to data recording. Ms Sinnott has never suggested to her that what she is doing with the autistic children who attend her centre is inappropriate or detrimental to them. During his cross-examination of Ms. Sinnott on Days 15 and 16, Mr McDonagh spent quite some time on the question of whether Ms. Sinnott would regard the ABA provided by Ms. Muldoon at her school as appropriate given that she does not have in place what Ms. Sinnott would regard as adequate supervision, but I do not propose to deal with that in detail. Suffice to say that Ms. Sinnott stated eventually that she was not familiar with what Ms. Muldoon is implementing at her school, nor is she familiar with the children attending that school, but that if she is implementing an ABA programme without supervision from a behaviour analyst, this would be a cause for concern (T.16, Q.37)

Model A

Mr McDonagh went through the document describing Model A and the various elements within that framework of provision and suggested that it bore resemblance to the sort of provision which she had in her own centre. She agreed that they had elements in common, but that she would have to pick and choose from it. For example, she does not provide TEACCH, and because she is a speech and language therapist, there is speech and language therapy in her centre. She found it difficult to answer the question as to whether if Model A was applied to any child in her centre it would be to their detriment, because she has not seen the model implemented; but she was able to say that if she had at her school a child such as S with a diagnosis of moderate to severe autism, Model A would not be sufficiently specific to address the needs of S. Mr McDonagh referred her to the part of Model A which requires an Individual Education Plan to be drawn up for each child, and that in this way the specifics of the appropriate provision would be provided for the child, depending on the needs of the particular child. But Ms. Muldoon felt that because she has seen the model only on paper, and she could not say what benefits it would have until she saw it in operation.

Neither was she familiar enough with S's current needs since it was a couple of years since she had seen him. Neither did she have sufficient knowledge of what exactly was provided in the ABA programme at St. Catherine's to say whether or nor she thought that it was what S needs. She was able however to state that if S has moderate to severe autism he needs intensive ABA, and it would not matter where he got that form of provision as far as she is concerned. But she thinks that Model A is deficient as a model for S because, *inter alia*, it does not specify the precise number of hours of ABA which would be included, even though it describes ABA as being a "core element". She believes that between 20 and 40 hours of ABA per week is required. Mr McDonagh suggested however that such a level of ABA was not precluded by what was provided for in Model A, but Ms. Muldoon thought that it would need to be more specific.

Mr McEnroy for the HSE asked her about how she went about the preparation of her report in relation to speech and language therapy for S. It appears that she did not have any discussions with other speech and language therapists who had assessed S, such as Ms. Ni Dhúill or the Lucena Clinic. But she stated that she had a number of reports which she read subsequent to her own assessment of S, and these seem to have been given to her by S's mother at the assessment. These are not listed in her report. She had not been aware of what courses the parents had undertaken themselves, such as the Hanen and the Early Bird courses to which reference has been made. But she did not agree that she should have spoken to other therapists, and found out what courses the parents had attended before she gave her report. Mr McEnroy put it to her that had she done so, she might well have arrived at different conclusions, but she did not accept that.

She agreed that speech and language therapy could be delivered to S other than in St. Catherine's but that the important thing was that it be functional. It would be important that wherever the therapy is being delivered to S, whether it be in St. Catherine's or another location, that the therapist be involved in the design and monitoring of the therapy in order to ensure that the person who is involved with the child is delivering the therapy correctly, and that in formulating the programme the therapist should take into account the ABA model of education which the child is availing of, if that be the case. She herself has not made any recommendation that S should receive intensive ABA as such, but she remains of the view, having assessed S, that the best outcomes for him will be achieved through an intensive behavioural analysis intervention, and through the use of a speech and language therapist in that environment, rather than having speech and language therapy delivered separately outside the school environment. She does not feel

that it would be advantageous for S to be in a national school because in her view the goals set for him by the speech and language therapist "will not be implemented in the same intensive way in the way that S needs". (T9, Q.209)

Dr Kevin Tierney

He is a clinical psychologist, and his doctoral thesis was in Behaviour Analysis. He completed that in 1986. He has been what he called the "Convenor of Behaviour Analysis in Ireland". That is an organisation here responsible for the promotion of behaviour analysis here over the past twenty years. He is not the holder of any qualification awarded by what has been referred to as the Florida Board, but nevertheless regards his experience and expertise to be equivalent to somebody who has such qualifications. Indeed he stated that most people of his generation are not Board certified, but that he would have trained those who are, and those who trained those who are, so certified. Apart from having studied behaviour analysis, he has also experience of applying that knowledge through Applied Behaviour Analysis with children with mental health problems, including autism. He described ABA as "the dominant approach" which he has used, although in his early years this was called "behaviour modification". Apart from his work in Trinity College, he has a position also with Beechpark Services run by the Health Service Executive, where he works in the area of autism. That work involved him teaching courses to parents, as well as being involved in autism specific outreach classes provided by Beechpark Services in mainstream schools. He no longer does this as part of his work for Beechpark, and confines his work now to delivering courses.

His course in Trinity College for parents, teachers etc

He wished to give evidence in this case because he had heard that during the course of the case it had been suggested that the course which he runs in Trinity College in ABA is a qualification in ABA, and he states that it is not, and was never intended by him to be such a qualification. There is no examination at the end of the course. This is in the context of a case being made that those involved in the ABA element of the eclectic model available in Templemealy were qualified to deliver ABA as a result of having done his course in Trinity College.

Appropriate ABA personnel

His view is that for the proper running of an ABA programme, three different types of personnel need to be involved, namely a class tutor, as well as a supervisor, who should be qualified to the level of Associate Behaviour Analyst, and a consultant who should be a qualified to Ph.D. level, and should be certified by the Florida Board. He does not believe that a person who has a fairly basic level of knowledge of ABA can deliver an effective ABA programme. Mr McDonagh asked him whether this view was in the context of an exclusive ABA programme only, such as he was familiar with at the Saplings School in Kildare. He stated that it was, and that such a programme has been shown in the research literature to produce effective outcomes. He agreed that what was provided at Saplings was not identical to or a replication of the Lovaas programme on which the Lovaas study of 1987 was based.

Dr Tierney draws a distinction between what he termed the comprehensive application of ABA in the classroom where ABA is the overarching approach which informs everything which happens in the classroom, and the application of a particular ABA procedure in order to address a particular problem, such as challenging behaviour. He stated in fact that ABA in this sense can be effectively applied even to children without autism where a particular behaviour problem exists. He stated that he has seen teachers who have attended his course in Trinity College applying ABA in the latter sense and situations, but that this is not the same at all as delivering a comprehensive ABA approach within the classroom. He was unable to say that he had actually monitored any such teacher implementing aspects of ABA in the classroom, but could imagine that they might have attempted to do so under the supervision of a behaviour specialist. However, he would be astonished if they could take on the task of implementing a comprehensive programme within a classroom.

Is ABA the only appropriate education for children with autism?

Mr McDonagh was anxious to ask Dr Tierney whether he subscribes to the view that those children who are attending autism specific classrooms throughout the country in national schools are not receiving an appropriate education. He fairly stated that he had been to only about four of those classrooms, and he answered this question by stating that he felt that they could be provided with a better education. When Mr McDonagh pressed him as to whether he thought that they were not getting an appropriate education, he replied "Yes – in some instances". But in answer to whether that was the case with all such children, he stated: "No – to that specific question" (T41, Qs. 104 – 115). He stated that he would not be able to comment in relation to the children in such classes that he had not visited, and that it would be "misguided" or "incorrect" rather than "unprofessional" to comment in that respect without being aware of what was being provided in those classes. (T41, Q.118)

At a later point of cross-examination, Mr McDonagh asked Dr Tierney if some children might appropriately be given an exclusive ABA programme, and others might not. Dr Tierney stated in this regard that Beechpark Services caters for a wide variety of children, some of whom are on the more severe end of the autism spectrum, and others who are at the milder end, and that the latter would not need inputs such as discrete trial training, and that "clearly not all children require intensive applied behavioural analysis" (T.41, Q. 155). He stated that while parents would ultimately make the decision as to which form of intervention was right for their child, it was his hope that most of them would opt for ABA because he believes that it is the most effective form of treatment for them, and he sees it as his function to promote the approach which he sees as being the most appropriate for children with autism.

Towards integration

Dr Tierney believes that it is desirable that a child with autism should integrate with mainstream peers as soon as it was appropriate to do so. (T41, Qs. 149-152)

Ms. Catherine Milford

She is an Occupational Therapist and prepared a report for use in these proceedings. She assessed S in May 2004. Her role with a child such as S who has autism is to promote function in any way possible either through direct therapeutic intervention, or by adapting his environment, or by training others working with S such as parents and teachers. She explained that for children and adults alike we experience the environment through the senses and how we move within it, and that the senses of a child with autism may be challenged making that process more difficult, and that the role of what she termed "sensory integration" is to help the understanding of the information received by that child through the senses, and to use the body accordingly. Following her assessment of S she did sixteen sessions with him, as I have already referred to much earlier in this judgment. These took place between August and November 2004, and comprised one session of an hour per week. She had concluded from her assessment of S that he had what she termed "delayed reflex integration and low muscle tone". In relation to delayed reflex integration, she considered the delay in this area to be in the mild to moderate range, and "not significant" (T13, Q.23) In relation to muscle tone, she first of all explained that this was not to be confused with muscle strength. It was the tension in the muscle before it is used, or the tension which prepares it for use. She went on to say that a child with low muscle tone will tire more easily since more energy is required for everyday activities.

She found that his balance skills were those of a child of 30 to 36 months, whereas S was by then 46 months. He also had delay in oral motor control which is the control of the muscles of the lips, tongue, teeth, jaw etc. She stated that he had normally developing

visual perceptive and visual motor integration skills, as well as concept development, but that some of his personal management skills were delayed, and that he had poor eye contact and social interaction skills. These personal management skills included dressing himself, brushing his teeth, bathing and so on. Also he did not like having his hair washed or brushed. These delays and deficits were put by her also in the mild to moderate range. Her concerns were around the sensory processing issues which in turn would continue to impact on the level of his personal management skills, since these involve a lot of touching, as well as tastes. She considers his sensory integration deficits to be more significant, and he had, not unexpectedly for such a child, significant difficulty processing information. He also had deficits in both gross motor skills and fine motor skills, the latter being worse than the former and were in the moderate range and significant. He made poor eye contact, and had poor imitation skills.

Educational recommendation

In her report she made some recommendations. She was aware at the time of her report that S had a part-time placement in the ABA pre-school at St. Catherine's, and she recommended first of all that this be increased to a full-time placement. This was because in her opinion ABA was the best type of placement for him, and she felt also that he should be in a single educational environment rather than having his time divided between Pixies (non-ABA) in the mornings and St. Catherine's in the afternoons. This divided approach would in her view be confusing for a child such as S. She went on to recommend that "in a few years" he should be placed in a mainstream school and that he could have the services there of a special needs assistant. In her evidence she stated that she felt that ABA would suit S's "current needs" and that she felt that "he showed great potential for long-term growth". (T.13, Q. 39) She went on to say that she thought that his social skills would be better challenged in an environment where he would be mixing with children who had appropriate social skills, rather than only with children with on the autism spectrum, since that would not encourage appropriate skills development. But she stated also that he was not ready for exposure to mainstream at the time she assessed him. (T.13, Q.39)

Occupational Therapy recommendation

She recommended that S receive two sessions per week of one hour each within a school setting, and with liaison with parents and teachers, and furthermore that it should be part of a multi-disciplinary team approach. In addition, she recommended that his direct occupational therapy should be supported by a home programme and as sensory diet.

Benefits of earlier interventions

At the assessment of S, she was given a great deal of information by S's father as to his behaviours as well as life at home and at school, including tantrums, obsessive behaviours i.e. watching videos, challenging behaviours such as biting and slapping, some on-going toileting issues, as well as eating difficulties and others. She is of the view that deficits should be addressed as soon as they are identified, and that if they had been addressed for S by appropriate interventions at age two, he would have responded quite quickly, and that while she could not say that he would not respond at age four, the older he gets the harder it is to achieve response. The younger the child is the easier it is to effect changes. She feels that it would certainly have been advantageous for S to have received therapy soon after December 2002 when the Lucena Report was available, or indeed after August 2003 when the Beechpark Services assessment was completed. She was unable to say precisely in what way it would have benefited S, but she is in no doubt that the younger intervention starts the better the outcomes. At a later stage she stated that an earlier intervention with therapies would have given S "a better chance at narrowing the gap or being independent earlier" (T13, Q.132), and that the difference would probably have been "quite a significant difference".

From May 2004 she was able to provide one hour of Occupational Therapy for S. She does not think that this was an adequate amount but it was all S's parents could manage at that time both financially and from a time viewpoint given the distance which they needed to travel to her. She is of the view that if the sensory issues had been addressed earlier with appropriate therapies, then some of the behavioural issues which arose out of the difficulties resulting from the sensory issues would have been less.

Ms. Bridget Sinnott

Experience and Qualifications

Ms. Sinnott is the Manager of the ABA Department at St. Catherine's and has held that position since the 2nd February 2004, which happens to be just two weeks before S commenced attending that pre-school. She described her role as being to design and implement and to oversee the training of those who provide ABA at St. Catherine's.

Having left school after the Leaving Certificate, she attended a college in California where she obtained a degree in the Liberal Arts. There is no need to set out the arts subjects which she studied for that degree, but she stated that there was some psychology content on that course in as much as she studied Skinner and Freud through their original works, but she makes no claim to have any psychology qualification. In 1999/2000 she worked at the CABAS ABA school in Cork. She was tutoring children ranging in age between three and six. After her time at CABAS she returned to the United States where she attended the Teachers College at Columbia University in New York. There she achieved a Masters degree in Arts and Special Education in Behavioural Disorders in 2002. She described her Masters Degree as being one in Applied Behavioural Analysis, and gave detail of what her studies covered.

She also commenced a doctorate qualification at that university, but decided that she did not wish to spend five years in the United States, which her doctorate would have required. In September 2001 she was employed as a teacher at the Hawthorne Country Day School, and spent one year there teaching in a class of six children all of whom had some form of intellectual disability, and some had also some physical disability. But each of these children had some form of challenging behaviour associated with their disability. Some of the children suffered from autism. Her work interacted with therapists, and the methodology used with all the children at the school was exclusively ABA.

After her time at the Hawthorne School, she spent the following year at the Fred S. Keller School in New York which is an early intervention school for children ranging from birth to about six years of age, after which children could proceed to the pre-school there, where, again, ABA was the methodology used with all students. She described ABA as having worked extremely well there.

It appears that in the summer of 2001 some parents in Co. Kildare and Co. Meath were anxious to establish a school with an ABA programme for children. She was contacted and she was engaged as a consultant for an ABA programme, which was intended at the time to be an ABA Home Programme until a school was built. This school became known as the Stepping Stones School, and the methodology used there was exclusively ABA. It appears that at that stage there was ongoing contact with the Department of Education in relation to funding, and this funding was achieved in March 2003, including her own salary as the Director of Education there, and twenty four tutors for each of the twenty four children attending the school. She stated that she would have been the prime negotiator with the Department in relation to the funding proposal, although parents were also involved. She left Stepping Stones towards the end of September 2003. When cross-examined in this regard she stated that there had been issues between the staff, including herself, and the Board of Management there (T.16, Q.115). The details do not matter.

She had some consultancy role for a school in Limerick around this time also. In addition she applied for a position at a school in Roscommon as a behaviour specialist, and also for the job which she eventually got at St. Catherine's..

Since September 2004 she has, in addition to her role at St. Catherine's, lectured and supervised on the ABA course at Trinity College. This is the course which entitles a person who has done the course to sit the examinations leading to certification by what has been termed the Florida Board.

Her interview for the job at St. Catherine's

Around September 2003 she had, as I have just stated, submitted her Curriculum Vitae to St. Catherine's. She cannot recall the precise date in September 2003 on which she did this. Mr McDonagh asked her why she had submitted her C.V. to St. Catherine's and she stated that Wicklow was an area she was looking at because her partner's work at that time was bringing him to Wicklow, and St. Catherine's was the main service provider in that area. She stated that the first contact she ever had with St. Catherine's was when they wrote to her about an interview. It appears that when she sent out her C.V. to St. Catherine's she was unaware that they might have any job for her. She was unaware of any job vacancies there, and made no enquiries about that before sending in her C.V. She was even unaware that St. Catherine's provided services for autism, though she presumed that they may. She had sent her C.V. to other places also, such as the establishment in Roscommon already referred to, and to Beechpark Services.(T.16, Qs.134-149)

She was asked also whether she had responded to an advertisement by St. Catherine's, because Mr Cullen had given evidence that they had advertised the position. She stated that she could not recall if she had seen an advertisement (T.16, Q. 165) At Q.169 on the other hand she said that she had not seen it.

At any rate she went for interview not knowing exactly what position she was being interviewed for. Her evidence is that she had no information as to what job was available. She had simply sent in her C.V in the hope they may have some job which would suit her, and that potentially the job on offer might have been one for which her ABA qualifications had no relevance.(T.16, Qs. 188-190) She stated that it was only at the interview that she learned that they wanted to set up a pre-school for children with autism. She says that she had received a letter mentioning autism, but she cannot recall any mention of ABA in the letter. She said that the letter did mention that they wanted to set up an ABA pre-school, and that she had no idea before attending the interview that they had this in mind. She named those who interviewed her, and these included Harry Cullen and S's mother, Yvonne Duffin, who is a clinical psychologist at St. Catherine's. This is the first time that it emerged in this case that the plaintiff's mother had been part of the panel which interviewed Ms. Sinnott for this position. Neither Mr Cullen nor mother had mentioned this in their evidence. Neither was Ms. Sinnott aware before her cross-examination that she had in fact been the only person who was interviewed for this particular position at the time. She stated that they had her C.V. at the time of the interview, and that it would have made it clear that she was an ABA specialist. She said that they appeared interested in this, and they all talked a lot about this at the interview, which was a lengthy one. (T.16. Qs.197-203).

In due course she received a letter offering her the position of Manager of the ABA pre-school. She thinks that it was a couple of weeks after the interview that she received a phone call from Mr Cullen telling her that she was being offered the job, and that she received a letter from him as well. She could not be precise as to when she was offered the job, but it is clear from other evidence that Mr Cullen wrote to parents on the 29th December 2003 telling them that a contract of employment had been offered to her and two other persons for the pre-school which they wanted to set up.

It was clear to her and the two tutors who were engaged for the pre-school that it was an ABA pre-school which was intended to be set up. She presumes that by the time she started her employment it had been decided that it was to be an ABA pre-school (T.16, Q.256-257)

St. Catherine's ABA pre-school

She described the teaching staff involved with S at St. Catherine's pre-school and stated that S's teacher there has an ABA associate qualification, and two of his tutors are studying towards achieving that ABA associate level of qualification. It appears that one tutor would deal with S in the morning and another would do the afternoon sessions. There are six children altogether in S's class, and the tutors teach all the children on a one to one basis on a rotational basis. The children would also have some group activity during the day.

In the pre-school there are ABA tutors and ABA teachers. There are twelve or thirteen tutors and three teachers. One of these teachers has a Montessori qualification, and the other two have a degree in psychology and are each certified as behaviour analysts by the Florida Board. She would generally interact with those teaching S on a daily basis.

She stated that her arrival in St. Catherine's coincided with the establishment of the ABA pre-school there, but that she does not recall thinking about or deciding about what methodology or science should be in St. Catherine's (T.14, Q.109) Mr McDonagh cross-examined her about this given that ABA was the only qualification which she has and she applied for the job advertised by St. Catherine's. The evidence of Mr Harry Cullen which I have already referred to is relevant to this question also. Mr McDonagh asked her whether she had between March 2002 and September 2003 (the date she left Stepping Stones in Kildare) had any role in trying to set up an ABA class in a school. It appears that the parents of two children in Co. Clare for whom she was providing some consultancy for a home based programme, had approached the local national school to see if an ABA programme could be established in that school. Ms. Sinnott was apparently asked by the Board of Management of the school to attend a meeting and provide some guidance. The project never got off the ground for reasons that do not matter, but Mr McDonagh referred her to the text of a document which she had prepared for the project and to the similarity between what she was proposing for that school and what now actually exists at St. Catherine's. Ms. Sinnott was not surprised if the two were similar because that is what is required for such a class to be put in place, wherever it may be situated. (T.15, Qs. 289-291). But Mr McDonagh was interested in the fact that under this proposal for an ABA class it was being specified that Ms. Sinnott would provide part-time consultancy on the basis of two visits per month comprising eight hours of consultancy, in addition to some telephone consultancy three times per week, and asked if she had considered that this was an adequate level of consultancy for such a class. She replied at some length, but basically to the effect that while it was not ideal, it was better than nothing, given that the children concerned were into primary school age, yet had access only to a home programme up to that point (T.15, Q.299).

She confirmed that there are no qualified teachers at the St. Catherine's pre-school in the sense of being qualified national school teachers, and also that the school is not one recognised by the Department of Education as a national school. There is one teacher there who has a Montessori qualification. The class tutors are usually people who have gained a B.Sc. degree or a BA in psychology. In fact one of the tutors currently there has a degree in philosophy. She stated that when these tutors are engaged they are told that the methodology of the pre-school is ABA, and they give a verbal commitment that they will undertake training and study in ABA to enable them to implement ABA repertoires, as they are called. At that point they need to be trained since their degrees have not

trained them in ABA. It was put to her by Mr McDonagh that in addition to providing for children's needs there, there is also training provided for psychology graduates so that they can in due course receive a qualification in ABA from the Florida Board. Ms. Sinnott said that this was the case (T.15. Q.177) but that ongoing training was necessary – even for herself as she was required to re-sit examinations every three years.

What is ABA

She stated that ABA is a science in contrast to teaching which she described as an art form. She stated that it is a science in that it is inductive and gathers evidence and draws conclusions from the evidence. This evidence would relate to how students respond or in relation to behaviours, the environment in which the student is learning, and conclusions would be drawn as to the needs of the student, what the student can do and what needs to be put in place to improve on that. She stated that sometimes ABA is described not so much as a methodology, but more a set of 'repertoires'. These repertoires, as she calls them, enable the teacher to measure and record the child's responding in terms of the length of time of a behaviour, how often it occurs, its intensity, and the form it takes. The data collected is then put in graph form so that it can be analysed to determine patterns of responding. The ABA instructor would be skilled in this analysis process, and in all aspects of ABA terminology, and she stated that this terminology was important to the precision of the science. This enables empirical evidence to be built up as to the effectiveness of treatments put in place for each individual child. This enables data to be available also for other children in relation to interventions and tactics which have already been shown to work in a case. In this way a bank of knowledge is built up which can be accessed by others in the literature. It is constantly being added to. She stated that this level of data collection is not available in any approach to the teaching of children with autism.

It was suggested by Mr McDonagh during cross examination that the collection of data was not simply for the benefit of the child, but also for the training of the tutors since they are usually untrained in ABA when they commence. But she denied this completely (T.15, Q.152) It was put to her also that a purpose of record keeping in ABA is because different tutors interact with the child during any one day or week. She replied that rotation of tutors was necessary for generalisation, so that the child would not get too used to being taught by just one tutor (T 15. Q. 188), but that the primary purpose of record keeping was for the benefit of the child in order to monitor progress.

Ms. Sinnott stated that ABA was not something specifically to deal with autism but was used in many areas of life. She also confirmed to Mr McDonagh that the Florida Board certification was not an autism specific qualification, but rather a general certification in behavioural analysis. In fact, Ms. Sinnott was not aware of any autism specific behaviour analysis (T.15, Qs.173-175).

Effectiveness of ABA

Ms. Sinnott states that ABA has been shown to be phenomenally effective and adaptable (T.14. Q.108). She has stated also that there was empirical evidence that what she was doing at St. Catherine's was effective (T.17, Q. 16). Mr McDonagh asked her whether she was trying to replicate in St. Catherine's what Lovaas had done in California, and she said that she was not. He enquired as to the scientific basis, therefore, for her assertion that ABA is phenomenally effective and the empirical basis for it. In reply she referred to the hundreds and even thousands of studies around the principles and tactics of ABA which she uses in St. Catherine's. She stated also that ABA relies on the five basic tenets of science, and she also relies on the available data showing effectiveness in relation to the students actually at St. Catherine's ABA pre-school. Mr McDonagh referred to the fact that she had held this view as to the effectiveness of ABA as a science before she commenced at St. Catherine's and therefore the evidence gained from children there after her commencement was irrelevant to her view. In response she referred to all the volumes of the Journal of Applied Behavioural Analysis from 1968 to date, and she considers this to constitute a huge body of evidence as to effectiveness. She later agreed that this was a journal produced by those who operate in the field of ABA, and is aimed at those with an interest in ABA, and is not a more general scientific journal into methods of education for persons with behaviour issues (T.17, Qs. 50-53) It is a journal which examines particular strategies or tactics which have been used in ABA and their effectiveness, but does not attempt to compare the effectiveness of exclusive ABA methodology to something else such as an eclectic model of provision.

Mr McDonagh referred to his questioning of Mr Willis as to the basis for his assertion that ABA was the only effective method, and to the fact that Mr Willis had referred to the work of Prof. Lovaas, and to that of Rita Jordan, Glen Sallows, and Eikeseth. He referred also to the fact that he had put to Mr Willis the work of Victoria Shea in which a contrary view is offered. In this regard he asked Ms. Sinnott, since she was not claiming that what she does at St. Catherine's attempts to replicate of copy what these authors state, what was the empirical or scientific basis for effectiveness of what she does. In reply (T.17, Q.23) she gave a quite lengthy answer which seems to boil down to the fact that while she does not try to replicate Lovaas because of the fact that he used aversives for his study, but nevertheless the same principles of ABA would be applied for which there are many empirical studies available in the research literature. There was a good deal of question and answer around the subject of the scientific and empirical basis for her views as to effectiveness of ABA itself, and over other methods.

There was a lot of question and answer about this whole issue and I do not propose to detail all of it, but simply refer to it in the way I have. But I am satisfied that the particular model of ABA in place at St. Catherine's does not follow any other particular model as such, but I am satisfied that Ms Sinnott uses, as necessary with any particular child, tactics and strategies for which she believes there is scientific evidence as to effectiveness in ABA literature. But she went on later to say that much of her training in the United States and here had been based on the CABAS model, and while she did not want to say that what she was doing in St. Catherine's was "modelled" on CABAS, it was a large influence on what she was doing. That, I believe, is the best way of summarising her position in this regard (T.17.Qs.70 -90)

She is unable to point to any academic/scientific study which compares the effectiveness of the CABAS model against any other type of provision for the same or similar cohort of children.

Data collection

In her direct evidence she stated that any system of teaching and learning where measurement and data collection is absent would not be as effective, and that this measurement feature of ABA is particularly important for a child like S who exhibits significant challenging behaviours, and significant other deficits. She believes that ABA has had a huge input into the improvements shown by S since he started attending at St. Catherine's, and that his incidents of challenging behaviours have greatly reduced as a result (T.14, Q.129-131).

At a later point in her evidence she gave evidence in relation to document which she prepared in order to show the rate of progress made across a range of areas since February 2004. At that time it appears that a behavioural inventory was done in order to establish a baseline from which to track progress. That progress can be tracked by reference to the data collection, graphs and so forth which is part of the ABA. The document sets out his rate of progress and I do not propose to set it out in detail from her evidence. She stated that she is very happy with his progress to date and that this progress has been steady (T.14, Q.278) She also thinks that he is a much happier boy now than when he started at St. Catherine's, and is more in control of his environment, since he now has some

communication skills and can access things for himself more. He can also play more as he has acquired some socialisation skills. But she believes that he still has a long way to go (T.14. Q. 282)

At the conclusion of her evidence on Day 22, I asked her by reference to the terms "poor, good, very good, or excellent" how she would rate S's progress since he attended at St. Catherine's. She said that she would rate his progress as "very good" (Day 22. Q.330)

Mr McDonagh cross-examined her as to her views on ABA being the only appropriate provision for a child with autism. He attempted at some length to get her to answer whether she could conceive of a situation in which a boy like S who might be attending a school where a range of different interventions was provided (i.e. an eclectic provision) might do better than he would if he was attending St. Catherine's. After much skirmishing she was able to say that it was a possibility, but provided that all the repertoires which she had said were necessary for S's needs were in place there. But when Mr McDonagh then asked the same question again but requiring that the record keeping and data collection are left out of what is in place, she answered that it was not possible that he could do better than at St. Catherine's (T.16, Q.61 - 62). This is because for her the data collection or the "technology piece" as she refers to it, is an essential ingredient for success, and any provision which does not have in place this technology piece and what she referred to as the "efficiency piece", is flawed (T.16, Q.89) I asked for some clarification from her as to whether "flawed" meant that it was of no benefit whatsoever or whether she meant that it simply was not as good as a provision which contained these pieces. She said that it could not be the best model (T.16. Q.96). In answer to Mr McDonagh moments later she agreed that for her it is "a mandatory requirement ... for an appropriate education for a child in [S's] position"(T.16, Q.99) I should say at this stage that she gave further evidence of her concerns around this question when talking specifically in relation to the provisions contained within the Model A recommendation for S, and I deal with that under a later sub-heading "Model A".

Mr McEnroy questioned her about record keeping in relation to delivery of therapies to S in the classroom (T.22, Qs. 134 et seq.). She explained that notes and records of these activities were not recorded in the same way as other learning activities, because they are not learning goals, but simply consist of activities unrelated to any short or long-term objective for which measurement would be required to assess effectiveness. On the other hand, some therapeutic inputs such as joint squeezes are recorded, and these notes would be passed to the parents, so that if he did not get as many of such inputs during the school day, this could be made up at home by the parents (T.22, Q.142).

Early intervention

She believes that education and treatment of a child with autism should commence as soon as the child has received a diagnosis, even where that diagnosis has been made at aged two or three years of age, and that the benefits of that early intervention are exponential. In relation to S in particular she feels that early intervention would have had huge benefits for him. Her experience in the United States was that there was a huge difference between children who had received early intervention before they entered the pre-school, and those who came to the pre-school straight from home. She stated that when S started in St. Catherine's he had a high rate of intense and self injurious behaviours, as well as poor communication and listener skills. In addition he had few play skills. She believes that these difficulties were embedded due to the fact that he had not received early intervention following his diagnosis, and that this would not have occurred if he had accessed interventions at an earlier stage, even though by the time he arrived at St. Catherine's he was till only about three and a half years of age.

At the time S started he was attending for afternoons only from 12.30pm and 3.30pm. and did not access full-time interventions until June 2005.

Therapies provided for S

She stated that S accessed therapies at St. Catherine's only to a limited extent. She said that when he started he was in need of occupational therapy and that he was immediately referred to the occupational therapy department because of his sensory and occupational therapy needs. There are apparently two occupational therapists available at St. Catherine's but that there is only a speech and language therapist who visits on a Monday, and that therefore any one child would be able to access speech and language therapy to a limited extent (T. 14, Q. 123)

Mr McEnroy asked her about what services were available at St. Catherine's at the time she sent her CV to St. Catherine's in September 2003. She stated that as far as she knew there were no autism services beyond a diagnostic service, and that once a child was diagnosed with autism or another disability, the child had to be referred elsewhere for services. She went on to accept that there were autism respite services available there. (T.21. Q.265; 271-273) She stated that at the present time there are services available in Speech and language, Occupational Therapy, Nursing and Physiotherapy. She is aware also that the HSE provides funding for these therapies on a per capita basis which she believes is €15,000 per child, making a total of €90,000 per annum. Mr McEnroy was anxious to find out what therapies S had received from his funding of €15,000 per annum. She was not able to be sure about this, since the organising of therapies does not come within her remit as the manager of the ABA Department (T.21. Q.299-309). It appears that she has little contact with therapists. For example she was able to say that since May 2005 she had no contact with the occupational therapist or physiotherapist, but she had had some contact with the speech and language therapists but not more than on five occasions (T.21. Qs. 310-315). She does not have notes of those meetings.

It appears that around May 2005 her role at St. Catherine's changed somewhat when she became manager of the ABA Department, and that between her commencement there in February 2004 and May 2005 she would have had greater contact with therapists. When S commenced there were recommendations made in relation to, say, physiotherapy requirements for S, and notes would have been made about that and which were put on his file. She cannot recall what the physiotherapy recommendations for S were at the time, but thinks that they were concerned with motor activities (T.21. Q.326) But she says that these recommendations were discussed with the parents and some were to be done at home and other at the pre-school.

She recalled also that a physiotherapy assessment had been carried out around March/April 2005 by the manager of the St. Catherine's Physiotherapy Department, at which Ms. Sinnott provided what was necessary in terms of equipment. This assessment took place over a two day period, but Ms. Sinnott was not present for all of the time involved. This assessment resulted in very specific recommendations in relation to his needs. Mr McEnroy was anxious to know what was done for S on foot of this assessment and recommendations. She described a number of physiotherapy related matter put in place on foot of these recommendations such as a sand-pit, and a gym ball so that his identified needs could be addressed. Without setting out in detail everything which Ms. Sinnott stated had been given to S by way of therapies, it is clear from her evidence that much if not all of what was recommended was done for S.

She stated also that an occupational assessment was carried out in the March/April 2005 period by the Manager of the Occupational Department at St. Catherine's. This took place over a two day period. S's mother was present for this, as was one of S's tutors. Ms. Sinnott also had an involvement in setting up the room with appropriate equipment for the assessment, but she was not present for

all of the time. She believes that they implemented the recommendations (T.21. Q.356). She is also aware that he was accessing occupational therapies outside St. Catherine's privately, and she gave some detail in this regard. It would appear that one of those therapists came to St. Catherine's in order to show how a particular therapy should be delivered in the required way ("the brushing piece") , as well as a procedure called "joint compression" (T.21. Q.381). She has described in her evidence many of the occupational therapy interventions which were put in place for S. There was reference to a dietary recommendation which was not put in place, and Ms. Sinnott believes that this may have resulted from a follow-up conversation with S's parents (T.21, Q. 410) She later stated that up to May 2005 S had not received any occupational input from St. Catherine's Occupational Department and that she had referred S there in the autumn of 2004 apparently (T.21. Qs. 440-445)

She attends meetings in her capacity as manager of the ABA Department at which therapists are present, and she takes account of these in the manner in which ABA is delivered to S, and facilitates the therapeutic input, but she has no input into the design of therapies provided. She believes that the recommended inputs have been done (T.21. Qs.421-423). But she does not think that S receives any input from the physiotherapy department, although other children do, but thought that maybe those needs were merged to some extent with what was provided by way of occupational therapy inputs (T.21, Qs. 434-435)

In relation to speech and language, she stated that S access speech and language therapies privately, and that this therapist came to visit the pre-school in February 2006 quite recently before Ms. Sinnott was giving this evidence . There are recommendations also from the speech and language therapist who attends at St. Catherine's on a regular basis, and any of those recommendations are part of the ABA programmes in place for S at any particular time.

Ms. Sinnott agreed that much of what the therapists do at St. Catherine's is to liaise with the ABA tutor and explain how to deliver aspects of programmes to the child, and she stated that direct therapy is limited by resources. The therapies are often delivered by the tutors but under guidance from the therapists. There was much questioning and answering around the question of what contact and discussion takes place between Ms. Sinnott as Manager of the ABA Department and the therapists involved with providing therapies to S, including on a private basis, and I do not propose to set out that in detail. But it would appear that on about seven occasions there have been discussions of this kind, but not at a multi-disciplinary level, but rather with individual therapists. Four of these meetings would have taken place before May 2005. (T.22, Qs. 15 -108)

As I have already referred to, Ms. Sinnott has described S's learning progress at St. Catherine's as being "very good". I went on to ask her, if that was so, how did she consider that his progress had been impeded by what she regards as the limited amount of therapies which were made available to him, and specifically whether if more had been made available he might have made "excellent" progress. She responded that it would have been "hugely beneficial", and she gave a couple of examples of times when an external occupational therapist and a sensory integration therapist attended for a week, and she stated that huge benefits were seen during that time, and that given S's sensory needs it would make a great difference to him to have that input several times per week (T.22. Q. 333)

Individual Education Plan ("IEP")

Ms. Sinnott's evidence was that an IEP is prepared for each child, and there is one prepared for S which contains up to 40 programmes on which he would work on most days. These would be across all areas of his needs in relation to self sufficiency, play behaviours, communication, socialisation and cognitive learning. This plan is prepared by the class teacher but under the guidance and supervision of Ms. Sinnott. It appears that an inventory is made at the start of the school year in order to build a picture of what deficits and skills the child has, and this determines what must be put in place in order to achieve improvement in skills and abilities. These IEPs are regularly updated as improvements are made in a particular area, so that the child can be moved on to other programmes to deal with other deficits. This happens approximately every six months. ABA is used as the exclusive methodology for these programmes and interventions.

Ms. Sinnott is of the view that it is extremely important that an IEP is prepared by somebody with her qualifications and experience, and that it is a curriculum for the child which evolves over time as the child develops and improves, and expertise is needed to do this. She believes that S will need to have an IEP of a long time to come and that someone with her level of expertise in ABA should be involved in its preparation and development. In fact she believes also that if S was to go to a school which does not have someone with her qualifications and experience in ABA his previous level of challenging behaviours could return through (T.14. Qs.203 – 209)

When she was cross-examined by Mr McEnroy, she stated that S's IEP would have been reviewed on three occasions to date since he commenced at St. Catherine's, and that his parents, his teacher and tutors would have been present, but that therapists would not have been present even though their reports would have been considered (T.22. Qs. 110-118)

S's Challenging Behaviour

Ms. Sinnott stated that when S first arrived at St. Catherine's in February 2004, shortly after she herself had started at the pre-school, he exhibited a high rate of intense challenging behaviours which took the form of kicking, biting, hitting and pushing. In addition he had self-injurious behaviour which often involved banging his head with a lot of force on hard objects. Of all the children who started at the pre-school in February 2004, S's needs were the greatest, and she thinks that even now he has significant needs, even though he is learning efficiently and his challenging behaviours have greatly reduced.

It appears that between February 2004 and April 2004 there had been some reduction in the rate of challenging behaviours, but that it increased again around April 2004. Much work was done with S over the summer months and improvements were noted, but in September and October 2004 there was again an increase. (T.14. Qs. 211-212) She described the autumn of 2004 as being a particularly difficult time for S, and that at worst he could exhibit 100 instances of challenging behaviour in one class session. She stated that this meant "a single occurrence of one of the behaviours.....hitting, biting, pinching, kicking" (T.14. Q. 214) Ms. Sinnott prepared a report around this time in November 2004 in which amongst other matters she referred to his challenging behaviours, and included a reference to other children in the class being afraid of him. In relation to challenging behaviours she notes in this report that:

"he bangs his head around ten times an hour.....with momentum and intensity. He looks to hard surfaces and bangs his head against them when he gets a chance. Often the only real hard surface [S] can get access to is another head. He is currently in very real danger of causing himself and others severe harm. He has caused himself and others injuries on a number of occasions. He has a high rate of hitting, biting, pinching and kicking. These behaviours are directed against himself and to others."

She confirmed that this was an accurate description of how S was at this time. (T.14. Q.219)

But Mr McDonagh asked her more about this rate of challenging behaviour and what was done about it in the classroom, when he was cross-examining her on Day 18. I need not set out this question and answer series in detail, but will simply say that what has transpired from her evidence is that the reference to 100 incidents of challenging behaviour per half day, or 10 incidents of head-banging per hour, includes incidents where this action was attempted but where the attempt was frustrated by a timely intervention from a teacher. In other words, it includes occasions where S may have set out to or attempted to bang his head against a hard surface, but the tutor either removed the hard object in question or put his own body between S and the object such as a wall. It appears that for recording purposes it is irrelevant whether he succeeded or not in achieving his intention, so both successful and unsuccessful attempts at such behaviour are noted for data collection purposes (T.18, Qs. 91 – 120) She accepted that for someone who was not familiar with this ABA way of recording behaviours and who read her report in which reference was made to 100 incidents of challenging behaviour per session, and 10 incidents of head banging per hour, the report could be confusing or could give a wrong impression (T.18. Qs. 121-122)

She stated that data was kept on his behaviours as this is an essential requirement of the ABA approach, and that a functional analysis was carried out in order to see what function these behaviours were serving for S. The purpose of that exercise is to examine the function and then put in place strategies designed to encourage appropriate behaviours to serve the same purpose. An easy example would be that if S wanted something and does not have the verbal skills to ask for it, he may instead, out of frustration, exhibit some inappropriate behaviour such as a tantrum. When that behaviour is examined from a functional viewpoint, the approach would be to try and eliminate it by putting S on a programme designed to teach him a functionally equivalent skill which would enable him to ask for what he wanted, thereby removing the need for the challenging behaviour. The functional assessment which had been carried out with S had shown to her that S's challenging behaviours seemed to serve mainly a communication function (T.14, Q.224).

She was also of the view that there were three things contributing to S's difficulties with behaviour. Firstly, he had very significant sensory needs; secondly, he had only a half day placement at St. Catherine's at that stage; and thirdly, he was attending a play school called Pixies in the mornings. His sensory needs around needing to be squeezed and have pressure placed on his head, he needed to put things he was playing with into his mouth, and he does a lot of what was described as "toe-walking", and has poor balance, and poor sense of space. She feels that he was in great need of sensory integration therapy and occupational therapy in relation to these matters. In relation to the half day placement, S in due course was able to access a full-time placement, and in relation to Pixies, he left that pre-school in November 2004. Other evidence in the case has suggested that one of the difficulties was that his attendance at Pixies was causing an inconsistency of approach, and that while all the personnel there did the best they could, they were not trained to deal with challenging behaviour.

Integration with mainstream peers: General

A document prepared by St. Catherine's in June 2005 entitled 'Special Classes for Autism in St. Catherine's Special School', reference is made to the aim of integration for children and Ms. Sinnott was asked about this. The document states that the need for integration is recognised in order to prepare the child for integration into mainstream as well as to provide peer models of typical behaviour, and that every effort will be made to facilitate this as they acquire the requisite skills needed to benefit in this regard. It goes on to state that where the appropriate integration site is another pre-school or Montessori school, St Catherine's will work with that other school and provide guidance where possible, and that normally such integration will involve successively increasing levels of attendance before integration is complete, and further that if the integration site most appropriate is a mainstream class, St. Catherine's will provide guidance where possible.

This part of the document goes on to state that once integration to a more typical setting becomes a possibility or likelihood in the future, the school will systematically prepare the student for this in various ways therein described, noting also that integration often involves a shared placement for a period of time, which allows a student to benefit from access to typical peers while instruction continues on a one to one basis for specific deficits (T.14, Q.153-154)

Ms. Sinnott went on to say that four of the first eleven students at St. Catherine's had now gone to mainstream schools since September 2005. She stated that one other student had gone from St. Catherine's to an autism specific class in St. Joseph's National School in Newtownmountkennedy. (T 14, Qs. 154-156). Others had moved on to national schools in Goatstown, Wicklow Town and Enniskerry. All moves were into regular junior infants' classes.

These moves had apparently been achieved successfully. At a later point in her evidence she stated that her aim was to get children to a point where they can move to mainstream and can function in a more independent environment. She says that this can be done as soon as they are ready for it "but not a day before" (T.14. Q. 227; see also T.17, Q.145).

It was established by her evidence that there are no set or written down criteria by which a decision is made as to whether or not a child would be ready to move to mainstream (T.17, Qs. 125-129)

Mr McDonagh asked Ms. Sinnott about the boy who had moved into St. Joseph's Newtownmountkennedy and if the necessary repertoires for that move had been put in place for him before he moved. It turns out that the place became available for that boy only sometime in July due to a cancellation by another child ahead on the waiting list. It appears that by Spring 2005 St. Joseph's had been identified as the placement of choice for that child (T.18, Q.24), but later in the school year there was no place available, and it was only very shortly before the child went to the school that it was made known that a place was available. Mr McDonagh suggested that this meant that what Ms. Sinnott had said in her evidence about it being necessary to have in place the necessary repertoires for moving to the other school environment was not in fact so, since this particular child appeared to have been doing very well even though his place became available only at the last moment. At T.18, Q.28, Ms. Sinnott gave a very lengthy response to this issue, and in doing so felt it necessary to clarify something she had said previously about having to know what would be available to the child in the new school before being able to prepare the child for a move there. I cannot possibly set out the answer in full, but I would think that it can boil down to the fact that she may have been misunderstood in relation to her previous evidence, and that the position is not that it is only when they become aware of where the child is moving to that they can start to put in place the necessary repertoires for the child for that move. Rather, she seems to be saying that they are at all times working towards integration on a gradual basis, and at the point at which another school is identified to which the child will move, then additional and specific things will be done to assist the transition. It is this latter part which she did not have the opportunity to put in place for the child who moved to St. Joseph's, but that was not to say that he was not equipped to move at all.

In relation to the boy who ended up going to St. Joseph's when the place became available, Ms. Sinnott knew enough about that placement to be able to support that move because she felt that the school could meet that child's needs (T.18, Q.66-69).

Changing S to another school

In her direct evidence, Ms. Sinnott stated that S is not ready to move to another school. She stated that even if there was another

school near where he now is that had everything in place which he currently has at St. Catherine's it still would not be good for him to be moved there because he is familiar with his teachers and his classmates, and has made friends which is important to him and that this process has taken a lot of time to achieve (T.14. Q. 227)

As far as a move to a school where there was access to an ABA consultant on a part-time basis only is concerned, she does not believe that this would be satisfactory for S, because he requires a greater input than that, and that where there would be many days where no such input was available to him the school would not be able to deal as appropriately or efficiently with him or in a way that was needed. The absence of a full-time ABA consultant in her view would have an impact not only on the child but on the teachers who require an input from the consultant also in order to ensure consistency since S's needs are complex, and guidance would be necessary from a behaviour analyst (T.14, Q.230-231; 234).

Mr McDonagh asked her specifically about S possibly moving to St. Joseph's Newtownmountkennedy. She confirmed that she knew enough about what was available at that school to be able to make a decision as to its inappropriateness for S. (T.18, Qs. 81-85). She is not satisfied that what S requires would be available to him at St. Joseph's. The detail of what she feels is absent is contained in her long answer at T. 18, Q.87. His challenging behaviour is at the heart of her concerns, and essentially if the level of support and supervision by someone with her level of ABA qualification is not present on a full-time basis, and if the degree of measurement found in ABA is not present, then the placement cannot be regarded as appropriate. That is a brief summary for her view as expressed in this lengthy reply.

At a later stage of his cross-examination, Mr McDonagh referred her to the fact that even in the autumn of 2004 she had already formed the view that it would be inappropriate for S to move on to St. Joseph's, Templaraine in September 2005 (there being a place available for him at that stage there), or to St. Joseph's in Newtownmountkennedy, where he was 2nd on the waiting list. She stated that at that time S's challenging behaviours were at a very high level, as has already been stated, and that she could not see how he would be ready to move to these places by September 2005. She had in fact spoken to Ms. Ursula Cotter, the principal at Newtownmountkennedy and had discussed, *inter alia*, his challenging behaviours and stated that Ms. Cotter had made it clear that these behaviours could not be adequately dealt with there (T.21, Q.199) Ms. Sinnott did not accept that at that stage she was "determined" that it was unlikely that S would be able to move on to either of these placements in September 2006 (T.21. Q.201) It appears that since the reduction in S's challenging behaviours since the autumn of 2004 she has had no further discussions about S with Ms. Cotter or with St. Joseph's, Templaraine. But she is clear that her mind is not closed to the possibility of S moving out into another placement and that as soon as it is felt that he could benefit more from being other than in St. Catherine's, steps would be taken to prepare for that to happen (T.21, Q. 209).

Integration as an aim for S

She does not believe that S is ready at the moment to begin the integration process, and does not see it as a possibility in the near future. She referred to the possibility that it could be two or three years yet before he might be ready. But she stated that it was "definitely a possibility" (T 14, Q. 160). A number of children at the school with S are in the integration process at the moment and S spends time with these children at times during the school day, but is not himself ready to start towards integration. Ms. Sinnott stated that there is no scripted/written document which sets out the repertoires which S would have to have mastered before he could be considered for mainstreaming in a school such as St. Joseph's Newtownmountkennedy (T.17, Q. 132; and Qs. 146-155). But she was able to list what repertoires she felt would be necessary in this regard. She stated also that what S would need to have learned for moving to a school other than St. Catherine's would depend on what would be in place there for S. (T.17, Q.160) Her answer to that question as I have referred to it must be read also in the context to another answer which she gave a few questions later at T.17, Q. 165. I must say that I am unclear as to the distinction between the two. But at any rate, no other school has been identified by Ms. Sinnott to which S might move. Her opinion on this has not been sought by S's parents and she said that usually her opinion would be sought. (T.17. Qs. 162-164)

In September 2005 S began a programme where he was placed for short periods in another class at St. Catherine's where he was in the company of some children who were themselves attending at a private Montessori Pre-school outside St. Catherine's with a view to mainstream integration. Those children apparently spend about three afternoons per week there (T.21. Qs. 140-152). Mr McDonagh asked if there was any reason why S himself could not access such a mainstream setting for some periods with a view to moving to mainstream. Ms. Sinnott stated that there was no particular difficulty about that given the progress he was making, and that work was ongoing with that future goal in mind. But she is clear that he is not yet ready (T.21. Q.153-154). She again stated that as soon as a child could learn more elsewhere than he will at St. Catherine's she will always do everything possible to facilitate this. Mr McDonagh was anxious to know what plans were put in place for S so that he could move from St. Catherine's in September 2006, given that by then he would be too old to remain in St. Catherine's and there was no funding in place for any additional classes there for children of primary school-going age. First of all Ms. Sinnott stated that she had never thought that there would be any problem about children such as S remaining in St. Catherine's and moving into other classes as they needed to at age six, and that these classes would be funded so that they could be put in place. Given that the pre-school had started only in 2004 she felt that it was always going to be inevitable that these children would in a few years reach the age of six and that at that stage the Department would provide the necessary funding for primary school classes to be established. She did not anticipate that there would be any problem in this regard (T.21, Q.179)

S's ability to embrace change

A feature of autism is that the child will usually need consistency in his daily life, and can be rigid as far as accommodating change is concerned. This can mean that a child with autism will have difficulties around changes in his/her routines, in the personnel with whom he/she interacts at home or at school and so on. A change of school for example would often present challenges in this respect, and it is one of the reasons why S's parents and those dealing with him at St. Catherine's are not keen that his present placement comes to an end. Mr McDonagh asked Ms. Sinnott about this aspect of the case on Day 21. Mr McDonagh referred to portion of the report of Dr Reid where he had stated: "In relation to change [S] is reported to be quite accommodating". But she stated that S does not accommodate change easily (Day 21. Q.21). Mr McDonagh pointed to the fact that even within his class routine at St. Catherine's there is change occurring since there is a rotation of tutors taking place all the time, and that S has one tutor in the morning and a different one in the afternoon, for example. Ms. Sinnott stated that this did not pose a difficulty for S since he was familiar with these tutors, since many of them have been dealing with S for two years. But he would be affected if somebody with whom he was unfamiliar came into his class room, for example if one of his regular tutors was sick (Day 21, Q. 27). She went on to say that recently they had tried to change him to a different room and that this had not gone well.

Parental Involvement

She stated that the involvement of parents in the child's education is essential, and that the training of parents is even more important, because they need to have a good understanding of what is going on in the school, so that it can be carried into the home environment. This helps with the generalisation into other settings of the skills learned in school. For this purpose at the end of every day a summary is prepared of what the child has done and this is sent home for the parents to see what has been going on at the

school. This summary is quite detailed and includes information about what objectives were achieved, as well as details such as whether he ate his lunch and so on.

It is important also, according to Ms. Sinnott, that the parents are happy with the method of intervention being provided to their child. It is important that they use ABA methods at home with their child.

Level of ABA training for teachers and tutors

In Ms. Sinnott's view S's teacher would require at a minimum to have training to the associate level of certification by the Florida Board, since the teacher would be involved in solving problems that arise with the child and functional assessment. As far as tutors are concerned, she believes that they should be working towards that level of qualification.

Model A

By February 2005, the National Educational Psychological Services ("NEPS") had engaged Ms. Clare Mangan to make recommendations in respect of the cohort of twelve children for whom the Department was providing funding at St. Catherine's pre-school. These children had previously obtained recommendations from persons such as Dr Albert Reid, and indeed S's mother, for an intensive ABA provision.

Ms. Mangan's recommendations for these children were that they should receive a Model A or Model C provision depending on age.

For S this recommendation was that he should receive provision within the framework of provision contained in what has become known as Model A – an eclectic provision. During 204 there had discussions between St. Catherine's and the Department regarding the funding proposal submitted to the Department. There is no need to go into detail about these discussions but Ms. Sinnott had taken part in at least some of those discussions. It would appear that there had been some issues which arise about the type of provision being provided at St. Catherine's. One such issue had been around the fact that there was no qualified national school teacher in charge of the classes. It would appear from the evidence of Mr Cullen that Ms. Sinnott as Manager of the pre-school was the person responsible for putting these recommendations into effect. The fact is that she did not put Model A into place for S, and nor did she put the other recommendations into effect for the other children. All these children were put into an exclusively ABA provision, since that is what the school was set up to provide. However the Department maintain that the funding was put in place on the basis of an eclectic provision, as set out in its letter approving this funding.

Mr McDonagh asked Ms. Sinnott if she was since February 2005 providing Model A for S. In her answer she began by identifying certain aspects of Model A which she regards as inappropriate for S, such as the use of PECS. (T.19. Questionnaire 214) She regards the Model as "incredibly vague". She stated that Model A is inappropriate for s (T.19. Q.217) Mr McDonagh pointed to the fact that Model A states that what is to be provided from the framework of provisions in Model A is intended to be provided depending on the needs of the particular child, and that it is not prescriptive in this regard. She takes issue with the specification in Model A that TEACCH would be an integral part of the programme, since it must always depend on the precise needs of a child at any particular time, and that while aspects of TEACCH can be useful, it needs to be faded out as the child's needs alter in time. She takes issue with the lack of clarity contained in Model A as to what and when particular programmes are to be included for a particular child, as well as in relation to what qualifications teachers must have in matters such as ABA, TEACCH and so forth. The constituents of Model A are too generally set out for her to be able to regard it as an appropriate model of provision for S. She is also concerned about the level of ABA training possessed by some persons in schools where Model A would be implemented.

I cannot set out all her evidence in this regard, but it is clearly evident from her answers to questions put by Mr McDonagh at passages of evidence such as those in T.19, Qs. 215 – 264.

Ms. Sinnott has concerns also that under a Model A provision there is no requirement for measurement of outcomes such as exists under an ABA programme (T.20, Qs. 25). Her concerns are fully set out in this answer but may be reasonably summarised by saying that without the sort of detailed data collection and measurement of effectiveness of programmes put in place, and without precise analysis of S's needs from time to time, that decisions on either leaving particular programmes and strategies in place or moving on to others, are based on anecdotal evidence derived from an opinion of those involved, rather than by reference to precise data showing whether it is necessary or otherwise. Her concern would be that by such anecdotal methods time could be lost to the child by having unnecessary strategies in place for longer than they should be, and delay in moving to others.

Mr McDonagh suggested that rather than Model A being described as "vague" it could be characterised as being flexible so that it can be adapted as required to the needs of individual children. But she in reply pointed also to the lack of specifics as to training being relevant to this flexibility since those making decisions on the basis of this flexibility may not have the required expertise to make those decisions.

Dr Olive Healy

Qualifications and Career

She is the holder of a doctorate awarded in 2001, and for which she specialised in behavioural analysis. In 2005 she qualified as a Behaviour Analyst, having received certification in the regard from the Florida Board. She also has a number of CABAS qualifications, and was from 1998 to 2005 the director of education and behaviour analysis at the CABAS School in Cork, which is run on an exclusively ABA model. She has also been employed in a number of part-time consultancy roles with other ABA schools, such as the Abacus School in Dublin and the Bluebell School in Limerick.

In addition she has a part-time consultancy role in St. Joseph's National School at Newtownmountkennedy in relation to the ABA element of the otherwise eclectic education provision there. That role involves supervision of the ABA component at that school and she does that for a block of three days in every month. She also teaches on the ABA course at Trinity College, and provides supervision for persons preparing to take the Florida Board certification exam to become certified associate behaviour analysts. She has a lecturing post at UCC also where she lectures on a higher diploma course in behaviour and cognitive therapy. That course is based entirely on ABA. The diploma is awarded by the National University of Ireland. She is a member of several professional bodies which are ABA related and is engaged in research in that area also.

Autism

She stated that autism is defined as a triad of impairments in the areas of communication, social interaction, and stereotypical behaviours, and that while all children will typically present with deficits in these areas, there is a wide range on the autism spectrum and no two children are ever the same. Associated with these deficits is also the fact that many such children will present with challenging behaviours. This can be the result of difficulty with communication, and lack of language skills, all leading to frustration in the child, which in turn leads the child to ask for things in an inappropriate way, such as by aggression. The child will often experience

an intense isolation from those around him/her. The aggression can be in the form of head banging or other potential self harm or indeed slapping and other forms of aggression towards others. While so-called normal children will often have a tantrum and behave inappropriately, she stated that such behaviour by an autistic child are often extreme and can sometimes even lead to such injury that they have to receive hospital treatment.

ABA

Dr Healy stated that ABA is a method of teaching a child with autism, and not simply controlling challenging behaviour. It is these behaviours which can impede the child from learning, and the approach is very much aimed at addressing the deficits so that the child can be educated. She has stated that it is a method of education used in many schools in the United States, and in many states is the recognised method of teaching children with autism, as well as addressing challenging behaviour in children who do not have autism. She stated that it is used widely also in schools in the United Kingdom in schools which are state-funded.

During her evidence she gave a great amount of detail about what an ABA model of education actually provides for a child such as S. She also stated that where only a portion of the education model in the school was ABA it can be damaging to the child, since the child can become confused by different forms of intervention during the school day. She does not believe that there are any deficiencies in the exclusive model of ABA educational provision because it is a system applied not just to the student, but in which the teachers, supervisors and parents are involved using behavioural principles.

When she was cross-examined she was asked if she was aware of any criticisms made of ABA as an exclusive provision. She was aware of some criticisms made by a Prof. Greenspan, such as that it may not teach play skills, and that it may not enable children to adequately generalise skills, but she does not accept that these are valid criticisms. (T.25, Q174 et seq.) She was asked also about the study by Lovaas in 1987 in which aversives such as slapping and electric shock had been used by him as 'aversives' with the children in his study, and was asked whether the success claims made by Lovaas for his group of children formed part of the basis for her view that ABA as an exclusive provision was the only appropriate model of intervention for children with autism. She pointed to the fact that aversives were not used in ABA now as they had been by him, and that what she described as the 'least restrictive treatment model' was used where reinforcement procedures were used, and where they did not work, then one would introduce negative punishment procedures and positive punishment procedures, but never physical aversives (T.25, Q.211) But she was firmly of the view that there have been later studies which establish the effectiveness of the ABA model even where the Lovaas-type of physical aversives are absent, and that it was not simply the aversives which accounted for the success identified by Lovaas, even though Lovaas himself referred to these aversives as having been an essential ingredient for the purpose of his study. It was put to her that she could not rely on that study as the basis for her view that ABA was the only appropriate intervention if she was not in fact trying to replicate his methods at CABAS Cork or the other schools where she was in a consultancy role, but she stated that she does not simply base her teaching on the Lovaas method alone, but also uses other ABA methods.

She stated to Mr McDonagh that her view that exclusive ABA is the only appropriate intervention was formed by her by 1998/1999 when she commenced at CABAS Cork, and was based on what she had been taught as well as her knowledge of the research literature and her own experience. (T.25, Qs. 220-229). She was referred to the article by Victoria Shea entitled: 'A perspective on the research literature related to early intensive behavioural intervention (Lovaas) for young children with autism' in which under a number of headings criticisms are made of the Lovaas study. That author concluded that:

"It is time for advocates and professionals to stop citing the figure of 47% and the concepts of 'normal functioning', 'being indistinguishable from average children' and having 'recovered' from autism. The reports of the initial research are not consistent with these interpretations; further, over three decades since the research began other studies have consistently fallen short of the 47% figure."

The author went on to state:

"Although there is little professional disagreement that early intervention is important and beneficial for youngsters for autism (National Research Council, 2001; Rogers, 2001) it remains the case that most children diagnosed with autism spectrum disorders continue to have significant functional difficulties throughout the lifespan (Howlin and Goode, Nordin and Gillberg). It is also the consensus of the professional literature that a variety of educational and therapeutic techniques help children with autism at all levels of functioning to develop skills, interests and relationships (Dawson and Osterling, Handleman and Harris, Hurth et al., National Research Council, Rogers, Smith and Volkmar."

When referred to these passages by Mr McDonagh, Dr Healy replied by stating that this was simply a view which the author was entitled to hold, but was not based on any scientific study which established her view. Dr Healy was questioned at some length about this response, and while it is unnecessary to set out her responses in detail, it is clear that Dr Healy disagrees with the criticisms identified by Victoria Shea. Dr Healy's view can be seen at, for example, in her responses at T.25. Qs. 293- 294.

Discrete Trial Instruction

She spoke of discrete trial instruction and what is called the "three term contingency", meaning that a unit of learning is broken down into parts, the first being that a request is made to the child to do something such as to clap hands. This request is called "an antecedent". The second part is the behaviour or response to that request by the child. The third part is called "the reinforcer" which can take the form of praising the child, or making a correction, depending on whether the response was the desired one or not. These units of learning expand as each unit is learned by the child. When the child has learned a series of units all making up a task, then one can see that the child has acquired the skill to perform the task. An example of this would be where the task might be to learn to read a short sentence. This would be tackled by breaking the sentence down into six learning units each being to correctly recognise and say each word. The child will not proceed to the second unit (i.e. the second word) until he has successfully learned the first word. As each word is mastered, the task is achieved successfully when the child can read the entire six words of the sentence. The discrete trial is at first the learning of each word individually, and it becomes at the end the mastery of the whole sentence. Once a sentence is mastered, the discrete trial might become the mastery of a paragraph and so on. Later in her evidence she was able to say that by this method of teaching and learning, the child will through generalisation achieve functionality. By that I mean that the learning of the words, for example, is beyond the mere parroting of the correct sounds related to the letters in the word but to acquire knowledge as to the real meaning and comprehension of the word. A simple example given was that through a series of small learn units, the child will recognise the letter "C" and know what sound is associated with that shape of letter, and say it. He will then learn in a similar way the sound related to the letter "A", and finally the letter "T", and he will go further and be able to say the word "cat" when the three letters are placed in sequence. But beyond that he will learn to say that word when he is shown a picture of a cat. In such a manner is reading taught so that very slowly words and sentences are built up with the aim of achieving a functional vocabulary.

Following on from this evidence, she described how ABA involved different phases of learning, where having mastered some words, for

example, the next phase could be towards achieving fluency where necessary depending on the deficits of the particular child, and after fluency the next phase could be maintenance in order to ensure that what has been learned is not forgotten. The final phase then is called "generalisation". This is where the child learns to perform or use the skill beyond the specific context in which it was taught, and extend it into other environments and with other people.

The "technology piece"/ Data Collection

She explained the importance to the teacher of learning what tactics work with any particular child, since all are different. This is done through the use of what she referred to as "the technology piece". This process involves the collection of data in relation to what is done with the child each day. This data will show what tactics works with the child and which ones do not. It will record successes and failures so that a graph can be prepared in which the progress or the lack of it is clearly visible. Depending on the results of this data, adjustments and changes to the tactics can be made in order to ensure that only those tactics which have been demonstrated by the data to work are used. She described this measurement and analysis of the data as "the bedrock" on which ABA teaching is based, and that without this objective analysis, you cannot describe the teaching as ABA. It is fundamental to the science of ABA. She stated that this was found to be an essential part of ABA in all the research literature. She explained also that one of the functions of the data was to be "the voice of the student" in the sense that a child with autism does not have the necessary language skills to tell the teacher whether a particular tactic is working or not.

She accepted that this collection of data was labour intensive and took a lot of time, but that it was hugely important in terms of outcomes. It was important also in connection with continuity, because if a different teacher was involved at any point, that teacher could see what tactics had already been successful for the child, and what the stated goals were for the child, and could adopt the same consistent approach. It is also important for the consultant, such as Dr Healy, who may be visiting the school only on certain days, and it is possible to see what is happening with the child and the consultant can look at the data and make suggestions for change if necessary.

Aim towards integration

She stated that the aim of ABA teaching was to provide the child with teaching procedures which will equip that child to acquire as many skills as possible, so that when possible the child could integrate with his normally developing peers. This question of integration as an aim of ABA was explored in cross-examination by Mr McDonagh (T.25, Qs.360 et seq.) Dr Healy stated that for some students the aim would be to access mainstream schooling, for others it would be to do so only on a part-time basis, and for yet others this may never happen because they could not have that potential, and that for each child the aim was to maximise potential. Mr McDonagh was concerned to know if at least at the start of an exclusively ABA programme a long term objective would at least be that the child would at some time in the future be able to function outside that exclusively ABA environment. Dr Healy was able to state that the goal would be to generalise what was learnt into other environments, and that she might have to teach a child to manage behaviours in the classroom and then to move beyond that so that it can be generalised into other communities. But she could not say that the accessing of mainstream education would be a long-term goal for every child, since not every child was going to be able to live and function normally, and that this is something which can be predicted when a behaviour inventory is prepared and deficits and assets are ascertained.(T.25. Qs. 372-373) But she went on to state in answer to further questioning that she would do on-going inventories, so that she would be constantly making judgments as to how fast a child was progressing and learning. But as a general proposition she was unable to say that it was a long-term aim or goal of ABA in all cases that the child would go to mainstream (T.25, Qs. 380-381).

Specifically in relation to S, she could not say when or if he would be able to access a mainstream education. She stated that while some of his skills are quite advanced, they need to be built on, especially his communication skills, and that at some stage when his behaviour inventory was updated, a decision could be made as to whether he was ready to do some part-time integration under an ABA programme. This updating would take place every six months, and that maybe in a couple of years' time he could be reviewed to see if he could move to mainstream. (T.25. Q.427)

Mr McDonagh referred to the research literature showing that an exclusive ABA provision was invariably in relation to such an intensive provision being for a short number of years- less than four years. Dr Healy was unable to point to any research which advocated such a provision for ten or fifteen years – in other words the only type of education the child might access from the age of, say, three years until school leaving age of eighteen years. But she is of the view that the research shows that ABA procedures are effective at all ages (T.25, Qs.443-444, and 451). At a later point in her cross-examination she stated that she would recommend that any child who never progresses to integration so as to access mainstream education should continue to receive ABA beyond the age of eighteen, and even into their thirties, forties or fifties (T.26. Qs. 275-276).

The Individual Education Plan ("IEP")

This is an individual plan tailored to the specific needs of each child, since each child is unique as far as deficits and appropriate tactics are concerned. Under ABA this is something which is very specific and tailored to the individual needs of the child. It would typically contain both short-term objectives or aims and also long-term objectives, and there would be both teacher and parental involvement in its preparation, as well as regular monthly review which ensures that goals are updated, as each is achieved, with new ones being added appropriately.

She stated that under an eclectic model, such as at St. Joseph's Newtownmountkennedy, the IEP is prepared by the teacher, and is reviewed with the parents at the beginning of the school year. She does not regard a once yearly review as adequate, or even a half yearly review. On Day 23, at Q.221 during her direct evidence she stated that while the teachers draw up the IEPs she had never actually seen them in St. Joseph's Newtownmountkennedy, even though she knew that this was done. That evidence proved to be incorrect when she was cross-examined on Day 26. On that occasion she stated that she has seen three such IEPs, but that in respect of some children there were no IEPs written up (T.26, Qs. 208 and 212). She then went on to explain that there were IEPs but that there were no clear objectives contained in them, and that certain procedures are in place for the children simply for the sake of ensuring that an eclectic mix of interventions is being used. (T.26, Q. 231). The three IEPs she referred to and which she had seen were in respect of 2006. In relation to IEPs for 2005 she stated that she had seen these for all the students who she is supervising. This is a total of thirteen IEPs. When asked to explain how it was that she had stated in her direct examination that she had seen no such IEPs she stated that she was not sure. She went on to explain that what she meant was that she had never seen "clearly scripted objectives outside of the behavioural programme lists that incorporate measurement and criteria to performance, criteria for students, and clearly scripted objectives under the eclectic mix that is recommended" (T.26, Q. 249)

Parental Involvement in ABA

She stated that it was very important that parents were closely involved in all aspects of the education programme, so that they can be trained to manage behaviours in the home environment in the same way that they are managed at the school. Consistency of approach is important so that the child is not confused. For this reason parents are welcome to attend the classroom in an ABA school. There is free access on reasonable notice being given of a wish to do so. She went on to state that from her role as ABA

supervisor at St. Joseph's National School in Newtownmountkennedy, she was aware that parents were not permitted into the classroom, and that this can result in the parents not knowing what goals their child is working towards or what stage their child is at. This means that there can be a conflict between what is done with the child at home, and what is happening with the child at school. The communication channel between the teachers and the parents is by means of a "communication diary". This in her view does not give sufficient detail to the parents.

She also explained that in a school like St. Catherine's the parents had regular access to the behaviour analyst on a daily basis, whereas this was not the position in St. Joseph's Newtownmountkennedy, since she as the ABA consultant, only attends for three days per month. She believes that it is vital that parents should have regular access to the ABA consultant so that regular feedback can be given as to the child's progress. This is important so that there can be consistency between what is going on at home and at school.

CABAS School in Cork

The school was established in 1998 with the help of significant state funding. The funding of the school by the Department is ongoing to the tune of about €1,000,000 per annum. According to the Department, this and other such schools are funded only as pilot projects. She states that this school is recognised by the Department as being an exclusively ABA school.

Currently there are thirty three children attending the school. Some of the children who attended up to the present time have moved into mainstream classes following their time at CABAS. She stated also that these children are not assessed by NEPS, but that the parents will have accessed a psychologist assessment themselves privately from someone such as Dr Willis, but others as well. In relation to CABAS in Cork, as well as the other ABA schools with which she is familiar, she states that there is great demand for places in these schools, and that parents seem to be keen to avail of an exclusively ABA provision of education for their children.

She stated that when the school was first established an Inspector from the Department of Education and Science sat on the Board until 2004 when he retired and was not replaced. The Department came to the school in 2003 and carried out an assessment of the ABA provision there, and issued and presented a report containing an appraisal and criticisms. She stated that the inspectors were impressed by the way in which the ABA methodology was applied at the school, and that there was no question of them suggesting that ABA was being in some way misapplied, and that there was no question raised about the implementation of ABA across the child's entire education programme (T. 24, Qs. 98-106). There were two criticisms in particular which she referred to. One suggestion was that they should use more from the National Curriculum, rather than the behavioural curriculum they were using. The second was that they wanted the school to have an suspension and expulsion policy for students exhibiting challenging behaviours. This concept is totally alien to the behavioural approach in the school, since sending the child home was placing them back into a scenario where there was less expertise to deal with the behaviours. The school has refused to put in place such a policy, and she stated that the Department had not brought the matter up again.

Mr McDonagh asked her about the report of the inspectors from the Department in July 2003 to which she had referred in her direct evidence. Before she was asked anything specific about the detail of the report she was given an opportunity to recall any other matters raised in the report besides the two matters she had mentioned in her direct evidence. She stated that it had been some time since she had seen the report but recalled that they had recommended drawing on other methodologies, and had recommended multi-disciplinary meetings, as well as more use of computers as part of the education plan (T.27, Q. 229). Mr McDonagh suggested that this reply did not sit easily beside her direct evidence that there had been no question raised about the implementation of ABA across the child's educational programme. She responded that the recommendations were that they should draw from other interventions but not that they should change from an overall ABA methodology. She does not believe that her answer in direct evidence was misleading (T.27, Q. 230). Mr McDonagh went through the report with her, and pointed to certain passages which appeared to him to be critical, such as that "there appears to be a lack of coherence in the contribution of the various professionals to the children's learning programmes". He asked whether it was the fact that she disagreed with the criticism which caused her not to mention the criticism. She denied that this was so, and that she had not remembered it when she gave her answer.

He referred her to another which related to children moving to integration and to there being in place "no indication of the curricular subject areas that these learn units [vocal and written learn units] pertain to, nor is there any additional information on file from the mainstream school regarding work accomplished, subject matter to be covered, or future aims for integrated sessions". She denied that she had forgotten to mention that, since that was actually happening. But Mr McDonagh referred to the fact that before the final report was issued, she had been shown a draft of the report at a further meeting, and in spite of that the criticism remained in the final report (T.27, Qs.240-242). Other criticisms were pointed to by Mr McDonagh, including one which was:

"Short-term planning does not refer directly to group teaching sessions. There is no reference to aims and objections that take specific cognisance of the triad of impairments for the teaching and learning of children with ASD. There is little evidence that cognisance has been taken of the importance of co-morbid conditions and their implications for the children programmes."

Mr McDonagh suggested that this is a serious criticism, and Dr Healy responded that it was, but that it was unfounded. He nevertheless asked why she had failed to mention it in her direct evidence (T.27, Qs.268-269) Many more matters were pointed to in similar manner, but in relation to these, Dr Healy stated that they were unfounded. She does not regard these criticisms as being criticisms about ABA being across the child's education programme (T. 27, Qs.271 – 303).

At a later point of her cross-examination, Dr Healy stated that the inspectors may have a lack of understanding of ABA as an educational programme, and that anyone who had a proper understanding of it would recommend it as "the intervention of choice". (T.28, Qs. 55-56).

Early Intervention

She is of the view that there is no doubt but that the earlier interventions are put in place following diagnosis the better are the gains made by the child with autism, and that where there is delay in putting those interventions in place, time has been wasted and in that period of delay many inappropriate behaviours have been established, and these have to be undone whenever an appropriate intervention is eventually put in place. This according to Dr Healy is clearly shown in the research into early intervention.

In relation to S, she is of the view that as soon as he was diagnosed in October 2002 when he was two and a half years old, appropriate interventions ought to have been put in place for him in order to address his deficits, and that if this had been done he would not have learned the inappropriate and challenging behaviours which were later evident. In addition, during the period of delay, opportunities for learning are lost to the child, since these behaviours get in the way of teaching and learning, as well as developing social and language skills. She believes that for S it was essential that he receive an appropriate intervention much sooner than he in fact did when he was able to avail of a full-time placement in St. Catherine's in June 2005. She said it was particularly significant for a

child to lose two years learning when he is very young, as S was.

She was asked if this delay would have caused actual damage for S, and she stated that this is time for S which was lost to him, and that every day matters. He could have been learning new skills each day and building on that progress during the years following diagnosis. She was also able to state that if this time had not been lost to him that he would be what she called ten steps ahead, and that meant in relation to reading, for example, that instead of having a vocabulary of twenty words he may have reached a vocabulary of one hundred words by this time, and that he may have been able to learn some early mathematics programmes.

Appropriate education model for S

Dr Healy is of the view that ABA is appropriate and suitable for S given his profile and his deficits. She is aware of other models of provision in special education schools, such as the TEACCH programme. She sees the distinction between the TEACCH model and the ABA model as being that in TEACCH the underlying idea is that the child with autism is not going to learn as well as a normal child, and that the child's environment would be adapted to the child's strengths in order that the child may learn. She referred to this as "structured teaching". She described the typical TEACCH classroom as being divided into partitioned work spaces so that each child had his own learning area set up for that particular child's needs. She described also the use of a visual timetable so that the child would be able to see his day mapped out in pictures showing what he would be doing at each part of the school day. She does not regard such a TEACCH method and environment as suitable for S, since there is no measurement of what the child has learned and whether it is necessary to move from that environment to a different one. This can mean that a child does not move on when such a structure is no longer needed. She thinks that one result can be that there is an over-use of visual tactics, even when the child is capable of moving on to the next level of learning – for example a listening component where the child would learn to listen and doing, instead of seeing and doing, or moving further to what she called "the speaker repertoires, so that the child learns not only to listen, but also to communicate in some way. She sees an over reliance on the purely visual strategies in TEACCH programmes, thereby limiting progress in a child who is ready to progress to other levels. This in her view limits the ability of the child to adapt into the real world, by limiting his ability to function to this controlled environment where everything is set up to suit the child's deficits and abilities.

Model A – eclectic model

In her direct evidence she stated that she has seen the document describing the Model A eclectic provision, but has never heard teachers in Newtownmountkennedy referring to the phrase "Model A". But she is familiar with this eclectic provision there, and regards it as being a mix of different interventions, involving speech and language therapy, occupational therapy, a picture exchange programme (PECS), ABA, sensory integration and auditory integration as well as other types of intervention. She sees problems with this mixed provision since it involves different people delivering the different pieces, and that there can be clashes and contradictions between how these personnel interact with the child. It lacks the consistency of approach found in an exclusively ABA school. She has seen this happen at Newtownmountkennedy.

Mr McDonagh asked her many questions about what was contained in the document describing Model A. She maintained her criticisms of it as a model because of its lack of definition and specificity in many respects.

Challenging behaviours and the eclectic model

She is critical of the way challenging behaviour is sometimes dealt with under the eclectic model. She gave an example of a child who may respond inappropriately to noise, and stated that in the eclectic model that child might be removed from the exposure to the noise by being taken out of the classroom, or otherwise make sure that he is not exposed to noise, whereas with ABA the child would be put on a desensitisation programme or something would be done with the child to enable him to learn to tolerate noise. She feels that this is a more useful approach rather than setting up the child's environment around his sensitivity to noise and that this equips the child better for the real world where noise is a common feature.

Curriculum and the eclectic model

She is critical of the use in the eclectic model schools of the National School Curriculum since the goals within it are very large and vague, in contrast to the smaller goals under ABA. An example which she used was that in the former the goal may be that the child would learn to write, whereas under ABA an initial goal to be achieved may be seen as enabling the child to hold the pencil. She believes that a disadvantage of this model is that the lack of proper measurement of progress through data collection prevents the teacher from identifying the particular difficulty a child has in learning, so that it can be effectively addressed. She believes that the outcomes for learning under the eclectic model are therefore less effective.

Circle Time

She stated that a large part of an eclectic provision consisted of 'circle time' where the child along with other children are sitting in a circle talking about various things. But she is critical of this activity in as much as it is not individualised, and the instruction is the same for each child. This results in each student sitting through the same exercise even though they may each have different communication skill levels. The child at the lower skill level will be disadvantaged and will not benefit, thereby wasting valuable instruction time.

Mr McDonagh asked her about circle time during cross-examination (T.27, Qs. 43 et seq.) Her criticism of circle remained that it was not an individualised activity with pre-set goals and objectives for each child, and that while some children may participate because they had, for example, reading and listening skills, others may not because those skills were lacking, and that for these children there was no benefit. (T.27, Q.56) She went on to say that it was possible to engage in circle time through ABA discrete trial instruction, by matching students, and individualising the instruction.. She went on to say that there can be measurement of circle time by the use of video where the results can be noted and data taken.

Appropriateness of St. Joseph's Newtownmountkennedy for S

Dr Healy fears that, given his history of challenging behaviour and the difficulties around treating those behaviours, a move from a school where there is a behaviour analyst who can be called on at any time, to a school where such a person is available only three days per month will cause a serious problem in terms of how he will progress behaviourally, since his teachers will not have the requisite skill levels to implement a behaviour programme. In addition, his exposure in St. Joseph's to a mix of interventions, where there would be a lack of coordination between the different personnel delivering the different programmes, will cause serious problems for his learning progress. She states also that there is no system of multi-disciplinary conferencing where the various teachers and therapists get together to discuss each child's needs and progress, in contrast to St. Catherine's. She has never been invited to attend such a conference in her capacity as the ABA consultant there, although she is aware that parents are invited in to discuss the design of the child's IEP at the beginning of the school year in October.

Level of training of teachers at St. Joseph's Newtownmountkennedy

She expressed the view in her evidence that the level of training in ABA of the teachers in St. Joseph's was of a lesser order than at

St. Catherine's or a CABAS school. She went into detail in relation to this and it is unnecessary to set out this in detail. Put briefly, she stated that none of the staff at St. Joseph's had any ABA qualification certified by the Florida, apart from herself as the part-time ABA consultant there. This was in contrast to St. Catherine's. She does not regard it as sufficient that the ABA element in an eclectic programme would be delivered by a teacher trained in the Montessori method, albeit one who has had six days training from her, and says that it is a misconception to think that somebody with that level of training can go into a classroom and design and implement an ABA programme. There is a need for a considerable amount of supervision and input from somebody who has a Board certified qualification. Her remarks in this regard were equally applicable if the Montessori teacher in question had undergone some form of Special Needs Training, or even a course in PECS or ABA.

She was cross-examined about her views in this regard, and she confirmed that her criticisms of teachers in Newtownmountkennedy was not confined to those at that particular school but extended to all one hundred and sixty national schools throughout this country, which have an autism-specific class. She went as far as agreeing that she was stating by that that none of these teachers was capable of providing an appropriate education to children with autism, unless they have some level of expertise in ABA and have ongoing supervision from some person who has her own level of ABA qualification. (T24, Qs.170-176; T.25, Qs.447-470). She also believes that this view is regardless of where on the spectrum of autism a particular child might be – even at the high functioning end (T, 24, Qs.218-221; 233-234).

She has stated that not only was she taught this during her ABA training but has herself come to the same conclusion from her experience.

She went on to say that there were perhaps five persons in the country who have that level of qualification. As far as suitably qualified ABA teachers are concerned, as opposed to those qualified to provide ABA supervision, she thought that there may be twelve such teachers in the country. She believes that in time the Department will come to recognise that only this is an appropriate educational provision for children, and points to the fact that the Department itself started the process of training its teachers in ABA in 2003 but that it in the following year did not place any teachers on the course, and that if it had there would by now be further teachers qualified.

Dr Healy was cross-examined about her views as to the competence of the teachers at St. Joseph's Newtownmountkennedy, by reference to what she had stated in that regard in her report. In her report she has stated that as far as the ABA component of the eclectic provision was concerned, the teachers there had learned to implement ABA strategies and did so effectively. During cross-examination she stated that the teachers there are doing their best to implement those strategies which she had designed for them, and that she admired their commitment to following her direction. But she went on to say that the person she was referring to who was ABA certified by the Florida Board, and who she supervised in that regard, was no longer working there since September 2005, and that while the personnel there were doing their best. Mr McDonagh referred to the fact that she had not mentioned the fact of this person leaving the school in September 2005. She stated also that she is now of the view that the interventions provided in that school are ineffective (T.26, Q.60). She explained that while she had written her report in early October 2005 it took some time for her to appreciate the impact of the loss of the ABA person referred to, because there were gaps between her visits there, and that her replacement has not shown competence in designing and implementing behavioural strategies on her own initiative. She altered her view in this regard by about November 2005. She does not put down the lack of effectiveness to any one person at the school but to the system in operation, even though the loss of the ABA person had a significant effect on outcomes. She still believes that all are doing the best they can. It came out during this cross-examination that the ABA person to whom Dr Healy was referring was not in fact in the class in which Model A was implemented, but was in the second autism specific class in that school where so-called Model B was in place. It turned out that Dr Healy was unaware that Model B was being implemented in the school, since nobody had ever told her that. Mr McDonagh sought to impugn her opinion therefore that the loss of that ABA teacher was of any significance as far as the Model A class to which S would be assigned should he attend this school, since she would never have been his teacher, and that it ought not to be any reason why she would alter her view as to the effectiveness of the teaching at the school as far as S would be concerned. Dr Healy's view, following this line of questioning is nevertheless that while ABA is as effective as it can be there, it could be more effective (T.26, Q. 104)

But it is worth noting her evidence given during her cross-examination that she does not regard the education of autistic children at St. Joseph's Newtownmountkennedy as an appropriate education (T.26, Q. 278-281; Qs. 287-305). Her reason is that ABA is not the overriding methodology. But she is prepared to remain as a consultant over such a provision for as long as the component of ABA there can show some effective outcomes for the children. She has seen improvements there but not as many as she would like to see.

Integration programme at St. Joseph's Newtownmountkennedy

When cross-examined by Mr McDonagh she stated that she had been asked by the plaintiff's solicitor to review S's programme of ABA at St. Catherine's and to make a judgment as to whether he should continue with that particular programme or whether he could move from St. Catherine's into either St. Joseph's in Newtownmountkennedy where she is a part-time consultant of the ABA element of the education provision there, or to St. Joseph's in Templaraine where there is an eclectic provision.

She stated during her direct evidence that there is an integration programme in place at St. Joseph's and that this involves children from the autistic class integrating with mainstream peers in either Senior infants' class or the 1st year class for short periods of time. They would also integrate at break time in the school yard. However, when cross-examined in relation to this, she stated that at present, as far as she knew, there was no integration programme in place for S, since he did not have the pre-requisite skills to be able to do that type of integrational programme (T.26, Q. 75). She could not recommend that at the moment he should be exposed even for short periods to his normally developing peers in a mainstream classroom.

She expressed her view that now is not the right time for S to be moved from St. Catherine's ABA pre-school to an eclectic provision, such as that at Newtownmountkennedy, given his progress to date. She believes that he has made so many gains, and has many more to achieve given the extent of his current deficits, and that if he was to be moved now he would lose momentum, and would lose access to the tactics which have been used successfully where he is. She believes that a move now would be detrimental, and has experience of children who went on an ABA programme at age two, and remained on such a programme beyond S's age, being six, and she can see no reason why S should be dealt with differently to those other children, given the benefits which he has gained from it.

She also does not believe that the educational provision should be judged according to his chronological age, but rather by reference to gains made and skills acquired. She believes that if S has started his education under ABA exclusively, this should continue until he reaches the age of eighteen. She stated that in CABAS schools the children are divided into different classes based on their levels of verbal behaviour, and that the decision as to what class he should be placed in should be made solely on the basis of his needs and his skills level.

Therapies through ABA

She believes also that any therapies which S needs such as occupational therapy, sensory integration therapy should be delivered to him through the ABA methodology. She stated that this was how these were delivered in the CABAS school in Cork, and that under this model, the therapists would visit the school but that the delivery of therapy would be coordinated by one person, an ABA behaviour analyst, who would have "the final say as to what was and was not appropriate for the child in question. She is of the view that without that coordination by a single person there are too many people making recommendations for treatment of the child and that this can be very detrimental for the child. An effect of such a procedure is that measurement of success of the therapies applied is taken in the same way as ABA measures other interventions and tactics in order to see what is working and what is not, so that appropriate adjustments can be made.

During her cross-examination she stated in fact that at first in the CABAS school in Cork there had been some initial difficulty when occupational or speech and language therapists would arrive at the school. It had taken a little time to establish that fact that these therapies had to be delivered through ABA methodology since the therapists were unused to such an idea. But she went on to state that it worked out very well, so that now all therapies are delivered under the supervision of the ABA school director. She does not believe that the class teacher is competent in this regard.

St. Catherine's ABA pre- school

She described in detail what ABA provision was available in St. Catherine's, and gave details of what was present there which is not present in St. Joseph's. She also identified differences in the ABA training of the teachers in St. Catherine's compared to the level of such training in that respect of the teachers in St. Joseph's. When she visited St. Catherine's she spoke to Ms. Sinnott and the other teachers involved with S, and was able to see his file including records dating back to when S first attended there. These set out what she called the base-line assessment of where he was at that time in terms of skills and behaviours.

Dr Healy prepared a Report on S for the Court. She stated that when she was at St. Catherine's on this visit, she had with her a copy of an article which showed the difference between an eclectic model of educational provision and an ABA model. I will refer to this for convenience as "the Howard article". It has been demonstrated in this case that a significant portion of her report as to what she found in St. Catherine's is stated in a way which replicates the text of the Howard article, rather than being composed in her own words based on what she saw there. This feature of her report was identified in the evidence of earlier witnesses, and Mr O'Moore asked Dr Healy how this had come about. She explained that she had used that article as a sort of check-list in order to measure what was available to S at this school compared to what was recommended in the Howard article. There are portions of the article which do not appear in her report since those aspects were not available to S at St. Catherine's. She stated, however, that she was satisfied that what is in her report reflects what she saw available at St. Catherine's and what was described to her by the personnel there, even though she had stated this simply by reciting text from the Howard report as if it was her own. I should add that she had not referred to the Howard article in her report or to the fact that she was using passages from that article in this way. When cross-examined about this by Mr McDonagh she stated that what appeared in the Howard article was what would be in place in any ABA school, and that they are what is in place in the CABAS school in Cork for example. She stated also that while she had not referred to the Howard article specifically in her report she had supplied a copy of it to the plaintiff's solicitors when furnishing her report because she felt it might be useful for them to have a copy of it. She had presumed that a copy of that article would also be handed over to the defendants when her report was being handed over. In fact that did not happen.

Mr McDonagh pointed to a particular difference between what was stated in the Howard article and what is in the provision in St. Catherine's, and this is the fact that in St. Catherine's there are therapies provided, such as occupational therapy. She stated that in St. Catherine's these are not provided under ABA methodology, and that there was no decision made in relation to these therapies by Ms. Sinnott and no measurement taken in relation to them (T.25, Qs. 605-607)

S's progress at St. Catherine's

By reference to the grid produced by Ms. Sinnott which sets out the progress achieved by S over the two year period since his arrival at St. Catherine's, Dr Healy described his progress from February 2004 as being quite advanced since some of those skills can take an autistic child a long time to learn. She could see a sequential movement from one goal to another. She considered this to show great progress. She noticed this not just in terms of learning but also in relation to play skills. She had also seen S in the class setting and stated that this gave her a clear picture of how he was being taught and in what context he was being taught, and this in turn helped her to see that all the components which she had listed as appropriate were in fact in place. She expressed the view, in the light of her knowledge of the school in St. Joseph's Newtownmountkennedy, that he would not have made the same gains or progress had been in that eclectic model of education, given the baseline from where he would have been starting, and the level of his challenging behaviour at that time. That behaviour if left undealt with would have prevented him from learning in the way he had at St. Catherine's under the exclusively behavioural model. She believes that the presence of a full-time behaviour analyst was essential for S's progress over that two year period, and that this level of progress was the sort of progress he would make at any exclusively ABA school, such as a CABAS school, and not simply St. Catherine's. She regards the education delivered exclusively through ABA as significantly more effective than that through the eclectic model at St. Joseph's Newtownmountkennedy, and this view is in relation to a wide variety of skills of which she gave details, including numbers, reading, writing, and play.

When she was asked whether she would rate his progress overall as poor, good, very good or excellent, she stated that she would consider his progress to have been very good. This answer coincided to that given by Ms. Sinnott to the same question, and she stated, when asked, that she had been unaware of what the latter's answer to it had been before she answered.

ABA as the only appropriate education model for children with autism

It is clear from Dr Healy's evidence that she is of the firm opinion that for all autistic children, regardless of where he or she might be on the autism spectrum, and regardless of what particular learning or other deficits which may be present, that the only educational provision which is appropriate is the exclusive ABA model such as that in CABAS, Cork or St. Catherine's. She stated that ABA is a suitable and appropriate model for S (T.23, Q.188). She believes that the TEACCH programme is unsuitable for S (T.23, Q. 192). There is no need to detail all the questioning in this regard. But one can refer by way of example to her answers to Mr McDonagh during her cross-examination which appear in T.24, Qs, 217-284, and my own attempt to summarise her position in relation to this following a protracted passage of cross-examination, and which appears just before T.24, Q.285. It would appear that her view is a fixed view gained not simply from her training but also her own study of the research, and is a view held in relation to all autistic children, and that in order to be of this view for all children it is unnecessary for her to refer to the psychological or other assessments which have been made in relation to a particular child, and unnecessary to consider what other placement, other than an exclusively ABA placement, may be available to that child in, for example, an autism specific class in a national school. It is an absolute view as to the appropriateness only of an exclusively ABA model of intervention. Nothing else can be considered as appropriate since the necessary supervision by a suitably qualified ABA analyst or consultant is absent, as would be also the necessary level of measurement which is a characteristic of such an ABA provision. Other provisions are considered by her to be detrimental to such children.

Mr McDonagh referred to the fact that in her report she had never stated that an eclectic programme could never be an appropriate model of educational provision for any autistic child. She confirmed that this was her view, and that it would be detrimental for S to move from his present ABA provision to such an eclectic programme, even where there was an ABA provision within such an eclectic provision (T.26, Q.258). She stated that there is no evidence to show that a child such as S should move from an ABA provision to an eclectic programme where outcomes have not been shown by measurement to be effective.

Mr McDonagh asked her to assume for the purpose of his questioning that no further funding would be available for S to remain at St. Catherine's and to say what decision should be made for S's further educational provision (T.27, Q.422). Her response was that he should continue to access an exclusively ABA programme, and that what was on offer at St. Joseph's Newtownmountkennedy, and by extension Templeraíne, was not going to be an appropriate education provision. But when pressed as to what her advice would be to S's parents in a situation where no such ABA provision was available, she stated:

"If you are asking me to make a choice between what is available, which to my knowledge is Newtownmountkennedy or Templeraíne, I would have to say, first of all, [S] would have to access a continued ABA education, delivered wherever. It will have to be a continued ABA education and the overriding methodology being that. If that is absolutely not available, then the next best option I can see is Newtownmountkennedy because at least there is an ABA component there being supervised by a qualified behaviour analyst. In Templeraíne as far as I can see there is no ABA consultant overseeing Applied Behaviour Analysis. So I don't know the extent of ABA or how it is being implemented there." (T.27, Q.426).

Her report on S

In order to prepare her assessment and report she read the reports on S prepared by Mr Albert Reid, Ms. Marie Clare Hughes, Ms. Clare Mangan, and Mr Alan Willis, as well as that of Ms. Catherine Milford, and Ms. Bridget Sinnott. She also read the reports from Beechpark Services. She does not consider it was incorrect to use the text of the Howard report in the way she did in preparing her report for this case. In order to ascertain what services were available for children in the south east of this country for children with autism she spoke to Ms. Sinnott only. She did not seek that information elsewhere. He referred her to a review of services for persons with autistic spectrum disorder in the eastern region which was prepared by the Eastern Region Health Authority (now subsumed into the HSE) in 2002 ("the Task Force Report"), and she conformed that she was familiar with this document. She was aware for example that in that report there is a reference to different available models of education, such as TEACCH, and ABA and other various services which are available.

Therapeutic services at St. Catherine's

She was able to conform that at St. Catherine's there are a number of service departments such as Speech and Language, Occupational Therapy, Nursing and Physiotherapy. However for the purpose of her report she did not make contact with any of these departments. She did not consider that the brief that she was given for the preparation of her report required that she should obtain the views of therapists in these departments.

Specifically in relation to S at St. Catherine's, Dr Healy had been informed by Ms. Sinnott when she spoke to her that S had not received any "hands on" speech and language therapy at the pre-school, and there were no records in that regard. In relation to occupational therapy, she stated that none was provided to S, apart from some which had been privately provided by the parents, as far as she was aware. She thought that S had availed of some nursing services there, but not on any regular basis. This information was obtained from Ms. Sinnott when she spoke to her about S.

Delivery of Therapies under ABA

She stated that where a therapist gives a direction for treatment for a child at St. Catherine's, these can be closely monitored by reference of ABA programmes in place for the child, and when the therapist returns in due course, progress can be monitored in order to assess what has happened and any necessary changes can be implemented. She is of the view that any therapy recommendations can be incorporated into the ABA programme, and she went on to conform that if such therapy recommendations are made these would not be countermanded by the Behaviour Analyst. She stated that each participant would be considered to be part of a team, and that there had to be one person who coordinated everything which is provided to the child. Progress would be reviewed as to the success or otherwise of outcomes following the particular interventions having been put in place.

She was asked by Mr McEnroy about her evidence that therapies must be delivered and can only be delivered appropriately under the methodology of ABA. She stated that she was not denying the role of therapists in the provision of interventions but was saying that ABA was the only proven effective treatment of children with autism, and that where therapies such as speech and language and occupational therapy was being implemented, these should be implemented through the use of ABA techniques, and that there are ABA strategies through which these therapies can be delivered through ABA so that the necessary measurement of effectiveness can be measured, and that there is research to show particular methods and tactics which are effective, and that the collection of data under ABA can be used to decide what needs to be changed from time to time.

Therapies at St. Joseph's Newtownmountkennedy

She stated that speech and language therapy is delivered at St. Joseph's once weekly on a one to one basis to some students and in a group situation to others, but that some students may access it only fortnightly. Prior to this the therapist would speak to the teacher, and the Special Needs Assistants would be shown how to follow up on the recommendations of the therapists; but she knows that records are not kept by the Special Needs Assistants and is unsure if the therapists concerned maintain records of their sessions. She gave evidence of what type of data would be kept under ABA methods to ensure that goals were identified in advance, that the way the learn units or discrete trial would be implemented was clearly set out, and that data would be kept to show whether the child had given correct or incorrect responses, so that all this could be later analysed for the purpose of seeing whether the child had achieved the desired goal of objective, and if anything needed to be altered in the future. She did not think that this sort of detailed measurement and analysis took place at St. Joseph's, and in fact had spoken to the speech and language therapist and occupational therapist only once for one hour in September 2005.

As far as occupational therapy is concerned, she is aware that the therapist makes recommendations for the child and that these are carried out by the Special needs Assistant, and that the school staff are consulted also. She says that the Special needs Assistants do not carry out measurement in relation to the delivery of therapies, as she has seen these therapies implemented at St. Joseph's, but is not aware of what records may be kept by the therapists. Mr McEnroy asked her why she had not spoken to the therapists concerned about this, given the importance which she attaches to measurement of progress. She stated that she had in fact spoken to the teachers about it and that her concerns had been taken on board, and she went on to say that in one particular data was being taken. She had not however spoken directly with the therapists but thought that the teacher may have done so. She explained that her visits to the school for three days each month did not coincide with the visits of the therapists. Mr McEnroy questioned her

at some length about why, if she was not happy with the way a therapist was delivering interventions to a particular child, she did not seek out the therapist and make her feelings known. Dr Healy stated that she spoke to the teacher because it was the teacher who had contacted her about it.

Dr. Ian Grey: Clinical Psychologist

He is a lecturer in Trinity College in psychology and specialist courses in the application of clinical psychology to developmental disorders and autism. He also has a research role there. In addition he holds a position with a disability service in Kildare, referred to as KARE. He has published widely during the past four years. He is a clinical psychologist, and not an educational psychologist, and he has developed an interest in behavioural analysis. Indeed, behavioural analysis formed a significant part of his doctoral thesis in 1994 at U.C.C.

He became a Board certified Behaviour Analyst in 2004. He achieved a further doctorate qualification from Trinity College in 2000, namely a Doctorate in Clinical Psychology. That thesis involved both his own research and the analysis of the research of others in the area of the cause s of behaviour in persons with intellectual disability.

Each thesis involved experimental research, and this research was published and he was asked to address conferences in relation to his work. Some of these conferences, but not all, were apparently organised by behaviour analysts. His education and clinical experience is not confined to behaviour analysis. In addition he was asked two years ago by the Department of Health to be part of a specialist committee looking into the establishment of recommendations for treatment and service provision for persons with intellectual disability and who exhibited what is referred to as challenging behaviours, and the relationship of that to mental health problems. That committee has by now concluded its work and made its recommendations. He holds a number of other positions, such as a member of the editorial board of the Journal of Intellectual Disabilities, as well as being a member of the Psychological Society of Ireland. He has also been a guest reviewer of articles in other journals, and a number of such articles have dealt with challenging behaviour. He is involved also in current research into the effectiveness of intensive ABA in Ireland for children with autism, and he is in the process of collecting data as part of that research.

His work with KARE involves working with persons who have significant challenging behaviours, and include children with autism. His particular involvement is with seven persons, four of whom have autism. The ages of these persons range from 11 to 24. It is a small tertiary level support service in that area where the local services cannot support these persons. KARE runs two schools in Kildare to which children with autism attend. Dr Grey stated to Mr McDonagh in his cross examination that he had been in only one of these schools, but in the other he was aware that there were two autism specific classes and while he was not sure about it he imagined that the methodology of education was an eclectic model.

He had worked also in Stewart's Hospital where there was a child with autism, and he was involved in a classroom context dealing with that child's challenging behaviours. The class is not an exclusively ABA class. He confirmed to Mr McDonagh that he was able to intervene in relation to these behaviours – which are at the extreme end apparently – albeit that he is only at the stage of carrying out a professional assessment, and has not yet put in place an actual programme.

He acts as a co-director of a course in ABA run on an extra-mural basis in Trinity College. Ms. Rita Honan is the Director of the course. He assists in the design of the course over the period of the course. No qualification is provided by Trinity College for that course, but he understands that Ms. Honan is trying to have the course recognised as a diploma course. On the other hand, the course can entitle a person who meets the criteria, including the supervision criteria, to sit the examination of the Behaviour Analysis Certification Board ("BACB") based in Florida. He described that body as that which sets the standards for practitioners working in the area of behaviour analysis.

The Trinity College course to which he referred is one which he described as being sanctioned by the Department of Education and Science. That is not strictly correct, but it appears that on the first such course which was run all of those attending the course, bar one, with him were national school teachers, whose fees for attending were paid by the Department. He believes that the Department recognized the need for teachers to have this sort of training.

I have not set out all of Dr Grey's credentials, but there is no doubt in my mind but that he is competent to express an expert view in relation to matters of which he gave evidence. This case is the first occasion on which he has been requested to give expert evidence in court.

Historical development of ABA

He believes from his researches that behaviour analysis was in fact applied to children with autism prior to the Lovaas study in 1987, but that it was an important study in that it was the first study to apply behavioural principles to a wide variety of behaviours either sequentially or simultaneously. He is conscious that the study was the subject of criticisms, namely in relation to the use of what are euphemistically referred to as "aversives" on the children, such as slapping, and secondly, in relation to claims made in terms of outcomes for a certain percentage (47%) of the children, namely that this percentage were unidentifiable from their mainstream peers. In fact the use of aversives, such as hitting the children were said by Lovaas to be vital to his research results. It follows therefore his success rate, even if true, could not be replicated in any group now.

In spite of these criticisms, he regards the study as important. He stated that within the American Psychological Association, there has been a distinct ABA division for the last twenty or thirty years. There is also within the Irish Psychological Society a distinct behavioural analysis division, albeit only very recently set up.

His view as to the effectiveness of ABA

He was asked what his view is in relation to the appropriateness of ABA for the education of children with autism. He responded by saying that his view is that it is a very effective method of educating children with autism.(T31, Q. 94). He believes that ABA is generally highly regarded by professionals, and that it is regarded as "a particularly effective model of educating children with autism" (T31, Q. 127) This view is based on his research and from attending at conferences. At a later point in his evidence (T.31, Q.332) he stated that "the model that is most appropriate based on research evidence is ABA". Specifically in relation to S, he stated that an "exclusive ABA approach is appropriate for S" and that "it is the approach that has shown significant substantial changes for S and for the family up to this point". (T31, Q.333)

At one part of his cross-examination of Dr Grey, Mr McDonagh referring to the claim by Prof. Lovaas of a 47% recovery rate for children on his study, asked Dr Grey would it be a legitimate for a person setting up an ABA school to tell parents of children with autism that there is a 47% chance of recovery for their child based on the results of that research. Dr Grey responded to this by saying that "what they should say based on the aggregate body of the information is that ABA is more effective across a wider range of problems associated with autism than any other approach." (T.32,Q. 229)

In Dr Grey's view, S should have received an exclusively ABA model of intervention from the time of his diagnosis.

He believes also that the CABAS model of education, that Prof. Greer developed, is also highly regarded. He referred also to the importance of ABA having been evaluated scientifically as an education methodology, because while autism is a clinical condition, there are education implications attached, and that a basic pre-requisite should be an evidence base for the clinical treatment of that condition, including education. He believes that if certain interventions have not been scientifically validated they should not be used, since it may be doing more harm than good. In relation to this point he was not aware of any scientific validation of what has been referred to in this case as Model A. Neither does he believe that Model A has been referred to in any paper outside this State. Neither has he seen it referred to in Irish journals.

He is however himself engaged at the moment in collecting data from two schools, one being the Red Door in Blackrock, Co. Dublin, and another in Roscommon which provides an eclectic model of educational provision. His purpose is to compare outcomes from each. Mr McDonagh suggested that therefore the question was still open as to whether there is an empirical basis for the claims made in respect of ABA over an eclectic model, and that he was trying to do this by comparing the outcomes of the Red Door children with those from the Roscommon school. Dr Grey did not agree that this necessarily followed in the way suggested, but he accepted that he had an open mind about what the result of the study would be. But his belief at this stage would be that the outcomes for the exclusively ABA children in the Red Door will be better than those for the eclectic group in Roscommon, and that this would be in line with the "majority of research" which he has read. It is, however, clear from his evidence, elicited during cross-examination, that he is unaware of what the particular eclectic model of education in the Roscommon school consists of. He does not know for example whether or to what extent ABA is part of or a core element in the model there. (T32,Q.274 et seq.) He had earlier stated that the problem with talking about something being eclectic is that it can mean any particular combination or constellation of just about anything" (T32,Q269) He was unable to say whether the Roscommon model was something like Model A comprising ABA as a core element, as he had never seen any of the IEPs for the children there. Nevertheless he stated that his "suspicion" was that the results of the study would show better outcomes for the Red Door ABA children. This was because of the amount of knowledge currently available regarding ABA models and eclectic models showing better outcomes for the former. Mr McDonagh suggested that it would be important to know exactly what was being provided in Roscommon before making any claims in respect of the results of his study. Dr Grey also confirmed that this particular study was the first such comparative study undertaken in an Irish context.

Stewart's Hospital class

Mr McDonagh during his cross-examination of Dr Grey referred to his role in the Stewart's Hospital class where he has involvement with a child who exhibits extreme challenging behaviour, and to which I have referred earlier. Mr McDonagh was anxious to know, given Dr Grey's view that ABA is the most effective educational intervention for children with autism, and the only one that has a recognised research base for effectiveness, whether he had yet informed the teacher in the class that he/she was not competent and does not have qualifications required in order to teach that child. He did not feel able to answer this question given that the child in question was not yet able to access education because of the extreme nature of her challenging behaviours. However, there are six other children with autism who are being taught in that class by a teacher, and Mr McDonagh asked Dr Grey whether those children were receiving adequate or appropriate education, to which Dr Grey replied that since he was dealing with just one child, he could not comment on the other six and that he had done no assessments of those children. He was pursued further on this point and was asked whether it would in fact be necessary to do an assessment of these children and what education they were receiving before he would be able to offer an opinion as to whether they were getting an appropriate education.. He stated that any professional offering an opinion about a child's education would have to carry out such an assessment in order to see if the child was benefiting. He went on to agree that it would not be good practice for a professional psychologist to offer a view in respect of a child who he/she has not been assessed and an educational setting which has not been assessed. Mr McDonagh then referred to the fact that there are about 160 autism classes around the country that are attached to national schools, and asked whether he felt able to offer a view as to the appropriateness of the education provision for the children attending these classes. Dr Grey stated in reply that he has seen no evidence in respect of outcomes for these classes, and that he could not comment on those children.

At a later part of his cross-examination, Mr McDonagh asked Dr Grey whether he would think that somebody who offered the view that intensive ABA was the only appropriate educational intervention for all the autistic children in this country was being very confident or inappropriately confident. Dr Grey commenced his reply by saying that if what was meant was that ABA was the method which was best supported and demonstrated best outcomes he would not consider that it was "going beyond the realms of confidence". (T32, Q. 594 et seq.)

More specifically, Mr McDonagh asked whether he thought that the intensive ABA which he saw at St. Catherine's is the only appropriate educational provision for all autistic children across the spectrum in this country (T32,Q.600 et seq.). Again, Dr Grey stated that it came down to what was meant by appropriate and that he equated appropriateness with effectiveness, and that ABA was associated with best outcomes. Mr McDonagh asked him would he go further than that and say that it was the only appropriate educational provision for such children. After some skirting around the question, Mr McDonagh asked it differently, by asking whether Dr Grey believed that the thousands of autistic children are getting ineffective educational provision, without having assessed those children or knowing anything about them or what is being provided for them. Dr Grey stated that he could not go beyond the research, and whether they were getting an ineffective intervention was an empirical question, and that he would need to find out more about what they were getting. (T32,Q607)

ABA training

He believes that extensive training is required in order to design and deliver an ABA programme, as well as supervision, and he believes that the standards set by the Florida Board are minimum requirements to practice ABA effectively.(T31; Qs.150-152) This certification has been in existence for only a few years.

Data collection in ABA

The collection and analysis of data on a child's progress in school is fundamental to ABA according to Dr Grey, since decisions which are made on what is working and what is not are based on that data. It is the data which will indicate in a scientific way whether or what progress is being made. In fact, he stated that without the collection of data, any intervention could not be described as ABA, and that without data one cannot conduct any proper analysis of whether an intervention is successful or not.(T.31, Q.367 et seq.)

Model A

First of all, Dr Grey was referred to certain clinical practice guidelines published by the British Psychological Society in 2004 in relation to the assessment and treatment of challenging behaviour. These guidelines set out five main components in the process which led to those guidelines being drawn up. He agrees that these components are a necessary pre-requisite to the preparation of guidelines and stated that he did not believe that Model A had gone through the same process of development and that it should have, since interventions to remediate the deficits associated with autism should be scientifically validated. This lack of scientific validation seriously undermines Model A in his opinion. (T31,Q.177)

Mr O'Moore then brought Dr Grey through the text of the document described as Model A. Dr Grey expressed in a number of respects how there was a lack of precision and specificity in the document, for example, where the document refers to ABA as a core element in the programme "in some cases" but without saying what those cases might be. Another example would be where the document refers to the team of personnel who would be involved in the preparation of an Individual Education Plan (IEP) for the child it refers to teachers, therapists, educational psychologist "and other professionals". Again he did not know what was meant by "other professionals" but noticed that there was no specific reference to a behaviour analyst, and that the involvement of an ABA qualified person is essential where ABA is to be part of the child's programme.

He is critical of Model A as an eclectic approach for the very reason that something eclectic is difficult to define since it can refer to any number of different approaches or combination of approaches. He was critical of the fact that the Model A document referred to ABA as a core element in some cases, but that in other cases ABA may be a smaller element. He could not see any circumstances in which ABA should be there as a small element, since the research evidence, in his view, confirms that "high intensity ABA is more effective than low intensity ABA or ABA that is mixed or delivered in an eclectic fashion" (T.31,Q.193) The intensity to which he was referring was in terms of number of hours of ABA.

He was also critical to the references to TEACCH and PECS as being also core elements, since he does not believe that the research establishes the effectiveness of TEACCH over ABA, and he is of the view that PECS is in fact applied behaviour analysis, and he finds its use in an eclectic programme to be strange, since its use is dependent on a knowledge and understanding of ABA. He is also unclear from reading Model A whether PECS would be used in all cases as a core element or whether it might be used in some cases.

He was critical also of the lack of clarity about what training the person delivering the ABA element of the programme would have received, since Model A simply states that "the class teacher would receive ABA training prior to taking responsibility for the class". He thinks that the criteria for such training should be clearly set out in order to ensure that the person concerned has the necessary knowledge and experience.

He was critical also about the way in which ABA would be supervised under this Model, because while it specifies that "there will be advice and supervision from an ABA specialist", it does not define what qualifications and experience such a specialist would have, and also to the fact that under this model, the ABA element would be decreased over time. He is of the view that where there is not adequate and consistent and regular supervision, a phenomenon which he called "procedural drift" occurs, which means that the techniques of ABA cease to be implemented correctly. (T 31, Q.217-218)

In relation to the "Training" referred to in Model A for the Class Teacher and the Special Needs Assistant, he is again critical of the lack of specificity as to what that training would involve. His view is that only a qualification to Associate level from the Florida Board is sufficient for a class teacher, and he believes that there is only one such person here with such a qualification. From what he knows about the qualifications of Ms. Sinnott and those others in charge of S in St. Catherine's, he is happy that they are suitably qualified to deliver an ABA programme.

He has a concern also that Model A states that it is the Class Teacher who will design the child's IEP, and that this would then be reviewed half-yearly in conjunction with parents and those involved in the delivery of the programme. His view, as given in answer to Mr O'Moore in his direct examination, is that the ABA specialist should have a significant input at the design stage and not simply at the review stage, since a behaviour assessment would form a major part of what should be in the IEP. He went into considerable as to his concerns about the absence of the ABA specialist from the design of the IEP and his reasons for them. (T31, Qs. 270; and 275-279) His readiness to answer to this question from Mr O'Moore in the way he did without any apparent reluctance or difficulty, is in stark contrast to the manner in which he responded to the same or similar questions put to him by Mr McDonagh during cross-examination on some days later (T.34, Qs.30-53) where, it seemed to me, he went to extraordinary lengths to avoid answering for Mr McDonagh the very question which he had answered without difficulty for Mr O'Moore. It was as if he felt, at all costs, that no question asked by Mr McDonagh should be answered if to do so might indicate any willingness to contemplate Model A or any part of it as an appropriate provision. I have to say that I found this part of his evidence, and indeed some others when the same difficulty seemed to present itself to Dr Grey, indicative of a certain lack of objectivity on his part in his capacity as an expert witness.

Without going into them in further detail, it is fair to say that his concerns and criticisms, as expressed in his answers to Mr O'Moore during direct examination, are about the vagueness of the Model as documented, the lack of training for those involved in the ABA element of the model, concerns over the design of the IEP, and in a general way that the research shows that outcomes for children in an intensive ABAS programme are greater than for those on an eclectic model of provision such as Model A. He also feels very strongly that it is important that the parents' of the child are supportive of and have confidence in the interventions of the child given the impact of matters such as challenging behaviour and behaviour generally on family life at home. He believes that the importance of parental involvement is well recognised in the research literature, and that without that confidence and support, the effectiveness of any programme for the child will be greatly reduced. In this context also he was critical of what Model A provides in relation to the parents' contact with the teacher. Model A states that contact with parents can be organised by daily feedback in relation to the child's target sheets, a home school diary where successes or other notable events are recorded, and a review of the IEP at half term meetings. He feels that this is not adequate, and not flexible enough to enable early intervention to occur in relation to some problem which may be occurring either at home or in school. In fact he feels that every week or possibly two weeks there should be a meeting between the parents and the person responsible for delivering the programme in the school (T.31, Qs. 312-314). He also believes that parents should have access to the classroom.

In relation to the Annual Review referred to in Model A, Dr Grey has concerns that it does not refer to any parental involvement in this review, but instead says that it will be convened by the Class Teacher and that it will involve "more detailed professional discussion". He regards parental involvement in the Annual Review as being fundamental, since parents need to be constantly involved.

He also believes that the parents themselves should be involved in the decision as to what Model of provision, and as far as he can see, there is no provision for parental involvement in any decision as to whether a child goes onto Model A, Model B or Model C, and he can see no drawback in any such involvement.

He was cross-examined at great length and in great detail by Mr McDonagh about the Model A framework and his concerns and objections to it as stated by him during his direct examination, and which I have simply summarised above. It is unnecessary to set out the detail of that cross-examination, save to say that that he did not give ground on any of the concerns and objections which he stated in his direct examination.

Early Intervention

He states that the consensus view among professionals is that early intervention achieves best outcomes, and that it should occur as soon as possible upon a diagnosis of autism being made. He later explained that where intervention is delayed the child is actually

losing learning time, and that the particular deficits which the child has continue and consolidate. In this regard he explained that when a child exhibits challenging behaviour it is very often because there is an absence of expressive language, and therefore the longer that deficit is left unaddressed, the greater the chance that the child will become predisposed to challenging behaviour problems, and that these can lead to self-injury and injury to others. A delay in intervention can lead also to the development in what are referred to as "stereotypical behaviours" leading to further exclusion. (T.31, Q.335 et seq.)

I have already referred to Dr Grey's view that S should have received an exclusively ABA model of intervention from the time of his diagnosis. He believes that a suitable ABA home programme should and could have been put in place for these parents after diagnosis. He has stated that if that had happened, his receptive language and expressive language would have improved, his challenging behaviours might either not have happened at all or, if they did happen, would have been of less intensity. He also believes that what are called "imitation skills and abilities" would have improved, as well as his tolerance for delay and change. In all these matters he believes that the level of improvement would have been significant and not simply marginal (T.31, Q.345-346), and that his learning abilities have been impaired "to a high degree" (T32, Q.80-81)

St Catherine's

Dr Grey visited St. Catherine's on the 13th February 2004 and discussed S with Ms. Sinnott the ABA Director there. He saw S's file also. His purpose there was to determine the type and quality of the ABA programme which S was receiving there and to review his progress. He described that progress as very substantial, and this view was based not just on his school visit but also on his conversation with S's parents. He had seen S both at home and at the school for a total of about four hours.

During his evidence he was shown a grid sheet prepared by Ms. Sinnott, and about which she gave evidence, showing his progress in a range of areas. He is of the view that the reason for this great progress is the intensive level of ABA to which he has been exposed and its generalisation into the home setting. Given those rates of progress from the time interventions were put in place, he is of the view that if they had been in place from the time of diagnosis, he would have made even better and substantial progress than that shown to date across all domains, since his progress to date shows a responsiveness to the type of intervention which is in place. (T31, Q.352) He does not believe that such progress would have been achieved under a programme such as Model A.

He regards the ABA programme in St. Catherine's as being of high quality.

What is ABA

During his cross-examination, Mr McDonagh asked Dr Grey to describe what was actually done with a child who was receiving 30 -40 hours of ABA in a school setting. In response Dr Grey asked whether he was asking about a specific ABA programme, to which Mr McDonagh responded by asking whether his answer would depend on the place and the programme. Dr Grey stated that it depends on the person who is constructing the IEP for the child based on ABA, and that the child would receive ABA applied to whatever was called for in the IEP. He stated that discrete trial training would be one intervention, and that incidental teaching would be another, and in for example a CABAS school there are what he termed "learn units" as another intervention. He referred also to a number of techniques of ABA such as "the principles of reinforcement, discrimination training, imitation, stimulus control and generalisation." Mr McDonagh asked him how ABA deals with imitation with a child compared to other models of intervention, given that imitation skills are important for every child. Dr Grey referred to the so-called three term contingency" of discrete trial training as what would be done (T32, Q. 465 et seq). Mr McDonagh asked whether ABA boils down to discrete trial methodology. Dr Grey stated that it was the primary ABA method but that it was not all that ABA was. Mr McDonagh asked whether there was anything apart from the three term contingency (involved in learn units, discrete trial training). Dr Grey stated that the primary method of intervention in ABA is the application of this three term contingency of which discrete trial training was one example, and that it could be applied to any specific behaviour (T32, Q. 474-477).

Changing from ABA to Model A

Dr Grey believes, given S's previous history of challenging behaviour (including head-banging) it would be no more than about six weeks before that would recur if S is to now be taken out of his exclusive ABA environment in St. Catherine's and put into another school under a model such as Model A where there would be an unspecified amount of ABA delivered by persons who have an unspecified degree of training in ABA to deal with these behaviours. The reason for this view is that it was the behavioural interventions in the school setting which were generalised into the home setting which were responsible for the reduction in challenging behaviours, and for that decrease to be maintained, the behavioural interventions need to remain, since these behaviours are not like a headache for which one takes a pill and it disappears. Challenging behaviours need to be constantly addressed because without that they will simply return (T.31, Q.355).

He made the point also that the parents are accustomed to having an ABA environment at home for S, and that he and they are familiar with that, and that if he is now to move out of an ABA school environment, there will be a conflict between what is done in school and what is done at home, and that this will decrease the effectiveness of the ABA being done at home.

He believes there is a high likelihood that moving him to an eclectic model such as Model A would be "quite harmful" (T32, Q.30-31).

Mr McDonagh asked Dr Grey to offer a view as to whether, if what is provided by way of an eclectic provision at the moment in St. Joseph's National School in Newtownmountkennedy, was to be replicated for S in St. Joseph's National School in Templarney, it would be beneficial for S. It had been the evidence that a Model A eclectic model was provided in Newtownmountkennedy, and that the ABA element of that provision was supervised by Dr Olive Healy, a suitably qualified ABA person. There was difficulty for Dr Grey answering this question and it took some time to reach the point where he stated that if the provision for S was to be derived from Model A he did not think that it would be "effective" for S. This is of course completely consistent with his view that nothing short of an exclusive ABA intensive provision can be effective and, by extension, appropriate. (T.34, Qs. 140 – 155) At a later point in his cross-examination he stated that his clinical opinion was that Model A will not be effective for challenging behaviour (T34, Q.279).

Integration objective

Mr McDonagh asked Dr Grey if one of the objectives of an intensive ABA provision was to assist the child to learn skills necessary to enable that child to access contact with normally developing children and a mainstream setting. Dr Grey stated that this would depend on the development of the child, and that there would be no point in placing a child in a mainstream setting if the child was not going to benefit from doing so, and that it could be counter-productive. When pressed as to whether at least it was an aim of ABA to achieve this, Dr Grey stated that the aim of an intensive ABA programme is to remedy as much as possible for the child the triad of impairments which the autistic child has. Mr McDonagh suggested then that the aim was to remedy those deficits so that ultimately at an appropriate time, the child might, at first perhaps on a temporary basis, access contact with his mainstream peers, and gradually then to a greater extent. However, Dr Grey stated in reply that this was not how ABA would approach this situation. Mr McDonagh then approached the question differently by asking whether Dr Grey thought that S should remain in an exclusively ABA programme until he is eighteen years of age. Dr Grey said that he was not necessarily saying that, and that the model would be

implemented only for as long as the model was needed. He stated that there were such children who had gone on to mainstream schools. So, Mr McDonagh asked him if he therefore regarded it as an aim of ABA "things going well" to get the child to mainstream. Unfortunately Dr Grey had a problem with the phrase "things going well" and said that it would depend on what that meant, since it could be interpreted differently by different people, and that the question boiled down to whether the child had the requisite skills. This passage of cross-examination again, as it did with the question as to whether an ABA supervisor should be present when the child's IEP was being designed, lasted through a considerable number of questions in an attempt to get Dr Grey to say if it was at least an aim of an exclusively ABA programme to equip the child for mainstream. As on the last occasion, he could not commit himself to a direct answer to that direct question, and I cannot understand his reluctance to say that it was not an aim, if that be the case, or if it is an aim, if that be the case. I would have thought that it must be an aim of any intervention for a child with autism to address the deficits as far as possible, and with the aim or objective that at some appropriate time the child might be able to be weaned into a mainstream setting. But while Dr Grey was able to say that the aim was to address the deficits of the child in order to equip the child to function as normally as possible, he was quite unable to make the small leap from that to saying that an objective was to enable the child to go to mainstream (T34,Qs.180-206). Again, I have to say that I find that inability speaks to his overall objectivity, just as I did in relation to the involvement of the ABA supervisor in the design of an IEP.

When being asked about what planning might be in place as to specific skills S would need to move from St. Catherine's, Dr Grey stated that he was unaware as to whether or not any meeting as such had taken place in that regard, but from what he had seen when he observed S at St. Catherine's on the day he visited, he feels that S is working, through the programmes he is working through, towards being able to move elsewhere. (T34,Q204-206)

Mr McDonagh asked Dr Grey to assume for a moment that this Court was intending to make an order requiring the Minister for Education and Science to fund the sort of facility at St. Catherine's which he was advocating, and to state in that imaginary context for how long he would recommend that S would stay there. Dr Grey stated that it would "depend on whether S had been taught and has maintained the skills necessary in order to move on".(T34,Q 309-.312) When pressed to say whether it might be six months, a year, five years etc. Dr Grey stated that he could not answer that, even as a matter of likelihood or probability since it would depend on the skills S might have. He simply was unable to offer an opinion or view as to when S might be in a position to move to mainstream, even on an assumption that the progress reported to date by Ms. Sinnott would be maintained. (T34, Qs. 315-317)

But curiously he stated in this answer: "It is impossible to say when he is going to move on. But it is absolutely where it is going, and the system around him is enabling that to take place at some point in the future.....it depends on his learning." (T34,Q. 314). I say "curiously" because it adds to my puzzlement as to the lengths which Dr Grey went to in order to avoid confirming to Mr McDonagh, during the questioning already referred to, that it was at least an aim of ABA that the child would move into a mainstream environment.

Evidence on behalf of "the State defendants"

Ms. Marie-Louise Hughes

Ms. Hughes is a Senior Educational Psychologist and Manager of the autism advisory and intervention service of the Southern Education and Library Board in Northern Ireland. She holds a Social Science degree in psychology, a Graduate Certificate in Education, and a Masters degree in developmental and educational psychology. Neither of these degrees involved autism to any significant extent. She made the point that at the time she pursued these studies not as much was known about autism as has become known in the past thirty years.

She is currently pursuing a further Masters degree in Autism Spectrum Disorder at Queen's University, Belfast. She has worked as a Special Needs Teacher in a primary school in 1980 and from 1981 she was employed as an Educational Psychologist by the Southern Education and Library Board already referred to, and which covers an area involving about 73,000 pupils. Her role as Educational Psychologist involves the assessment of children, advice on special needs and how those needs can be met, and where there are gaps in provision, how those gaps can be met. These children fall into a broad range of special needs from the most gifted to those with significant needs including children with autism.

In 2001 she was appointed as a Specialist Educational Psychologist for Autism Spectrum Disorder. In that role she spends two days per week taking part in multi-disciplinary assessments to diagnose children with autism; but her role also involves advising the Board on services which need to be improved, including the provision of autism specific classes within mainstream schools, as well as such classes in special schools for children with more severe needs.

She gave details also of several professional bodies to which she is affiliated.

In 2004 she was appointed as Senior Specialist Educational Psychologist for autism spectrum disorders, and Manager of the Autism Advisory and Intervention Service of the Board. She leads a team of eleven people there.

In 2004 she was asked by the Department of Education and Science here to carry out an assessment of S's needs and to make recommendations as to how best to meet those needs. She has prepared a report which has already been referred to in evidence, but to which I shall return in due course.

Autism

She referred to the triad of impairments associated with a diagnosis of autism and which has already been referred to, namely impairments in relation to social communication, social integration and the tendency to be rigid and inflexible in their behaviours and thought processes. She stated that these three features must be present before a diagnosis of autism can be made (T.43, Qs. 55-57). She described it as being a neurological disorder of genetic origin and which is life-long in the sense that, while it can be managed effectively, it can never be cured as such.

She stated that a child diagnosed with autism will often also have a learning difficulty of some degree, ranging from mild to severe. Some challenging behaviours can be another feature with children with autism, resulting from their communication and socialisation impairments, and in about 10-15% of such children these behaviours can be severe (T.43, Q. 68)

Her training in Applied Behavioural Analysis

She has completed a 5 module on-line course in ABA which is called the Profexel Course which covers many of the main principles and theory of ABA, and she has done a four day course from the Institute of Applied Behavioural Analysis. She is also familiar with the research literature and peer review literature relating to ABA.

Her other autism specific training

She has completed courses in PECS (Picture Exchange) as well as a five day TEACCH course in Belfast, and a course in inter-active play which she described as a relationship based approach to children with autism.

ABA

Ms. Hughes stated that ABA is not a unified concept, and that she cannot find any agreement in terms of how it is defined. She views it as the application of a system for observing, understanding and managing behaviour, and states that it is sometimes more narrowly defined as 'operant conditioning' related to consequences of behaviour, and more broadly in terms of systems for bringing about systemic change, as opposed to focussing on consequences.(T.43, Q.78-79)

She accepted, of course, in cross-examination that the ABA experts called to give evidence of ABA on behalf of the plaintiff were more qualified than she is to speak about the content of ABA and how it is actually delivered (T.46. Q.243). She accepts also that it is an appropriate provision within an overall eclectic approach to provision, and that view is based on her professional experience rather than by reference to any particular piece of research.. She believes that the research is unclear about its effectiveness even as part of an eclectic approach, and referred to the Howard study in this context, although some children were shown to have done very well (T.46. Qs.250-251) She accepted that there was no research on which to rely for the eclectic model of provision since there are so many variables involved in carrying out a study of eclectic models, but that each component of the eclectic model, such as PECS and TEACCH has research evidence to support effectiveness. She believes that one must look at the individual child in order to assess the effectiveness of what is provided within a combined or eclectic approach (T.46. Q.255-256) Despite her reference to the Howard report concluding that some children benefited from an eclectic approach, she accepts that it is not research which supports the view that an eclectic model is a superior model to an exclusive ABA model. But it is nevertheless her view, and according to her the view also of the consensus view of other educational psychologists and others that an eclectic approach is the better approach (T.46, Q.262-264).

Ms. Hughes report on S

For the purpose of preparing her report she was provided with various reports already available, and she had a consultation with S's parents which took place on the 16th October 2004. She also had an opportunity of observing and working with S in his home. She was provided with relevant background information and history as well as information as to the courses which the parents had attended. In her report she referred to the recommendations contained in Dr Reid's report for 30-40 hours of intensive ABA per week, and says that she feels that this was too much for a child of aged three, and that she would be in favour of interventions of a less directive nature which he had not referred to such as TEACCH and some play-based approaches including 'floor time'. These would be less adult led and more child led interventions. She was of the view that these would cause less anxiety for such a young child and would focus not just on skills but also on broader emotional, social and communication needs (Day 43, Qs. 26-27)

Dr Reid in his report apparently had relied on the Luiselli et al study in 2000 for his recommendation of 30-40 hours of intensive ABA. In her report Ms. Hughes had questioned his reliance on that study for his recommendation because in her view the authors had found that the children's progress was in fact "independent of the number of hours of in-house programming that occurred". Mr Holland asked her about this when cross-examining her (T.53. Qs. 49 et seq.). I have considered that passage of the evidence. I do not believe that it shows any reasonable basis for saying that she is not entitled to professionally disagree with Dr. Reid's reliance on that study. She takes a different view, and professionals may disagree.

Benefits of TEACCH for S

She described TEACCH as a system of teaching which begins with structure, sometimes referred to as structured teaching, where the environment is divided into sections – a section of one to one learning, a section for lunch time, a section for group activity. This, according to Ms. Hughes creates a structured environment where the child has a sense of where things are and where to go. It gives predictability to the child's environment. This TEACCH structure includes what is called 'visual scheduling' by which the child can see by reference to pictures what he is to be engaged upon throughout his school day. She described how this plays to the child's strengths rather than to his deficits in terms of language and communication (T.43. Q.30) She referred to TEACCH as an internationally acclaimed autism approach (T.43. Q.28), and that it is used in over thirty countries, including the United Kingdom and, as far as she knows, Ireland, and is professionally endorsed.

Interactive Play

She referred to this as a child-led interaction where communication is facilitated through play, as opposed to the adult led approach of discrete trial instruction found in ABA. Floor time is similar in nature.

In her evidence and as referred to in her report, she stated that she had spoken to Ms. Sinnott about what was in place for S at St. Catherine's and that elements of TEACCH, such as a visual timetable, and Interactive Play are used there, including Floor Time, and that Ms. Sinnott had stated that S responded well to these elements (T.43. Q.38)

In her report she refers also to various research studies as to the relationship between intensity of provision with outcomes, and in her report she expressed the view that "there is still a limited knowledge about comparative and combined efficacy of the various treatment approaches" and that it would be potentially disadvantageous to have a single approach for S. In relation to ABA her view is that for some children it works well, others do less well, and that some others do not do at all (T.43. Q.45-46).

St. Joseph's Templeraíne National School

The teaching staff

In her report Ms. Hughes stated that she had spoken to Ms. Joyce the teacher in this school, who has informed her that there was an autism specific class at the school where there was one teacher who was Montessori trained as well as having a diploma in special education and had undertaken as part of her continuing professional development a range of courses including PECS and ABA. It is stated also that further professional development in TEACCH was planned. In addition there is a Special needs Assistant, one full-time pupil and two part-time pupils. She reported also on the fact that apart from the general curriculum, an IEP is prepared and reviewed for each child, and which will focus on "core priority areas as agreed with parents", and that the class receives regular support from Beechpark Services including by way of advice and support from a psychologist and occupational therapist.

S's autism diagnosis

Ms. Hughes described the Childhood Autism Rating Scale ('CARS') test as a diagnostic screening and classification for showing where on the spectrum a particular child may be. There are three categories. The mild to moderate range includes children with a rating score of between 30 and 37; whereas the severe range applies to scores between 37 and 60. A score below 30 is not autistic. S's score is 38.5, and she stated that this score therefore places him "at the lower end of the severe and the upper end of the mild to moderate" (T.43. Q.52). Later she stated that this meant that "his autism is quite conspicuous" (T.46. Q.83), whereas where a child has mild autism one would need to look closely and observe for long periods in order to see the subtleties of the autism.

In her report, which she spoke to in her evidence, she sets out a summary of the CARS testing under a number of headings, namely relating to people, eye contact, imitation, emotional response, body use, object use, adaption to change, visual response, listening response, fear or nervousness, verbal and non-verbal communication.

She dealt also with his sensory issues, and having spoken with S's mother has stated that he has a high pain threshold, meaning that he can take a lot of pain before he reacts to it, and in addition is particularly sensitive to touch around his head..

This autism score is distinct from his level of learning disability which is measured separately.

Mr Holland in his cross-examination asked her about her conclusion that S's CARS score of 38.5 places him "at the lower end of the severe and the upper end of the mild to moderate" (T.43. Q.52) as set out above, and she accepted, when it was put to her that there is nothing in the CARS Test to indicate anything other than that S was in the 'severe' range on the spectrum, that there is nothing in the result which suggested that he was in the 'moderate' or 'mild to moderate' range. She agreed that this is so (T.50. Qs. 10-12). But she went on to say that it is wrong to rely just on the classification system⁶⁸, particularly where there is disagreement about the exact point at which S fell within any of the categories between the parents and herself. She said that there had been some debate around S's precise scores within each of the categories, and that she had to use her clinical judgment in order to properly represent fairly his degree of autism. She stated that in her multi-disciplinary clinic they do not stick rigidly to scores, and that it can be the case that a child might achieve a score of less than 30 which would rule out a diagnosis of autism, but that their clinical judgment may be that the child is mildly autistic, and it can happen the other way as well, and that they exercise a clinical judgment. She said that none of the tests are absolute (T.50. Q.13)

Mr Holland put it to her that on page 9 of her report she described him as being at the lower end of severely autistic, and that at page 15 he is described as a moderately severely autistic boy. But she said that there is no distinction other than in the language used (T.50. Q.14). She formed the opinion of moderate to severe given that he was close to the cut-off point and by reason of her clinical judgment, and that at the end of the day it is a matter of clinical judgment (T.50. Q. 23), and she stated later that the CARRS Test was designed to be used with clinical judgment (T.50. Q. 68)

Ms. Hughes also stated that with the progress made by S since her assessment, including the reduction in his challenging behaviours and since he had grown older, it was possible also that his autism would have improved, and she has never seen a child who has disimproved (T.50. Qs. 70-74).

Mr Holland referred to the fact that if S was found to be in the 'severe' category by a score of 38.5, as opposed to mild to moderate range, it would take S outside the category of child for whom Model A is appropriate as an educational provision. He referred to the specification in Model A that "in the main the degree of autism is also likely to be in the mild to moderate range...". Ms Hughes replied that Model A does not take account simply of the degree of autism, and that it takes account of the whole picture, which would include the child's abilities (T.50. Qs. 35-36) She completely rejects any suggestion that she may have altered her report so that S would be seen to fit a Model A provision. She stated also that her recommendation of Model A was based on a broad assessment of his autism, his intellectual abilities, his skills and of his need for mainstream placement (T.50.Q. 52).

Dr Mitchell Fleming's comments on CARS

I think that it is useful and appropriate at this stage to refer to some of the evidence given by Dr Mitchell Fleming in relation to the CARS testing system, given its relevance to what Ms. Hughes has stated about its use in conjunction with clinical judgment. He stated in answer to Mr Holland's cross-examination in relation to Ms. Hughes' report of the 20th October 2004 that CARS uses three categories of autism – mild, mild/moderate, or severe ranges of autism. But he stated also that most people working in this area recognise that the display of autistic behaviours which contribute to the score on the CARS is something which can vary. He gave as an example a child whom he had worked, who that month was functioning at the mild end of the spectrum, but who next month might be seen as functioning at the severe end of the spectrum, if he/she was upset at the time. He said that, accordingly, the whole rating scale for autism needs to be approached with caution, because it is in the nature of autism that that people can express autistic behaviours "at different ranges at different times". He went on to say that the fact that Ms. Hughes makes reference to the fact that S is functioning within the severe range must be read with great caution, where she is stating that he is in the borderline area between mild/moderate and severe (T.61, Q.57).

Dr Fleming went on to say that the completion of the CARS is based on impressions which are got from observing a child at a point in time, and that if the same child was to come back the next day, a different impression might be obtained which would cause the score of the previous day to vary (T.61, T. 58). He described CARS also as being not a very precise instrument and that scores can move up or down (T.61, Q.63). Dr Fleming is of the view that Mr Holland was placing too much credence or reliance on the CARS score of 38. 5 in order to place him in the severe range of autism, rather than in the moderate range. He regards the main question to be whether or not the child is on the autism spectrum or not, and not where on the spectrum the child's degree of autism places him/her.

He stated also that as far as Beechpark Services is concerned, once a child is on the autism spectrum at all that child is eligible for services from Beechpark if the child also has a mild general learning disability. In other words, whether the child is at the mildly autistic range or the severely autistic point on the spectrum does not matter as far as educational services are concerned. It is the degree of intellectual disability which is relevant to whether the child is eligible for education services, since Beechpark Services provides such services only for children with a mild general learning disability, not to be confused with a mild degree of autism. In other words the degree of autism as such is of no relevance with regard to decisions on educational placement. It is only the degree of intellectual or general learning disability which is relevant to that (T.61, Q.68). He stated further that it would be quite wrong for Beechpark Services to say, based on one day's CARS testing where he/she was found to be mildly autistic, that the child is entitled to services, and then, based on testing done the following day when he was more upset and came within a more severe range, that child is not entitled to services (T.61, Q. 74).

S's Learning disability diagnosis

Psychometric Testing

In her report she sets out a number of different testing methods which she used when carrying out her psychometric testing of S. These were:

Ability testing – Leiter International Performance Scale – Revised (1979). There was a revision of the Leiter manual in 1979 and a later revision of the Leiter test in 1997. She chose to use the earlier test method (one developed in 1948 by Leiter) because it was in her view a more appropriate test for S, and easier to use with him. The reason for this was his difficulties with verbal communication, since the test is entirely non-verbal requiring no oral instruction. She says that S's mother was present when this test was applied

and understood why she was using the older version of the test (T.51. Q.8).

Her conclusion in relation to this test, which is a non-verbal means of assessing general intelligence, that S at aged 4 years and 4 months had a mental age of 5 years, and that "it is probable that his non-verbal IQ score places him within the range indicating average/high average ability".

Mr Holland explored with her why she had chosen to use the older model of the test and suggested that it was outdated, and that the Leiter organisation had themselves pointed to deficiencies in the older test. He suggested that if she had used the 1997 version she would have been able to take on board these deficiencies. But she replied that she has no doubt that she would not have been able to carry out the 1997 version of the test with S, since it takes between an hour and an hour and a half to complete, whereas the older version took her half an hour (T.51. Q.81)

Developmental Testing – Griffith Mental Development Scales – Extended Revision (GMDS-ER) 2004

This test assesses the mental development of young children by direct observation, testing and reports from caregivers, and measures several avenues of learning. In relation to Large Motor Skills, she reported that all his early milestones had been reached at expected times and that there are no concerns about his development in this area. In relation to his personal skills, such as dressing and undressing, drinking from a glass, opening doors, putting away toys, stating his age, she placed him at age 2 years and 8 months. In this regard she noted also that he has a poor sense of danger both inside and outside the home. In relation to communication skills he was estimated to be at age 18 months to 2 years. Regarding hand-eye co-ordination he was estimated to be at age 3 years and 6 months. In relation to what are called 'performance skills', which included tasks such as completing standard four-hole boards, six-hole boards, and eleven hole boards, as well as returning bricks to a box and assembling bricks by colour, she estimates that he was at age 3 years and 10 months.

Her summary of this test was that S's developmental profile is typical of a child with autism in that he had higher performance and visual scores, and lower scores in the language and social domains. She added that because there was a wide dispersion between these developmental scores she did not recommend to attempt to obtain a 'General Developmental Quotient for S. In her evidence she explained that to do so by averaging out these scores in all areas would not be appropriate for S because of the large disparities appearing and the average arrived at would fail to do justice to what are his areas of strength.

Mr Holland questioned Ms. Hughes about why she had not tested S's adaptive skills by using the Vineland test used by Mr Willis. There was much question and answer about this which I do not propose to detail, but at the end of the day, Ms. Hughes stated that she preferred to use the Griffiths test because with it information is obtained from the parents and from direct participation and contact with the child, whereas the Vineland is based on interview with the parents and not on contact with the child (T.50. Q. 175). She also stated that in fact whether one uses the Griffiths or the Vineland there is no difference in the result obtained so far as assessing the child's adaptive skills (T.50. Q.181) Mr Holland referred to Prof Carr's book and to the fact that he recommends the Vineland for testing adaptive skills, and Ms. Hughes replied that she does not believe that she is wrong to use the Griffiths test and that it is simply a matter of professional disagreement, and that it is common practice among professionals to use the Griffiths test.

I should maybe at this point refer to a question put to Ms. Emer Ring by Mr Holland on Day 47 which is at 193. He asked whether an assessment of learning disability of a child with autism which did not take account of the child's difficulties with adaptive behaviour would be likely to be deficient. She agreed that it would be deficient.

Language Testing – British Picture Vocabulary Scale-Second Edition (BPVS-II)

Under this test, she concluded that his receptive vocabulary for Standard English was that of a child of aged 2 years and 4 months. The standard score in this test is 40 and S's raw score of 5 placed him in the 1st percentile of children. In other words 99% of children of his age would do better. When cross-examined in relation to this ranking by Mr Holland, she accepted that she had made a mistake in this result, and that instead of him being at 1%, he was in fact worse, since the correct place was 0.1%. In other words he was worse than she had reported. She stated in her evidence that while she had obviously made such an error it did not alter her overall view as to his abilities (T.50. Q. 257).

Assessment of Play – Lowe and Costello Symbolic Play Test

In her report she described S's co-operation as being good for the initial period. He demonstrated that he could concentrate on tasks for up to 30 minutes, although some challenging behaviours were also noted such as kicking, throwing objects and punching the examiner. He also banged the table. He was difficult to engage in verbal activities and apparently protested by not responding or screeching. She stated also that he often focussed on details of visual materials and was difficult to re-direct. The purpose of this test was stated to be in order to evaluate his relational play (using objects with each other appropriately, such as attaching a tractor to a trailer) and to observe the manner in which he manipulates objects in a play situation. She states in her report that S was able to demonstrate meaningful play sequences with miniature figures, and she placed him at age 2 years and 9.7 months.

Summary of her assessment

In her report she summarised her assessment of S by stating that he is "moderately severely autistic", that he shows the 'triad of impairments' in communication skills and language, social interactions and has restricted and repetitive pattern of behaviour, play, interest and activities. In addition she described him as having strong evidence of sensory seeking behaviours and tactile defensiveness. In her evidence she stated that her calculation of his being moderately/severely autistic is by way of a general opinion based on the findings derived from the tests applied (T.45. Q.90).

She went on to state that he has average non-verbal intellectual skills, and that his verbal cognitive skills are severely delayed and deviant. Her use of the word "average" was used by reference to normally developing peers rather than by reference to children with autism. She noted also that he was compliant for parts of formal testing, and was able to work for reasonable periods of time on tasks which appealed to him, but displayed challenging behaviours by throwing objects and hitting out.

She noted his strengths as follows:

- Ability to communicate needs using verbal and non-verbal means
- Ability to engage in tasks with adults
- Responsive to praise
- Ability to engage others' attention for functional and social purposes

- Ability to express choices
- Good perceptual skills
- Good gross motor skills
- Emerging parallel play, and
- Relational play with objects

She noted his weaknesses as follows:

- Significant receptive and expressive language processing difficulties
- Significant language deficits in pragmatics
- Short attention span on tasks which are not of his choosing
- Challenging behaviours, and
- Poor generalisation of skills.

Later in her evidence she gave evidence about the different categories of learning difficulties diagnoses in this country. These categories are "mild general learning disability", "moderate general learning disability", and "severe learning disability". She states that NEPS has a banding system containing these categories (T.46. Qs. 85-93). For the purpose of placing a child within one of these categories, a scoring system is in place. She stated that the Vineland Adaptive score of 58 which S achieved clearly places him in the category of 'mild' learning disability in this State. She went on to say that the banding system in the United Kingdom is different. In particular, given Mr Willis's evidence that he disputes that S is in the 'mild' category with a score of 58, Ms. Hughes stated that in the UK children with scores between 50 and 70 are placed in the 'moderate learning disability' category, as they are in Northern Ireland also. She explained also that in Northern Ireland children who fall into the category there of 'moderate learning difficulty' would be placed in a similar setting as children here who are categorised as having a 'mild' learning disability (T.46. Qs. 99-103)

In fact she later stated that she did not believe that there was any disagreement between herself and Mr Willis about the level of S's learning disabilities, based on a conversation which she had with him at Dublin Airport in November 2005 9T.50. Q. 132).

Special Educational Needs

The next section of her report appears under a heading: "Special Educational Needs". In this section she outlined his core needs in relation to special education which should be considered in any IEP for him.

Behaviours

She stated that S needs a "behavioural programme to deal with his challenging behaviours", which she regards as a major issue at the stage she assessed him on the 16th October 2004, since these behaviours "will reduce [S's] chances of successful inclusion in school". She explained that if he was ultimately going to be integrated into a mainstream setting, these behaviours would be very difficult for a class teacher to manage in such a setting (T.45. Q.104)

I could just add by way of reminder at this stage that October 2004 was a time at which, according to evidence already given in the case, his challenging behaviours had significantly increased during the summer months of 2004. They reduced thereafter to lower levels over the following months after he commenced at St. Catherine's in February 2005.

In her evidence, Ms. Hughes explained that the behavioural programme to which she referred would include a functional assessment so that an understanding was gained as to the origins of the behaviours, when and in what settings they occur and the function which they serve for the child. This assists in identifying what triggers these behaviours so that they can be managed appropriately.

'TEACCH'

She opines in her report that like the majority of children with autism, S needs structure to help him compensate for his weaknesses in attention, planning and organisation, and that he would benefit from a higher level of external or physical structure to help him to cope with the additional demands of a classroom setting. He would also benefit from what she called "a daily schedule (picture + word) to outline his day", and a work schedule to convey information to him about what work he has to do and what he must do when he is finished. Such a structure is said by her to encourage adaptive behaviours, independent work habits and discourages over dependence on adults, and that environmental structuring is widely regarded as an essential component in any approach and that it a fundamental feature of TEACCH, based on empirical evidence of the relative ease of processing visual information as opposed to verbal information for children with autism. In her report she referenced "Mesibov (1997)" as the research basis for this statement.

Mr Holland cross-examined Ms. Hughes in relation to the question of whether there is any empirical evidence to support TEACCH. He referred to a passage from the Howard article in which the author states that in contrast to ABA "there is little objective empirical evidence regarding the efficacy of non-behaviour analytic intervention models, such as TEACCH and others mentioned also. Ms. Hughes stated in reply that there was very little comparative research of TEACCH versus some other intervention, but that there have been TEACCH evaluations, and said that two such had been carried out in Northern Ireland, but that they are not comparative studies (T.51. Q.257). She went on to say that there was not as much research evidence for TEACCH as there is for ABA but that TEACCH is not a research based intervention in the way ABA is. She had also referred in her answer to the study by Ozonoff and Cathcart. Mr Holland referred to a report which she had done in the past on another child and in which she had stated that there is "a strong research basis" for TEACCH, and had referenced two articles in that regard, including one by Prof. Sines of the University of Ulster, and she had referred to Ozonoff and Cathcart. He was keen to know how she could have said in that report that there was a strong research base for TEACCH whereas now she was saying that there was not. She replied that the research by Ozonoff and Cathcart as well as the evaluation by Prof. Sines "had some strength", and that as a result of the Sines work the Boards in Northern Ireland had introduced TEACCH in all the autism specific classes and other classes which had children with autism. But she accepted that Ozonoff and Cathcart was not strong evidence (T.53. Q.45).

IEP

In her report she stated that in addition to a differentiated National Curriculum, S should have an individual curriculum in the form of an IEP to be used as a teaching and planning tool, and that this should record targets for S and his progress over time, and, further,

that his parents should be involved in agreeing core areas for his IEP, and that it should focus on the autism (in particular S's social interaction and communication difficulties) as well as on the functional application of skills across contexts. Targets set should be realistic and achievable. She explained in her evidence that it is important that there be an estimate of time within which targets should be achieved, in order to assess in due course whether progress is being made.

In her evidence she described the National Curriculum as one that was broadly based and balanced and which would cover speech and language, listening skills, literacy, early mathematics, personal, social, health education, environment studies, and also creative arts such as drama (T.45. Q. 114). She stated in her evidence that also that areas of physical education, drama, art and music are important where the focus is not so much on academic achievement but assist in the areas of emotion and socialisation, and address a child's needs in a holistic way, and not simply confined to academic matters (T.45. Q.119).

Range of Strategies

She reported also that a range of different strategies should be put in place which would take account of S's age, profile, and preferences for learning, and which should include but not be confined to behavioural, educational, communicative, play-based and sensory approaches. With regard to play, she recommended 'Floor Time', and also 'Venturing into Play – a play skills profile'. She specified also that links should continue to be maintained between home and school, and that this could be achieved by consultation meetings as well as written or verbal home-school communications. She stated in evidence that such communications were a feature of special needs education in general (T.45. Q.125)

Mr McDonagh asked her if 'Play Time' has a connection with ABA, to which she responded that it has not, and that "it is at the other end of the continuum of approaches in terms of being more child led than adult directed" (T.45, Q. 123)

Partnership with other services

Ms. Hughes sets out in her report the need which S has for sensory stimulation, and recommends that advice be taken from an occupational therapist with a special interest in sensory issues. Similarly she recommends input from a speech and language therapist to advise in that area, and in notes in this respect that "given recent research into psycholinguistics and pragmatics, one should be cautious about using a discrete trial learning paradigm (ABA) to the exclusion of other approaches when attempting to enhance communication skills (Prizant and Wetherby 1998)". In her evidence she was asked about the reference to this research, and she stated that they examined the continuum of approaches from discrete trial to play-based approaches, and that they argue that neither extreme is appropriate and that there should be some middle ground or some merging of both (T.45. Q.128)

She went on to state in her report that S needs opportunities for structured activities in order to test and expand his listening skills so that he will be able to follow more complex instructions in a typical classroom setting.

Use of ICT/Computer Assisted Learning

She believes that the use of computer learning would be of particular use to S since it focussed on the visual presentation of information, thereby helping him to overcome the difficulties which he has with processing complex language instruction. She outlined a number of benefits to this form of instruction. She expanded on her views on this topic when giving her evidence. She stated that S has a particular interest in computers and that it is used at St. Catherine's as a reward (reinforcer). She says that it capitalises on his strengths, and allows him to work at his own pace and to control his learning in that setting, and that it also offers opportunities for social interaction. In that respect she referred to the possibility that he would learn to take turns at and share the computer with another child. Because he enjoys the computer so much, his use of it would have to be managed or controlled, and that it should not in any way replace the teacher (T.45. Q.131)

Monitoring

She specifies that S's responses to teaching needs should be reviewed by his teacher in order to establish evidence for effective learning and behaviour, and that this will also help to establish future priorities and give direction to teaching, and further that parents should be regularly consulted for their views on priority target areas. She states also that his IEP should be focussed on a few key areas and that targets should be specific, measurable, achievable, realistic and time bound. In her evidence she stated that such measurement is essential and is part of what teachers do both in Northern Ireland and here (T.45. Q.133). Mr McDonagh asked her in this regard whether she was referring to the type of measurement which is undertaken under ABA at St. Catherine's and she replied that she was not referring to that sort of "second to second or minute to minute monitoring" but rather to a situation where targets were set in an IEP, and there is monitoring to see if those targets are being met, and that it is broader and does not involve the same intensity or frequency (T.45. Q.134). She expressed concerns about measurement which was too frequent, since it may result in time being lost for engaging the child. She does not regard that intense level of measurement as being essential, although some level of measurement is needed (T.45. Q.135)

Recommended School Provision

This is dealt with in her report under the heading 'Requisite Provision'.

Aims

She described the main aims of such provision as being to enhance learning and development across a range of academic and developmental domains, to provide opportunities for wide-ranging and positive interactions in the least restrictive environment, and to increase skills of parents and professionals in meeting his needs. In relation to 'the least restrictive environment' she explained in her evidence that this was one with which S could cope at any particular time, and being one which offers opportunities and challenges, but nevertheless where it is a supported environment where opportunities for integration with other children exist (T.45. Qs. 137-138)

Placement

She states in her report that his intellectual skills and attainments are such that placement in a mainstream school which has autism specific provision, curriculum and methodology would be appropriate. She explained that what she has in mind is a mainstream school which has supports and would offer what she called "a bridge between the setting that [S] has now, and full mainstream class" (T.45, Q. 141). By way of further explanation she stated that such a class would be a learning support class which is autism specific and which is attached to a mainstream school (T.45, Q.145). She also described such classes being available for children with autism in Northern Ireland and went on, having been asked about this by Mr McDonagh, to state that in Northern Ireland there are in fact no exclusively ABA schools or classes such as have been described in this case such as at St. Catherine's, Saplings and the CABAS schools, and neither are there any proposals for the establishment of such classes (T.45, Qs. 148-149). She has visited such schools here and is aware of what is provided there, and recommends as an appropriate provision for S an autism specific class attached to a mainstream national school. A particular advantage for him in such a provision is the opportunity for him for inclusion with other children of the same age and who are not autistic as well as having access to the national curriculum (T.45. Qs. 153-156)

She regards the opportunity for inclusion or integration as being very important, and that it is part of what she described as a

normalisation process. It is a fundamental part of such provision in Northern Ireland and has been for decades, though in more recent times has been strengthened by recent legislation there by being a requirement to facilitate and provide inclusion to the greatest extent possible (T.45. Q.158) She referred also in this context to the Lovaas study in 1987 and to the more recent research by Glen Sallows in 2005, in which, she states, strong emphasis is placed on mainstreaming, not as an end product but as part of the interventions in place for the child. She believes that this aim of inclusion forms part of all the research articles which have been presented to this Court in evidence. She is not aware of any research article which recommends an exclusive or intensive ABA model of provision to the exclusion of some element of mainstreaming as part of the process (T.45, Qs.160-164)

Special Needs Assistant (SNA)

In her report she also specified that a Special Needs Assistant would be required for S in the classroom in order to support him appropriately, and that he/she would work closely with the class teacher to facilitate social integration, to access to the curriculum, to assist in language instruction, to help provide suitable levels of reinforcement and to help to implement guidelines for appropriate behaviour. She states also that this assistant should provide supervision for S at high risk periods of the day but that it should not reduce learning opportunities from peers. She states also that the SNA will require training in relation to autism strategies such as visual structure and behavioural based techniques.

Summary

In her report by way of summary she states that the educational setting should be an autism specific class within a mainstream school; that there should be a classroom structure with work stations and physical boundaries, a daily routine of learning with a picture schedule, as well as a quiet area for individual work.

Staff Training

She reported that there should be a curriculum overseen by a trained teacher and supported by trained SNA staff. She explained in her evidence that a trained teacher means one recognised as meeting requirements by the Department of Education and Science. She is of the opinion that to be a teacher trained in the national curriculum and how to deliver it is fundamentally important.

She was asked about the view given by Mr Willis that a trained teacher in this sense was not necessary for the delivery of a differentiated national curriculum (see T.8. Qs. 90-99). She stated that this would be an unusual view and not her view. She believes, speaking both as someone who is a trained teacher albeit in Northern Ireland and a psychologist, that it is of assistance for a trained teacher will know how to manage a class, how to work in groups, how to teach groups, and how to teach children in terms of integrating parts of the national curriculum (T.45. Qs. 170-172)

She recommends in her report that the trained teacher and SNA should have a knowledge of the triad of impairments associated with autism, how they affect S, be aware of the range of current approaches to autism (i.e. ABA, TEACCH, PECS and play-based approaches), including their benefits and limitations, an ability to incorporate new ideas from their training, an ability to recognise learning opportunities throughout the day, knowledge of behavioural principles as part of a total approach to learning, managing and supporting behaviour, a knowledge of functional analysis as a core part of S's programme, an ability to recognise emerging capabilities and skills, an ability to write an IEP, and an ability and willingness to work in partnership with parents. She expanded on what is in her report in this regard when she gave evidence and this is found on T.45. Qs.174-176).

Referring to the limitations of various approaches, she stated for example that both ABA and TEACCH can have limitations, in that she feels that they do not address adequately the social and emotional needs of children. TEACCH, she states, focuses on independence, and the structuring of the environment of the child, and does not fade out quickly enough for children. With ABA the focus is on observable and measureable behaviour to the neglect of the social and emotional side of the child, such as may be available in 'circle time'.

When Mr Holland cross-examined Ms. Hughes he asked her what sort of training in TEACCH the teacher and SNA should receive. She said that it would be highly desirable that they should have done the 5 day 'Division TEACCH' course (T.46, Q.319). Mr Holland suggested that Model A was vague as to what the required training would consist of. Ms. Hughes preferred to regard it as 'flexible', rather than prescriptive, and that training is an ongoing matter as the need is seen.

He referred her also to the evidence of Dr Grey that as a minimum those delivering ABA to a child would need a Florida Board certified level of ABA training. She disagrees with this, even though she agrees that such a qualification is clearly an appropriate qualification. She bases this view on her own experience of effective delivery of ABA in Northern Ireland by persons who have not gone as far as being certified by the Florida Board.

ABA as an exclusive provision

As part of her evidence on this part of her report, Mr McDonagh asked her what her view was concerning the evidence given on the plaintiff's behalf that an exclusively ABA provision as described in this case can be applied to all autistic children in the country (as well as U.K and United States). She believes this to be a very sweeping statement which does not hold since every child will have a wide range of differing needs at any given time, and that while a behavioural approach will address some of these needs, it is insufficient to address all of them, in all children, all of the time (T.45. Q.177)

She has never made a recommendation for an exclusive ABA intervention for any child which she has assessed and made recommendations in respect of. She is of the view that ABA has its rightful place as part of a combined approach, but that as an exclusive provision it is confined and sets limits on terms of curriculum, learning opportunities and experiences, and in terms of accessing inclusion with normally developing peers (see for example T.53. Q.90). Mr Holland cross-examined her about her views in this regard, and in relation to various research articles to which she had referred in some reports on other children in relation to the efficacy of an exclusively ABA provision. She has relied, for example, on an article by Gabriels in relation to her view that the number of hours alone of treatment does not correlate with good outcome. She stated in cross-examination that her purpose in citing the Gabriels article was simply to indicate that that a number of hours per week or intensity is not a predictor of outcome (T.53. Q.114) Again, there was dispute raised about Ms. Hughes's reliance on that article for opposition to the number of hours recommended by Dr Reid (30-40 hours per week) since, as put by Mr Holland, it is not clear from the Gabriels article if any of the children had received any ABA at all, even as part of intervention. It appears that those children received what is referred to in the abstract in the article as "generic treatment" – a range of interventions. Mr Holland suggested that her report in this respect was to be criticised for not setting out what it was the Gabriels studied. It is not in my view necessary to set out all the questions and answers in this line of cross-examination. But she agreed that Gabriels claimed only that his study raised questions around intensity, but did not arrive at definite conclusions. She was questioned similarly about her reliance in her reports on a review by Connors 1998. Mr Holland criticises the fact that she did not refer to these articles in more detail in the reports of the other children referred to.

Again I do not propose to go into these exchanges in detail. In like vein, Mr Holland questioned her about her reliance on the article

by Victoria Shea already referred to.

Whatever be the differences of opinion about reliance on particular pieces of research and exactly what conclusions should be drawn from them, Ms. Hughes remains firmly of the view that the research to which she has referred is research which it is appropriate to cite for her belief that the provision of an exclusive model of ABA intervention is not in the best interests of any child with autism. That is her view, while at the same time accepting that ABA has its place as part of a combined approach.

Knowledge of behaviour principles

She regards it as an essential and core part of the training of teachers and staff who manage children with autism that they are trained in behaviour principles, and that this training includes one to one discrete trial training/ABA, as well as broader elements such as inclusion and quality of life measures as opposed to purely skills. They should be trained to look at what is useful, functional and necessary to improve quality of life for the child. These behaviour principles are not confined to special autism classes, but to all classrooms. In addition to giving evidence about the need to be trained in behaviour principles, she spoke to the other elements of training which teachers and staff need training in., as identified in her report (T.45. Qs. 195 -198)

Mr McDonagh asked her whether the training in behavioural principles had to be a qualification such as has been referred to by reference to Florida Board certification. Ms. Hughes stated that she was not suggesting that the teacher had to be an expert in ABA, but simply that he/she must have an awareness of and a good knowledge of the principles and procedures of ABA (T.45. Q.215) She believes that such a person should have done a course such as the one she referred to namely Profexel as a starting point. She mentioned also that such training was an ongoing thing, and that each teacher would have to decide, depending on the particular children they are working with at any time, what training they need to do their job adequately. They should do additional training as necessary.

Parental Involvement in the classroom

She stated that parents should be heavily involved at every stage, but stated also that this can give rise to some difficulties in relation to parents going into classrooms, since it can have implications for the teaching and learning, as well as the fact that such parents would also be observing other children in the class, and maybe commenting on what was seen to the parents of other children. She thinks that while the final decision should be the teacher's, and that there can be problems associated with it. It can cause disruption and can sometimes upset other children (T.45. Q. 198).

Differentiated curriculum

She has reported that S should have a clearly documented curriculum linked to the national curriculum – in other words a differentiated curriculum to take account of his particular needs. She went on to say that approaches such as TEACCH or ABA were not in themselves curricula, but are rather frameworks through which the curriculum is delivered (T.45. Q.201)

A combined approach

Part of her recommendation is that there should be a combined approach to provision, which includes both an educational and a behavioural approach in accordance with best practice models. She believes that it may be distracting to look just at brand names such as PECS, TEACCH and ABA since if the constituents of each are looked at there is much in common, and that it is good to look at aspects of each which are associated with good outcomes. Mr McDonagh referred her to Mr Willis's concern about the implementation within an eclectic provision of a wide range of different approaches without any clear rationale as to what the model is and how it can be effectively delivered (see T.8, Q.94). Ms. Hughes stated in relation to this that she is not suggesting that that different approaches be used without thought or consideration, and rather that individual needs would be looked at and that there is discretion as to what should be provided, and that all approaches should be considered (T.45. Q.208)

Model A

The Model A framework for educational provision for S was drawn up by Ms. Clare Mangan, and Ms. Hughes took this on board when making her own recommendations. She described it as a framework to assist in deciding what educational provision is likely to meet the needs of a child. She is aware that Model A as well as Models B and C have been prepared by Dr Mangan in consultation with the Department of Education and Science. She is also aware that since 2002 an autism specific class has been in existence at St. Joseph's in Templarney.

Model A recommendation for S

In her recommendation of Model A, Dr Mangan has stated that allocation of a child to Model A is based on professional evidence that references a "mild degree of learning difficulty", but that in exceptional cases younger children may be allocated this model even if more significant learning difficulties are evident, and that this may occur where indicators of progress have been documented. She states also that "in the main the degree of autism is also likely to be in the "mild to moderate range, with the exception of pupils who are described as having high functioning autism". When Ms. Hughes was asked if in her view S fell within these criteria, Ms. Hughes stated that S's assessed level of autism falls within "the lower end of the severe, on the second bracket of the mild to moderate within the particular diagnostic instrument that I used, but that it is the preferred model because at around the cut-off point in any system there has to be flexibility and I think that taking [S] as a whole, taking the whole picture, that it would be better.....to consider a model, such as Model A for children with mild to moderate autism, as opposed to children with severe autism, given that [S] is so close to that middle range in any case". She went on to say that it is quite likely that his autism is within the mild to moderate bracket (T.45. Q.233)

This view was formed by Ms Hughes in November 2004 when she gave her report, and she stated that she still now feels that a Model A provision would be the best type of placement for S.

Preparation of an IEP

Model A envisages, following allocation to this Model that the teacher, parents, therapists and other professionals would identify the specific targets that are a priority for the child, and that the range of interventions referred to in the Model provide a menu that can be used to match these identified needs. Ms. Hughes stated in relation to this that it provides the sort of team approach she was recommending in her report where the team, including the parents, will set out the parameters for discussion, and that it affords a range of options at different stages (T.45. Q.239)

As far as the third stage, the implementation stage, is concerned, the model refers to the IEP of the child, and that the targets identified in the IEP will be implemented. Ms. Hughes stated that under Model A there is not one particular method of provision, and that it looks to the individual needs of the child at any given stage and in any given setting, and that "it is ruling nothing in and ruling nothing out" (T.45. Q.240)

The class teacher and Special Needs Assistant

Under Model A the pupil is to be taught in an autism specific class, with the management of the curriculum being the responsibility of the teacher, and Ms. Hughes went on to state that it was important that the class be managed by the teacher (qualified national teacher), so that in a situation where other professionals may be coming into the class (i.e. therapists) the class teacher is the best person to manage the class and "keep it all together".

She also agrees with the specification within Model A that the pupil would have a Special Needs Assistant "initially on a one to one basis in most cases although this should reflect the level of support which a particular pupil requires" (T.45. Q.243-244)

Provision for ABA, TEACCH and PECS

Model A goes on to provide:

"Depending on the needs of the pupil it would involve the following core elements: ABA as a core element in some cases. In other cases ABA may be a smaller component to the programme offered. This will be agreed on the basis of professional advice and on the agreement of parents and relates to the delivery of both individual work and small group work".

Ms. Hughes stated in this regard that in Northern Ireland she has recommended ABA for children, and that ABA is part of the essential training for the service provided there. She sees ABA as being a core element of provision particularly for children with challenging behaviours, and she sees no inconsistency with such a provision and the management of the class by a teacher, but that it will depend very much on the skills, confidence and knowledge of the teacher, and that if the teacher needs further consultation or advice, this can be addressed at the time as required. She says that in Northern Ireland the teachers deal with this very effectively (T.45. Q.250)

She went on to say that there are about 800 children in Northern Ireland with a diagnosis of autism and that all of them would have some level of ABA as part of their provision, but that some children with challenging behaviours require a more systematic approach to recording these behaviours, which will involve the sort of functional analysis which has already been referred to (T.45. Q.252).

Model A also provides for TEACCH to be introduced as part of the programme, "in particular the visual timetable which can be supplemented with other elements of the programme to prompt pupil independence if deemed appropriate". Ms. Hughes regards a level of structuring as essential, the level of structure to be provided being dependent on the particular needs of a child. This can vary from child to child. But she went on to say that there was no question within Model A of something having to be imposed on a child where there was no need for it, and that a common sense approach is adopted with discretion and flexibility.

PECS is also provided for in Model A, and again, Ms. Hughes stated that it can be used if the child's needs suggest it should be used. This need would be identified by the team in place (T.45. Q.255)

The provision of speech and language therapy, occupational therapy is provided for, as well as to a range of multi-sensory experiences, and, again, Ms. Hughes is in agreement with these.

Integration within Model A

This model provides that there should be a graduated model of integration with non-autistic peers to promote social and language development, and that if progress continues, then more extended periods of integration can be planned, and that in the early stages integration would be supervised by the Special Needs Assistant but directed by the class teacher. Ms. Hughes agrees with this gradual approach.

Training in ABA

The model provides that the class teacher and the Special Needs Assistant would receive ABA training prior to taking responsibility for the class, as well as training in TEACCH, and in particular in relation to the visual timetable, and that there would be supervision available from an ABA specialist, which would decrease over time.

Parental contact and the school year

The model also provides for communication with parents through daily feedback, home diary and review of the child's IEP at half-term meetings. It goes on to provide that the school year should be extended into part of the month of July. Ms. Hughes agrees with these aspects of Model A.

Annual review

Model A provides for an annual review convened by the class teacher which will involve more detailed professional discussion, and which will consider the components of the programme and the resources needed. It can include an educational psychological review by a psychologist working for NEPS if there are any concerns regarding aspects of the placement, and whether transfer to another form of provision is to be considered.

It is Ms. Hughes's opinion that taking Model A as a whole, the recommendation of provision for S which she has made can be accommodated within a school which applies this Model A framework of provision for him (T.45. Q.266)

Moving S from his current ABA pre- school at St. Catherine's

Ms. Hughes does not see that because he has started at St. Catherine's on an exclusive ABA programme is a reason for him not being moved to some other provision, and stated that none of the research over thirty years indicates this, and that it was never the intention that it should always continue, but rather was intended always to facilitate progression to the next stage of education. She went on to state that the research highlights the importance of mainstreaming children as part of intervention (T.45. Q.267)

Mr McDonagh referred her to the fact that at St. Catherine's there is no classroom of normally developing children, but asked Ms. Hughes to say how where there may be such a mainstream class attached to a school where there is an autism specific class that integration would occur. She replied that in Northern Ireland there were nine such autism classes attached to mainstream schools, and that typically a process called 'reverse integration' would happen at first where a small number of mainstream children of a similar age would come into the autism class, and that they may all then engage in some sort of social interaction by means of something like 'circle time' already referred to. This enables contact to occur with very little stress. Following this, the autism child might start to move out of the autism class and engage in selected activities involving other children, and that it is a gradual process depending on the speed at which the child is comfortable. Parents are consulted about this in advance, as are the mainstream class teachers so that all are in agreement (T.45. Q.268)

Mr Holland cross-examined her in relation to the importance of continuity and consistency for S in the context that he has been in an exclusively ABA environment since February 2004, and suggested that it was a legitimate concern for S's parents that he might now

be moved to an eclectic provision where not everything would be done through ABA. Ms. Hughes preferred to say that continuity and progression were important considerations and that continuity does not mean that one does not offer change and ensure that children progress. She went on to say that change is a necessary part of life, and that children, including autistic children need to be taught the skills necessary to deal with it (T.54. Qs. 384-385) She was referred also to Dr Grey's evidence that to move S could cause him to regress (see T.32. Qs.30-31), and she stated that this would be a poorly managed change, but considered that it is a theoretical possibility (T.54. Q.403), and that the risks attached to moving to another provision can be minimised by careful planning, and that the advantages outweigh the risk (T.54. Q.409)

S and integration as of October 2004

She believes, without any doubt, that at the time she assessed S in October 2004 he would have benefited from integration with mainstream peers and referred to the fact that at that time he had been attending a crèche facility from 2001, and later a mainstream Montessori nursery school at Pixies until November 2004 to which reference has been made in this case earlier. She is of the view that while he would have needed a high level of support at that time, he would have benefited from integration based on earlier reports that he enjoyed play with other children.

When she was referred by Mr McDonagh to the evidence that in November 2004 he was taken out of Pixies because of the view taken at the time that the inconsistency arising through part of his day being spent at Pixies and the other part at St. Catherine's was causing an increase in his challenging behaviours, she stated that she was surprised that he had been removed from Pixies, because she would have seen that as providing some balance by enabling him to have access to other children for part of the day (T.45. Qs.270-275). She believes also that from the start there should have been a plan to move S into a more integrated setting, instead of taking him into a more restricted setting, and that his present regime at St. Catherine's is not moving S forwards, and in addition is keeping him from having a teacher with access to a national curriculum and with no opportunity for integration with mainstream peers (T.45. Qs. 277-278)

Later in her evidence she stated that she agreed with Mr Willis's evidence that S is not ready to move to a full mainstream class, but is of the view that he is ready for a well supported autism specific class attached to a mainstream school which allows for a gradual and well-supported integration (T.46. Q.15) and that remains her view as of the time she gave her evidence.

Mr Holland cross-examined Ms. Hughes about her view that S should access mainstream class, and referred to Dr Grey's evidence that he had done research into this area and had reached the conclusion that exposure to mainstream peers per se is not associated with positive outcomes, and may have the reverse effect, and that it can happen that such children can be excluded by their normally developing peers. Ms. Hughes accepted that this can happen with poorly managed integration (T.54. Q.300). Mr Holland also referred to a recent article written by Baroness Warnock in which she rolled back to a degree on her view expressed in the 1970s which was in favour of inclusion, and suggested that the question needed to be revisited. Ms. Hughes is aware of this view, and agrees that inclusion which is managed too quickly, or at too high a level has resulted in some children being excluded, and that for these it can be damaging (T.54. Qs.308-309). She agreed with Mr Holland's suggestion that the process of managing inclusion must be approached cautiously. She accepts also that Dr Grey's and Mr Willis's view is one which is entitled to weight. But she went on to say that in recommending inclusion she was advocating taking risks in relation to S (T.54. Q.320) and is not recommending his inclusion into a mainstream class, but rather to an autism class attached to a mainstream school where inclusion can occur in the gradual way she spoke about in her direct evidence.

She stated that it was not possible to say today how S would have fared in two years' time as far as integration is concerned and that it would have to be monitored over time. Her point is that there should have been some effort to work towards integration by now at St. Catherine's, not in relation to academic subjects or into a regular classroom, but into a social environment, such as in a playground or through music or computer work which S is interested in (T.54. Q.324).

Difficulties with change for children with autism

Ms. Hughes stated that it is common for children with autism to have difficulty coping with change, and that they do not like sudden change, and prefer routine and predictability. But the extent of resistance to change will vary from child to child. She believes, however, that change should not be avoided, but that children should be taught about how to change, and that it is part of life. She does not believe that these difficulties are a reason for not attempting some form of integration. She stated that in Northern Ireland the practice is that they talk to the parents and work out a plan in order to prepare the child for such a placement and prepare the school to receive the child as well. Integration would take place gradually (T.46. Qs. 76-80)

In relation to the evidence of Mr Willis that if S was to be moved from his present placement he would revert to some of the challenging behaviours he had in 2004, Ms. Hughes disagrees and states that she was surprised with that evidence since if S was to be moved he would be moving into a school with a high level of support and structure in terms of his physical environment and to a teacher who will be able to manage the situation and monitor behaviours and any deterioration which might occur (T.46. Q.104)

Supervision for ABA

Mr McDonagh referred Ms. Hughes also to the view expressed by Dr Olive Healy in her evidence (see T.28. Q..283) that a qualified teacher such as is available at St. Joseph's Templeraíne or at St. Joseph's Newtownmountkenedy lacks the skills to sustain S's progress and that there would not be sufficient supervision or access to an ABA specialist, and that such a class would not be appropriate for S. She was surprised at this view, and regards the opportunities for inclusion, the access to the curriculum, as well as access to an ABA analyst there offers best opportunities for S, and stated that "no single professional has all the experience and expertise to execute all the functions of education for [S]" (T.45. Q.279)

She does not regard it as essential that S should have on site an ABA analyst who has received Florida Board certification before any education provision can be regarded as appropriate, and that none of the research papers identify this as a requirement, and she referred to the article by Glen Sallows to which reference has been made in this case, and to the fact that the conclusion was that outcomes were the same as between a group of children who had intensive supervision, and a control group which received low level supervision. Her view is that the level of supervision claimed is exaggerated in importance and is not essential (T.45.Q.280).

She later gave evidence about schools in Northern Ireland where ABA is delivered only as part of an eclectic provision of education. It appears that in none of these schools is there supervision by someone with Florida Board certification, but those supervising have some ABA training such as in Profexel course, or the Trinity ABA course, and all have completed a course at the Institute of Applied Behaviour Analysis. She regards these people as being competent to carry out their functions (T.46. Qs. 65-75).

ABA as the only properly validated form of education provision

Mr McDonagh referred to the evidence of Ms. Bridget Sinnott and Dr Olive Healy that ABA was the only scientifically validated form of education for children with autism and asked her for her views on that assertion. Ms Hughes in a lengthy response stated that there

was much uncertainty as to the conclusions which can be drawn from the research, and that across all the research there are some children who have done well, some who have done moderately well, and some who do not do well at all. Later in her evidence (Day 46. Q.11) she stated that her view would be that as far as S is concerned he would not be in the category which do not do well, and neither is he in the group that has done well since, if that was the case he would be moving towards inclusion in mainstream, and that her view is that he is in the middle group of children who have done moderately well

She stated that all research papers have limitations and that authors refer to these limitations in their papers. She stated that in these researches there are too many uncontrollable variables in terms of methodology and chosen outcomes by which measurement is assessed for any certainty as to results. For example, an unknown variable very often is how much work is done at home by parents outside the study environment and about which the researchers have not been told. That cannot be controlled, and this is not a problem confined to ABA research (T.45. Q. 281).

She referred also to the article by Dr Victoria Shea to which reference has been made in this case, and in which reference is made to the difficulty of making claims for the efficacy of intensive ABA. Ms. Hughes says that this is an important article which cast some doubt on the confidence which some people place on the research of such as Lovaas, and its follow up in 1993 (T.45. Q.285) She believes that the research mostly relied upon for ABA is the first one namely the Lovaas study and that there are what she described as extravagant claims in that paper for such as a 47% recovery rate which parents grasped at, and even though Lovaas later appeared to resile from that claim to some extent, parents nevertheless are told that there is no ambiguity about outcomes under ABA. She referred also to a paper which was given in Belfast recently in March/April 2006 by Gina Green who she said was certainly on the Florida Board and is President of the Behavioural Analysis Association of California, and in which Ms. Green while claiming that there was no 'miracle cure' for autism stated that children will lose their diagnosis, and Ms. Hughes regards such a claim to be unfair to parents (T.45. Q. 286).

Dr Clare Mangan

Dr Mangan is currently a Senior Education Officer in Northern Ireland with responsibility for children and young people services. Her area of responsibility has a school population to about 140,000 children. She obtained an Honours Degree in Psychology from Queen's University, and a teaching qualification the following year. Thereafter she has completed her M.Sc. degree in Developmental and Educational Psychology. She was awarded a Doctorate from Queen's University in 1986, the work for which investigated "the misconceptions that children and adults have solving multiplication and division word problems. When asked about this work by Mr O'Moore, she accepted that its relevance to autism was not high, but nevertheless she sees some relevance to the education of autistic children (T.55, Q.286-289).

In 1995 she completed a further part-time three year Master of Education Degree in Guidance and Counselling, while at the same time working as an Educational Psychologist. Her other research work and employment positions were outlined also. Between 1991 and 1994 she worked in Northern Ireland as an Educational Psychologist, where her work included the assessment and review of children in special schools and learning support centres attached to mainstream schools. She had also a role in relation to assessment of children who had a confirmed diagnosis of autism, or where autism was considered to be part of their profile of special educational need, and, in conjunction with parents and teaching personnel, to make recommendations as to what was required to meet the child's needs.

She described how in the mid-1990s more children were being diagnosed as being on the autism spectrum, and an advisory teacher for autism was appointed by the Southern Education Library Board where she still works. Funding was provided to establish behaviour support teams, and in 1998 she was appointed as Senior Educational Psychologist to manage that team in the Southern Education Library Board's area, and remained in that position until 2002. During that time, her role involved her in screening referrals that were made to the service in order to see if it was a legitimate referral, or whether the referral should be to a different service. In particular her task looked at whether there was evidence that behaviour was the primary difficulty, or whether there were other areas of special need identifiable.

In 2002 she was appointed Assistant Senior Education Officer for the Southern Board, and this gave her a number of management responsibilities in the areas of Special Education, Educational Psychology, Youth Service and so forth, and her knowledge and experience with autism was relevant to these roles, since they involved not only the assessment and recommendations in relation to provision to children with autism, but also to facilitate the development of services to meet the needs of children and young people. She has been involved in the development of autism services in her Board's area.

Her functions and roles over the past number of years, have caused her to have to look at different methodologies and curricula which may be effective for children with autism. She described what classes are available in her area, and what is available in these classes. She said that they work towards a strong inclusion agenda, and that 60% of children with autism are in mainstream schools, 20% are in learning support centres attached to mainstream schools, and 20% are in special schools.

Autism specific classes

In these special ASD classes there are no more than eight children in a class. The class teacher will have training in a range of interventions such as TEACCH, PECS, ABA, social skills and play skills interventions, which they consider to be very important in relation to the child's development. Her team will also assist the teachers and support staff to have an awareness of the sensory needs of the children, and they try also to work with the health and social services to increase the probability that therapies are delivered as part of the overall autism provision for the child (T.55, Q.120).

Aim of inclusion

Dr Mangan stated that the aim of inclusion for children with autism in Northern Ireland is because, firstly, it is part of the statutory framework of education for children who have special needs; and secondly, because school and education is part of the developmental life-span of a child, and that accordingly, it is important that children with autism can access the educational, social and play experiences which school can provide, so that these constructive experiences can facilitate their independence into other learning situations (T.55, Q.121).

ABA

The framework of provision in these autism specific schools is based on a combined skills approach and includes ABA. She stated that some children require more intensity on their provision to meet their specific needs. She went on to say that there is one unit set up by parents in one Board area in Northern Ireland which is akin to an exclusive ABA centre such as has been referred to in this case, and which is sometimes referred to as an exclusive ABA facility but on other occasions it is described as 'eclectic' (T.55, Q. 129).

Model A

Dr Mangan has visited a number of schools and autism specific classes around this country as part of her work, including some of the ABA schools which have been referred to in this case already. She has assessed some children who have been attending these

facilities. She stated that the detail of what is contained within the Model A framework does match what she found in a number of these places in terms of the constituent components of Model A. She stated that Model A arose out of a request in about December 2001 by NEPS to provide professional opinions in relation to a cohort of children who were at the time attending an ABA school in Galway, which is the Ábalta school. The remit was to establish that each child had a diagnosis of autism, and if so, to state what sort of special educational provision was likely to be appropriate for each child. She went on to state that, bearing in mind that autism is a continuum, it became apparent that each child in this group of children had very different needs both in terms of the autism and in terms of learning. Having observed and assessed these children, it became apparent that there was one group of them which could score on psychometric measures and had language skills and clear signs that they could make good developmental progress, and that the other group consisted of children with a very significant autism profile but also with severe learning difficulties. The children in the former grouping were referred to as 'Model A' children, whereas the latter were referred to as 'Model B' children. She was of the view that simply to place all the children in the same programme of provision seemed, in her view, to compromise the potential for progress of each of the groups. Model C apparently appeared as another model of provision in about 2002, as did Model D. These need not concern us (T.55, Qs. 150-154).

Her report and recommendations for S

Dr Mangan first of all stated that in Northern Ireland there is a Code of Practice (1998) which informs and guides the assessment of children. There is what she called a model consisting of a number of stages. One stage relates to strategies and interventions that a school can put in place for a child with special educational needs. The next stage relates to the need to prepare an IEP for the child to be agreed with the parents. Following that stage, there is another where the school may feel the need to access specialist support services or make a referral to the educational psychology services. It is from this stage that the more prescriptive aspects of assessment and analyses of information becomes important, and if it appears that the child has more intensive educational needs, then a statement of special educational needs is required, and following its preparation the Library Board is statutorily obliged to seek professional advice from an educational psychologist, educational advice from the school in which the child is placed, or medical advice in relation to speech and language therapy, occupational therapy or physiotherapy. All of these reports are then considered by special education officers. These do not have direct contact with the children concerned, but on the basis of reading the documentation a recommendation is made (T.55, Q.157).

Dr Mangan was asked by Richard Hennessy in NEPS in May 2004 to prepare an independent opinion on the reports which had been done on S. The purpose was to establish if on the basis of the information provided, it facilitated the identification of his educational needs. It was also to consider the type of educational provision that would meet his needs (T.55, Q.161). This request came in the form of a telephone call to her from Richard Hennessy of NEPS. Her report was ready by 31st August 2004, and she explained to Mr O'Moore that it took until this date because of other assessments she was doing and her own holidays (T.57, Qs. 32-34).

Referring to the fact that by August 2004 when she prepared her report, much of the information which she had been provided with in respect of S was about twelve months' old, Mr O'Moore asked her if she had considered seeking more up to date information before preparing her report. She stated that she had not because she had received two fairly detailed reports dated August 2003 and November 2003 and that this was sufficient for her to give her professional opinion at that time, even though she was aware that his profile may have changed in the intervening period. She believes that the reports which she had were within a reasonable timeframe even if it was not an ideal timeframe (T.57, Qs. 377- 394).

Autism diagnosis

On the basis of the information contained in all the reports, she had no doubt but that S has autism. Dr Reid's report, as noted by her, indicated a moderate level of autism by reference to his doing the CARS test (T.55, Q.170).

S's adaptive behaviour level

She was satisfied from reading the report of Dr Mitchell Fleming and Dr Moira Kennedy of Beechpark Services in relation to the scores achieved in relation to the application of the Vineland Adaptive test, that S had at that time a 'mild' delay in terms of his adaptive skills.

In fact she went on to say that Dr Reid's result on the Vineland test for adaptive behaviour and those resulting from the Vineland test done by Dr Fleming and Dr Kennedy were consistent (T.55, Q. 173-175), and that the progress which S had made between the 12th August 2003 when they had done the test and November 2003 when Dr Reid had done the same test was very encouraging.

Cognitive test results

She reported her comments in relation to tests which Dr Reid had carried out because she had been given a copy of his report. He had done a test referred to as the Snijders-Oomen Non-Verbal Intelligence Scale for Children in November 2003 (S being 3 yrs and 5 months at that time) and had reported that S had an age equivalent score of 4 years in relation to 'puzzles' and 3 years and 8 months in relation to situations. She found these results to be encouraging given that at the time S was 3 years and 4 months chronological age. The scores were slightly above normal limits – i.e. for normally developing children.

Dr Reid's recommendation for 30 hours per week of ABA

Dr Mangan is unclear as to the basis for this recommendation made by Dr Reid given the positive aspects of his findings in relation to S. She outlined these positives in her answer, including one that he could 'self correct', and is of the view that from an educational psychology perspective there were signs that S was a boy who was developing critical thinking skills. In relation to the reliance by Dr Reid in his report on certain research literature for his recommendation, she is unclear as to what particular piece of empirical research he was referring to. She stated that she is familiar with most of the research which has been referred to in this case, such as Lovaas, Eikeseth, and Howard, and while she may be able to see where Dr Reid may be getting some of his thinking from, the emphatic way in which he makes his recommendation is something which she thinks there is no empirical evidence for.

Later in her evidence, Dr Mangan returned to the question of this 30 hours of ABA recommendation, and reiterated what I have just set forth in relation to her views, but added that unless there had been some regression or difficulties which have impacted on his rate of progress from the time that Dr Reid had assessed S, she is unclear as to the reason for the recommendation (T.55, Q. 269)

Empirical evidence for 30 hour ABA recommendation?

Dr Mangan stated that there were two questions involved in this question. Firstly, there is the question as to whether there is any empirical evidence to support the proposition in general that 40 hours of intensive ABA per week will make a difference to a child; and secondly such a level of intensive ABA input was appropriate for S, given his particular needs. As to the first question as to the position in general, she said that "the jury is still out on that". As to the second question, Dr Mangan stated that she finds it to be

"a very strange recommendation and a worrying recommendation, that this child, who had experienced progressive integration in a play-group setting in Pixies, in Montessori, who showed some lovely examples of spontaneous social

engagement with his mother, who was able to repeat the melodies of songs that were sung to him, who was able to have a range of functional language, and in fact in one assessment context, when [S] wanted the assessment to discontinue, he went – in the assessment report it is referenced that he said the word 'go'. So I think that the child was showing very, very clear signs of communicative intent, very clear signs that there were early strengths that needed to be nurtured, encouraged, and promoted within a more inclusive context, than was recommended by Mr Reid" (T.55, Q.187).

Dr Mangan stated in her own report that S has "a complex profile educational need". By this she means that S has strengths, particularly in the area of the visual, but that there are clearly issues regarding his receptive language skills, and that while he is a child who can recognise numbers, match colours, and so on, there are lower levels of functioning, and this creates a complexity of need. She believes that he needs a range of different approaches. PECS was not mentioned by Mr Reid in his report, and yet S was already accessing PECS in Pixies. Also she felt that S was already accessing his mainstream peers satisfactorily in Pixies at the time, yet accessing mainstream is not mentioned by Mr Reid as part of his recommendations. She regards these as significant flaws in relation to the design of an IEP for S (T.55, Qs. 190- 192).

Model A

The purpose of Model A as designed by Dr Mangan is to provide an administrative framework to facilitate the differentiation of children on the autism spectrum, and to enable those children who are showing more promise to have the opportunity of having a placement that provides more inclusive opportunities, and that this is the cornerstone of Model A (T.55, Q. 195). She stated that Model A itself has no empirical basis in the sense that it is not empirically tested, but it was not designed for that purpose. It is an administrative framework from which components are taken for any particular child's needs. These will be included in the child's IEP. What components are taken and included will be in accordance with good practice in relation to autism services and provision (T.55, Q.196).

Dr Mangan states that it is envisaged that the range of interventions listed in Model A provides a menu that can be used to try and match the learning, social and behavioural needs of the child to particular interventions. In her evidence she stated that the purpose of having such a model is to provide a framework for professionals to consider options which may be appropriate for a given child (T.55, Q.212).

Mr O'Moore asked her if Model A excludes an exclusively ABA intervention for a child, to which Dr Mangan stated that Model A refers to ABA as a core element, but that it is unlikely, unless there were exceptional circumstances, that it would represent an exclusive model of support for any individual child (T.57, Q. 38). She does not consider that such an exclusive ABA intervention would be appropriate for S. For this reason she disagrees with the recommendation which was made by Dr Reid (T.57, Q.42). She stated a little later in her cross-examination the opinion given by her to NEPS is a recommendation and not a direction. She stated also that in any case where the child is determined to be autistic and has mild special educational needs, Model A is the preferred model, barring some exceptional circumstances found to exist, and regardless of what the child's educational experience has been up to that point (T.57, Qs .269-271). She stated that an exceptional circumstance could be where a child had a very high level of challenging behaviour which made it very difficult for the child to cope in a small group setting, even if that setting was an autism specific setting (T.57, Q.273). Mr O'Moore asked if it would have been helpful for her to have known how S was doing at St. Catherine's when she was preparing her report. She stated in reply that "it would have been helpful if [S's parents] had wanted to forward information that related to his performance at St. Catherine's..." and that this would have been accepted as information to be considered as part of her opinion, but it appears that the reports which were forwarded did not include such information (T.57, Q.280-281).

Criteria for Model A

Allocation to the model is based on professional evidence that references a mild degree of learning disability. Dr Mangan stated that in this regard the term 'mild' was used as it is understood in this State. This comment relates back to the difference in terminology used in parts of the United Kingdom, and by Mr Willis in his report and evidence, where the score achieved by S in relation to general learning disability placed him in the 'moderate' range of disability for Mr Willis, but in the 'mild' range here for Ms. Hughes's and Dr Mangan's purposes. She has also stated that in some exceptional cases Model A is appropriate for younger children in the age range 4-7, even where an assessment has shown the child to have more significant learning difficulties. She explained that the reason for this was that some children's educational profile is not going to be constant, and that there will be what she called 'peaks and troughs'.

Aim of integration

But she went on to say that if the evidence indicates that there are sufficient indicators of good progress even in the early stages, it is better to give that young child the opportunity to be with children who are likely to be more able. This contact with peers, she says, is likely to have an impact on the social, communication and play skills of the child, which assists in addressing aspects of the autism profile (T.55, Q. 203). The model also facilitates children who have a degree of autism more severe than 'mild to moderate', provided that it is shown that such children have the cognitive ability to cope with the demands of Model A, including the emotional demands. But placement is on an assessment basis, and where it is shown that the child is having difficulty in this context, an alternative provision needs to be identified. But Dr Mangan went on in her report to state that there are individual differences which apply to pupils on the autistic spectrum, and that Model A enables children with broadly similar learning needs to be placed in the same class, and that it provides a framework for the delivery of a curriculum where "shared as well as individual learning, social and behavioural objectives can be targeted". She states that one of the key components of the Model is that an autism specific programme is available for the child, but that progressively one is working towards creating a context where the child should begin to access more opportunities that are consistent with normally developing peers, both in terms of social and play experiences, and the curriculum (T.55, Q.206).

Dr Mangan referred to the fact that the Model A framework envisages that children are progressively working towards integration with mainstream peers, and that the child's allocation to Model A is the first stage in a three-stage process. The time-frame in which this will occur will be dependent on the needs of the child, since some children will be able to cope with social integration at the outset, while others would have difficulty doing this and this would need to be worked on gradually. One method used is what has already been referred to as 'reverse integration' where mainstream peers will come into the autism specific class for short periods of time, perhaps for 'circle time', or for the break period, leading to a point where the child with autism will eventually be able to go into a mainstream class for short periods, and then for longer periods.

She stated also that where a child has up to the time he/she commences in a Model A provision, been attending an exclusively ABA class, all persons who have been involved up to that point can be invited to a meeting to discuss and identify specific learning, social and behavioural targets for the child, and would be encouraged to do so, because it is vital that there is a multi-agency and multi-disciplinary approach. This assists in providing consistency of approach and structure which might be absent of these professionals were not involved (T.55, Qs. 208-210).

Integration aim for S

In her evidence Dr Mangan stated that from the professional reports which she had seen for S, she was of the opinion that there were what she called 'clear indicators' that S was a little boy who had a good experience of being in a nursery setting and had had a good range of social opportunities in that setting which he seemed to enjoy, and that this was a vital building block for future opportunities for social, language and play integration with other children. This integration should be supervised by the Special Needs Assistant, since in the early stages he might need to be supported and guided in relation to a particular activity to assist in the integration process (T.55, Q.246).

Individual Education Plan ("IEP")

The preparation of the child's IEP is the second stage of the three stage process. The child's IEP will be drawn up after the meeting with parents and professionals who are in a position to specifically inform decisions as to targets and she mentioned that the involvement of parents was imperative as they must have ownership of and a good understanding of the constituent parts of the plan (T.55, Q.214). In the IEP there will be cognitive targets set, in addition to targets which relate to the child's autism, by reference to what has been called 'the triad of impairments', an example being in relation to behavioural issues, such as tantrums, and obsession with ritual (T.55, Q.229).

Mr O'Moore asked how any disagreement between what the parents wanted in an IEP and what the professionals wanted in it could be resolved. She indicated that in Northern Ireland there was a Dispute Avoidance and Resolution Service to which such parents could have recourse in order to discuss their issues, and also an appeal procedure to the Special Education Needs Tribunal, but she is unaware of any equivalent procedures here, which she considers regrettable (T.57, Q.665-667).

Implementation of the IEP

This is the third stage. Model A specifies that such an IEP is designed in the first place by the class teacher, and will be reviewed on a half-term basis in conjunction with the parents and other relevant professionals. Any review of the IEP will be informed by the original IEP, and amendments will be made to this from time to time as required, depending on the progress made up to that point by the child (T.55, Q.226).

Class Teacher under Model A

Model A specifies that the child will be taught in an autism specific class by a teacher whose teaching qualification is recognised by the Department of Education and Science. The intention of this requirement is to give reassurance to parents that those involved in the delivery of services in autism specific classes meet this "basic criteria" (T.55, Q.218).

Dr Mangan referred to the fact that in Model A it provides that the class teacher would receive ABA training prior to taking responsibility for the class. In this regard she stated in her evidence that such training that she has found to be useful for teachers in Northern Ireland is the on-line Profexel ABA course that has been referred to. She described this course as a 'starting point'. In relation to the suggestion made in evidence in this case that this course is not a practical course and is more academic in nature, Dr Mangan stated that while it is a distance-based course, there are modules built into it, and that it was important to remember that it was a course which she was talking about in the context of its delivery to persons who are already teachers and who are skilled in working with children and understanding the development of children, and that it part of ongoing training and enhancing their existing skills base (T.55, Q.249).

Mr O'Moore questioned her in some detail about the level of autism specific training which the class teacher should have before taking charge of an autism specific class. During the course of a number of questions and answers to him, she stated in effect that it is preferable that such training should be in place at the outset, but that it can be provided also as part of continuing professional development, since a teacher will already have experience in child development and special education needs. But in such a situation the teacher would need to have the support of autism specific specialists, such as specialist teachers with experience of autism or an ABA consultant. In the absence of such support she would have concerns that it would not be satisfactory (T.57, Qs. 506-517).

Florida Board certified ABA qualification

Dr Mangan does not regard it as necessary that a class teacher delivering ABA as a core element in a child's provision would have a qualification awarded by the Florida Board (T.55, Q. 251-254). Model A specifies that there will be available advice and supervision from an ABA specialist, and that this should interface with agreed social and educational targets. In relation to this Dr Mangan stated that such an ABA specialist could be somebody who has the certified ABA qualification (T.55, Q.257).

Differentiated National Curriculum

Dr Mangan regards it as essential that a class teacher, from his/her knowledge of the national curriculum, manages that curriculum and adapts it to the needs of a child with autism, particularly as the aim is that the child will access a mainstream classroom with normally developing peers (T.55, Qs. 220-211).

Special Needs Assistants ("SNA") in an autism specific class

Model A specifies that in the autism specific class the pupil will have a Special Needs Assistant who is available on a one to one basis in most cases, but that this will reflect the level of support which a particular pupil requires. Dr Mangan stated in her evidence that her discussions with parents it was evident that parents have sometimes more assurance in a system where an SNA is identified who works directly with the child; but that gradually as progress towards integration was made, the child would be able to complete tasks without that one to one involvement. The level of SNA need would be reviewed with a view to reduction in the level thereof, on the basis of the child's ongoing need rather than by reference to any financial considerations. In fact she went on to say that if the level of SNA input was not reduced in line with progress made by the child, this could adversely affect the child in relation to development of independence, since the child would develop a learned dependence on the SNA, and this would not be ultimately in the child's best interests (T.55, Q.222-225).

Eclectic model of provision

Model A speaks of a combined skills approach to provision. It states that "depending on the needs of the pupil, it would involve the following core elements: ABA as a core element in some cases. In other cases ABA may be a smaller component of the programme offered. This would be agreed on the basis of professional advice and in agreement with parents. This programme would relate to the delivery of both individual work and small group work as appropriate".

ABA as a 'core element'

Dr Mangan described in her evidence how a child may have attention span difficulties, or a difficulty such as sitting in a seat for a given length of time, and that the child in these circumstances might require more intensity in terms of creating a learning framework and a situational framework in which he/she is more receptive to learning. With some children this is needed, and may be crucial at the outset so that the child accesses learning. She added that since autism is a developmental disorder, it can change over time, and

that a child's profile requires ongoing review by the professionals involved so that emerging differences can be identified. This process can be achieved within Model A (T.55, Qs. 231-233).

TEACCH as part of provision

Model A provides that TEACCH would be applied as an integral part of the programme, and that in particular the visual timetable will be the main aspect of TEACCH to be included in the child's daily schedule, but that it may also be supplemented with other elements of TEACCH in order to promote pupil independence, if deemed appropriate. In her view, TEACCH reinforces the structure of the learning environment in order to facilitate teaching, and that this can be varied from time to time, whereas the ABA component focuses more on the needs of the child for an intensive support (T.55, Qs.234-235). She added that there may be children for whom a visual timetable may no longer be required, and this will be assessed when a review of the IEP is undertaken (T.55, Q.237).

Dr Mangan states that in Northern Ireland they encourage class teachers and SNAs to undergo a five day training course in TEACCH before commencing to teach the class, but that it is not always possible. She states that it is still possible to implement aspects of TEACCH without having done such a course, but from a quality assurance perspective, it is desirable that the course would have been done, and it would be helpful also if the teacher continued to be supported by experts who have knowledge and experience in autism. When cross-examined by Mr O'Moore on this point she stated that it would not be a good starting point for the class teacher to have had no TEACCH training, and that every effort should be made to put such training in place as a matter of urgency (T.57, Qs. 503-504). The absence of such training being in place (or indeed in ABA or PECS for that matter) at the outset would not in her view render the provision inappropriate (T.57, Q.506).

PECS as part of provision

Model A provides for PECS to be part of what is available, if appropriate, to assist with communication deficits which may exist for a child. She described PECS as being based on principles of ABA, although there are differences in its application because it is used to encourage the child to be the initiator of behavioural contact, rather than being adult led. The child can reach the point where he/she is able to use single words, and if that be so, then PECS would become redundant (T.55, Q.238).

Access to therapies

Model A provides that where deemed appropriate by professionals, speech and language therapy is to be available as part of an integrated educational and language based programme, as would occupational therapy. In addition, there would be access to a range of multi-sensory experiences so that tolerance can be achieved in relation to sensory experiences which they would otherwise find difficult, such as noise, light, taste, touch, smell and so on (T.55, Q. 241)

Development of self-help skills

This is also part of a Model A provision, because, while the educational environment has a strong focus on academic outcomes, children with autism often have deficits which need to be addressed in relation to self-help skills, such as dressing themselves, crossing a road and so on (T.55, Q. 243).

Circle Time

Dr Mangan stated that the purpose of circle time was to provide children with a context in which they can be encouraged to communicate their thoughts and feelings in a way that was not intimidating for them. She described how that happens and said that it contributed to learning about what she called "the rules of communication", such as taking turns. She regards it as something useful for children with autism, as it can reduce anxiety around communication, because certain ground rules are laid out in advance and these do not change (T.55, Q.264-265).

ABA generally

Mr McEnroy asked Dr Mangan about ABA as an exclusive provision. He asked her if there was a legitimate controversy in the area of psychology between people who subscribe to the exclusive ABA viewpoint, and those who do not.

Ms. Emer Ring

Ms. Ring is employed by the Department of Education and Science, and is currently a Divisional Inspector of Schools with responsibility for special education at primary and post-primary level in the South West, and has been involved in the Inspectorate of the Department of Education and Science since 2001. She was a District Inspector until January 2005, and is now a Divisional Inspector.

She gave her academic and vocational qualification, background and experience, which includes a Bachelor of Education Degree from Carysfort College in 1981, and a post graduate diploma in Special Education from St. Patrick's College in Drumcondra awarded in 1998.

She has always had an interest in teaching children who have difficulty learning, and this full year diploma and it included training in teaching of children with autism. Between 1999 and 2001 she again attended St. Patrick's and obtained a Masters degree in Education, which covered Special Education. Her first year covered the theory of special education, research methodologies and educational placement relating to children with special education needs. In her second year she completed a thesis on the question of inclusion of a pupil with moderate general learning disability in a mainstream primary school where she was teaching at that time. Thereafter in 2002 she completed another post-graduate diploma in Autism at St. Patrick's College. Her focus on that course was on approaches to the learning and the provision of a broad education to such children. She went on in 2003-2004 to complete another Masters programme from Birmingham University, where her tutors included Rita Jordan some of whose research has already been referred to. It was a distance learning course and it related to the learning and teaching of children with autism. She is currently undertaking a Doctorate with St. Patrick's College in which she is examining the impact of generic in-service teaching in the area of autism. This involves action research into its impact on teachers in ten schools.

Apart from her academic career she has eleven years' teaching experience as a primary teacher, as well as further experience as a learning support teacher, teaching children with a range of learning disabilities, including children with autism,

The National Curriculum

The current National Curriculum has been in existence since 1999 and she describes it as providing educational experiences for all children to enable them to inherent and potential capabilities to the best of their ability, and that it translates into all settings, including mainstream schools, children with special education needs, immigrant populations as well as children in disadvantaged areas. The National Curriculum runs to twenty volumes.

When cross-examining Mr Holland asked her to confirm that the National Curriculum was designed for so-called 'normal' children - children who had no special education needs. However Ms. Ring stated that the introduction to the National Curriculum stated that it is for all children, and that the starting point is that it is for all children so as to develop their imaginative development, emotional

development, physical development, cognitive development, spiritual development and moral development.

The Differentiated National Curriculum

In order to cater for children with different education needs, the National Council for Curriculum and Assessment has published a range of draft guidelines, divided into three categories, namely children with mild general learning disability, those with moderate general learning disability, and finally those with a severe to profound general learning disability. She went on to explain that this is not a separate curriculum, but rather is there for teachers to assist them in mediating the National Curriculum for children who may need it in the light of their learning needs, interests and capabilities. This differentiated curriculum itself runs to sixteen volumes.

Mr Holland referred to the Task Force Report on Autism and its recommendations, one of which was an urgent need to create structural provision for curriculum development, and Ms. Ring accepted that as of October 2001 there was an urgent need for curriculum development in the context of autistic education. She also agreed that it was unimpressive that five years' on only the stage of draft guidelines has been reached in relation to children with autism. She made the point that guidelines are not a curriculum, but were there to assist teachers in differentiating the national curriculum for children with general learning difficulties. Mr Holland suggested that specific guidelines for the differentiation of the national curriculum for autistic children were needed in addition to general guidelines, and that this was in line with what is stated in the Task Force Report. Ms. Ring agreed that such guidelines would be helpful but that they would have to be used in conjunction with the general guidelines because the dual diagnosis of autism and learning difficulty of some degree cannot be ignored.

Differences between UK and Irish terminology

Ms. Ring stated that in 1993 the Special Education Review Committee (SERC) established by the Minister for Education examined the needs of all children with special education needs, and how these could best be met by the Department. The report which issued subsequently divided children into three categories of disability and these were: mild general learning disability, moderate general learning disability, and severe to profound general learning disability. Children in the 'mild' category are said to be those with an Intelligence Quotient (IQ) in the range 50 – 70. She went on to say that in the United Kingdom, such children are categorised as having a 'moderate' general learning disability (T.47, Q. 50), and that in the United Kingdom different phraseology is used (T.47, Q.63)

This Report makes reference also to the World Health Organisation having classified persons in the IQ range 35-50 as being in the 'moderate' range of disability, and those in the IQ range 20-35 as being in the 'severe' category, and below 20 as 'profound' (T.47, Qs. 50-54). These are the categories of disability now in use here since 1993 and are generally known by psychologists here, and is the basis on which they write their reports. This is, of course, relevant to the difference of opinion between, say, Mr Willis, and Ms. Hughes as to the appropriateness of Model A for S, since Model A states on its face that children accessing Model A will usually have a mild degree of learning difficulty..

She states that these categories are the basis on which the Department allocates resources, since if a child has a mild general learning disability this has resource implications which are different to those for a child in any of the other more serious categories.

CABAS in Cork

In 2002 she was asked as part of her work to carry out an inspection of this school. It appears that at the end of 2001 the Department's Inspectorate decided to conduct an evaluation of educational provision for children with autism spectrum disorders in the State. A number of schools and centres were inspected including CABAS Cork, and ten autism specific classes attached to seven mainstream national primary schools, and other special needs classes. Later in her evidence she stated that though the CABAS schools were not part of the national school system there were set up as a pilot project and the evaluation she had done was to monitor the pilot project (T.47. Q. 334)

She herself inspected three such Model A-type autism classes as part of this evaluation process. These classes were staffed with a teacher and a special needs assistant, and delivered a child-centred curriculum through an IEP, and using a range of approaches such as some TEACCH, some ABA, as well as communication and intensive interaction. She found the education provision in these classes to be very satisfactory. She found that the curriculum was being differentiated and delivered, the children were happy and making progress (T.47. Q.79).

Ms. Ring gave evidence in accordance with her report on CABAS Cork which was dealt with during the evidence of Dr Olive Healy earlier. There were a great many negatives identified in the report which were put by Mr McDonagh to Dr Olive Healy when she was giving her evidence. These are expanded upon by Ms. Ring in her direct evidence on her report. I will not set them out again here, but it suffices to say that they are concentrated on the lack of qualified trained teaching staff and the fact that a differentiated national curriculum is not the curriculum provided, and that there is only ABA, rather than a combined approach.

Before this report issued, Ms. Ring had a meeting on the 3rd February 2003 with Dr Healy and some of her staff and went through these issues with them. Following that meeting the report was issued in which, Ms. Ring says, the good practices were affirmed and certain recommendations were made with the intention that they would be implemented. One of these recommendations was that "consideration should be given to utilising alternative autism specific methodologies and teaching approaches in the management of the children's learning and behaviour". She explained in her evidence that this referred to things like PECS, TEACCH, floor time, interaction (Hanan), incidental teaching and others (T.47. Q.153) Her report concluded with the following:

"The education provision available to children of CABAS Cork, is based on the principles of ABA (Applied Behavioural Analysis). ABA is one of a range of approaches to the learning and teaching of children with autistic spectrum disorder. It is concluded that ABA approaches have a value, if considered as an element of education provision for children with autistic spectrum disorder that takes explicit cognisance of the triad of impairments experienced by children with ASD and that adopts a broad and balanced educational focus."

She explained this view by saying that there are elements of ABA that are very beneficial and that teachers use ABA all the time in classroom for positive reinforcing of behaviour, for shaping behaviour, prompting and fading prompts, but that ABA is not an all-encompassing theory of human behaviour or learning, and that other theories have been shown to be effective, and that within a broad and balanced education, focus is related to providing the child with access to those curricular areas that enhance the dimensions of a child's development - physical, aesthetic, imaginative, emotional, social and cognitive (T.47. Q.157)

When cross-examining, Mr Holland Ms. Ring asked if she could envisage the possibility that an exclusively ABA education may be appropriate for a child. She replied that it would depend on many contextual factors, such as whether or not there would be teachers implementing the programme (T.47, Q. 245). She added that if the programme was being delivered by a trained teacher, and if there was support from a multi-disciplinary team, then she would be content about it (T.47, Q.246) On the other hand when asked if she could be happy with or endorse the placement of a child in the CABAS school in Cork in a situation where her recommendations

had not been implemented, she said she would not (T.47, Qs. 247-250).

Mr Holland asked her the same question in relation to other CABAS schools that she had inspected, and she said that the same applied unless her recommendations are implemented. It is fundamental in her view that the differentiated national curriculum be delivered in such schools by a trained teacher. Mr Holland asked her whether she has the same view in relation to CABAS Waterford, and she said that she had not visited that school as it was outside her area. In fact she was unaware that it even existed. But Mr Holland was attempting to understand how it came about that, if this was her view in relation to the CABAS schools generally, that CABAS Waterford opened in July 2005 with State support. She is not aware of the school in question but said that the Department is about to issue a composite report about the provision of education for children with autism in schools such as CABAS and other autism specific classes and schools, and that would be considered by the Department in detail (T.47, Qs.269-272).

Mr Holland also suggested to her that before she inspected the schools, including CABAS Cork, she had a pre-formed view that an exclusive ABA model was inappropriate and that an eclectic provision must be in place. But she said that this is not so and that CABAS Cork was the first school that she had visited and that she had an open mind, and that her focus was on whether the children were getting education, whether she could see teaching and learning going on, whether she could see the eight dimensions of a child's development being addressed in a meaningful way, whether the child was participating and benefiting from education to the best of his or her ability (T.47, Q.280)

It is Ms. Ring's view that the ABA education provided at CABAS school "cannot be equated with education as in the United Nations Convention on the rights of the child, as in the Universal Declaration of Human Rights, as in the National Curriculum" (T.48, Q. 11) She did not accept the suggestion made by Mr Holland that since she was not an expert in ABA she was not in a position to evaluate an ABA school. She stated that her function had not been to evaluate ABA but to evaluate the education, learning and teaching and she was an expert for that purpose (T.48, Qs. 41-45).

Special Education Support Service ("SESS")

Ms. Ring stated that this service was set up about three years ago in order to support teachers in meeting the needs of all children with special educational needs, and that this support is given in a number of ways such as providing funding for teachers to attend courses in TEACCH, PECS, Lámh (a manual signing course) should they feel the need to apply for funding. In addition to providing funding of this kind, the service engages experts to provide Continuous Professional Development ("CPD") for teachers. At the time she was giving her evidence, such a 5-day CPD course was being given in relation to TEACCH by a team of experts from Division TEACCH in North Carolina (T.47, Q.161) She described a number of other ways in which special needs teachers, including those teaching in autism specific classes, are assisted by SESS (T.47, Q.163)

Need for a Qualified Teacher

Ms. Ring believes that a differentiated National Curriculum needs to be delivered by a qualified national teacher, because such a teacher is skilled in pedagogy, curriculum philosophy, child development, a child's social and emotional development, and also modes of assessment. She described such a teacher as having flexibility to meet the needs of a child, and that it is an art gained by a lot of experience augmented by CPD.

Mr Holland suggested to her that the qualification as a national teacher, was not of itself sufficient to equip a teacher to teach a child with autism. Ms. Ring stated that the B.Ed. degree was a starting point to be added to by appropriate additional training in the event of a teacher being in an autism specific class. That training could, in her view, take place either simultaneously when taking over the class or prior to doing so (T.48, Q.239) She was pressed further about whether a person who had only a B.Ed. could adequately teach such a class, she stated that such a person with only a B.Ed. is not equipped per se, and would need to engage in CPD to meet the needs of the children in the class (T.48, Q. 249)

Mr Holland also referred her to a survey carried out among principals in national schools by the Irish Primary Principals' Network and published in January 2006. She had not seen this survey. It addressed the question of resourcing of autism specific education. One of the questions in the survey questionnaire related to training, and 70% of the principals who completed the survey had to leave that question blank because neither they or their staff had received any training. She agreed that this was "an appalling state of affairs" (T.48, Q.298), and that it showed that there was "a lot to be done" (T.48, Q.299) Mr McDonagh submitted after this evidence was given that the facts emerging from this survey were hearsay and had been introduced without any notice to him. Mr Holland accepted that it had the frailties of hearsay evidence, but that it had been put to the witness without objection at the time.

As it happens, Ms. Ursula Cotter, who subsequently gave her evidence is a member of the national committee of the IPPN and was aware of this survey of national principals. She described it as a non-scientific survey, and that it was just a fact-finding effort so that they could inform School Principals what sort of training was available. She thinks that there would have been about 1500 School Principals to whom the Questionnaire was sent, and that 205 responded. She was aware that only 57 out of the 205 principals had completed the question about training. But she could not be sure that the reason why the remainder had not was because their staff had not done training. When she was cross-examined she accepted that survey resulted partly from a concern on the part of the IPPN that there was a lack of training resources for Principals, but went on to say that it was also due to a feeling that standardising these resources and provision upwards would have been "a positive fact" and making them aware of what was available.

She also agreed with Mr O'Moore that they had not expected to find the 70% of responses showing no training, and she stated that this was certainly a worrying percentage.

Ms. Ursula Cotter

Prior to February 2006, Ms. Cotter was Principal at St. Joseph's Newtownmountkennedy.

Currently she is a Schools Inspector. She is a trained teacher having qualified from Carysfort College in 1986. She holds a Masters Degree in Education. Having taught for some years in Fermoy, she moved to St. Joseph's Newtownmountkennedy in 1996 as Principal. Her further training has included the Hanen More than Words Course in 2002, the Profexel course in positive discipline course in 2003, Dr Tierney's ABA course in Trinity College, and another Profexel course on Inclusion for Children with Special Educational Needs in Mainstream in 2005.

She gave evidence of the structure of St. Joseph's. The Catholic Archbishop of Dublin is the Patron of the school.

It is a national primary school for Catholic boys, and is run by a Board of Management, though she as Principal was responsible to the Board of Management for the day to day running of the school. The Board of Management employs the staff directly, but the salaries of staff employed are paid by the Department of Education and Science.

Autism classes

When she arrived at the school in 1996 there was no autism specific class at the school. It would appear that they received a request from the Department in 1998 to set up two classes for autism, The Board of Management set about some fact finding around this in the area and decided that they should do so. They set up two autism classes towards the end of 1998 having done some necessary building and refurbishment work. They started with seven such children and two teachers.

At first there was no distinction between the two classes in terms of the level of learning difficulties of the children in each. Until 2003 these classes were taught by qualified national teachers delivering a differentiated national curriculum, and that they had access to the guidelines published in 2000/2001 in respect of the delivery of that curriculum.

She confirmed during cross-examination that at the time these classes were set up in St. Joseph's the extent of her training in relation to autism specific education was a course of half a day or a day in 1997. She also visited a Beechpark Services Outreach school. Mr O'Moore asked whether she regarded that as satisfactory at a time when she was the Principal of the school, to which she replied that it was satisfactory given that she was a trained teacher with a number of years of experience, and she went on to say that she considered it to be more important that her teaching staff had additional training since they were actually working with these children. They were her priority as far as training was concerned.

Training of teachers

The two teachers who taught these classes from 1998 (Ms. Balfe and Ms. Daly) had what she called a general training in autism specific education, as well as some training in TEACCH. As new teachers have come to the school, Ms. Cotter stated that the Board of Management ensured that they got training prior to or immediately starting to teach. Ms. Balfe had received a significant amount of training in this area of teaching over the years, including by having a qualification in ABA as certified by the Florida Board in 2004. Ms. Balfe no longer works there having been seconded to St. Patrick's College as a lecturer in Special Education.

Ms. Cotter stated that the Board of Management of the school has a policy to ensure that teachers are supported in their professional development, and that this would include ensuring that if a teacher was going into a special needs class, he/she has the necessary training. As Principal she had a role in providing advice to teachers on further courses of training.

In cross-examination, Ms. Cotter agreed that the amount of training in autism specific education obtained by the teachers in her school was "grossly inadequate" (T.56, Q.231)

Request from parents to set up ABA class

Ms. Cotter has stated that in about May/June 2002 one parent on behalf of other parents in the area asked if she would consider setting up an ABA class at the school. She stated that at that time they did not know a lot about ABA, and they liaised with both the Department and also with NEPPS. They were asked to submit psychological reports to NEPPS in order to get a professional opinion as to the framework of intervention for those children. She stated that in May 2003 these parents met with Dr Clare Mangan and a representative from NEPPS and that Model A was discussed.

Funding for an ABA Consultant

The Board of Management applied to the Department for funding for an ABA Consultant, since ABA is a component of the Model A framework. She advertised for someone with a post-graduate ABA qualification, having obtained advice from NEPS and Dr Ken Kerr in how that advertisement should be worded. She received a couple of replies but none fulfilled the criteria that she had been advised were best suited to working in a classroom situation. It appears that at this time Ms. Balfe was working towards her Florida Board qualification and was in touch with Dr Olive Healy as one of the tutors on her course. She mentioned to Ms. Cotter that Dr Healy could be approached in relation to the ABA consultancy position.

She met with Dr. Healy who expressed interest, but because of time commitments this consultancy was shared between Dr Healy and Ms. Clare Egan who was also Florida Board certified. At the end of 2005 Dr Healy became the sole consultant to the school, and on the basis of three days per month, and this is funded by the Department of Education and Science.

Model A and Model B classes

She stated also that it was apparent by 2004 that that some of the children concerned had more severe learning difficulty and for that reason one of the two classes in the school was designated for those children and to whom a Model B framework would be provided, and the other class became the Model A class for those with milder learning difficulties.

The division of the children between these two classes was based on psychological reports prepared for the children by Beechpark Services and on the NEPPS recommendations made by Dr. Clare Mangan (T.56, Qs. 245-248)

Ms. Balfe was in charge of the Model B class until she left in summer 2005 and was replaced by Ms. Aisling Foley, who is a qualified teacher having graduated from Mary Immaculate College, Limerick. She has done a two day PECS course, Dr Tierney's ABA course at Trinity College, a two day TEACCH course, and also a course in 'floor-time'.

The Model A class at the school was taught by Mrs D. Kelly until she left at the end of 2004 and was replaced by Ms. Catherine Daly. She stated that Ms. Daly had three years' experience of teaching children with mild general learning difficulties, and was a qualified teacher, having a B.Ed. Degree and a Graduate Diploma in Special Education from St. Patrick's College. She also has attended Dr Tierney's ABA course at Trinity College, and has completed the on-line Profexel ABA course which Ms. Hughes had referred to. Ms. Daly has also completed a 2-day and a 5 - day TEACCH course, as well as a verbal behaviour course by Dr Carbone.

Ms. Cotter stated that Dr Healy had not made her aware of any deficiencies in the level of consultancy, or the adequacy of the ABA or other educational provision, or the training in ABA of the teachers or Special Needs Assistants. She stated in fact that Dr Healy had been very positive about her role at the school, and that she had never expressed any concern about the expertise of Ms. Aisling Foley, the teacher in the Model A class. When cross-examined by Mr O'Moore, Ms. Cotter agreed that the experience of having Dr Healy available to the school as a consultant had been a beneficial one.

Delivery of Model A at St. Joseph's Newtownmountkennedy

Ms. Cotter stated that Ms. Foley is in charge of the Model A class of six children, with one Special Needs Assistant for each child. She is supported by a multi-disciplinary team from Beechpark Services who provide an occupational therapist and a speech and language therapist who visit on a Friday. A psychologist visits also on a regular basis as well as a behaviour specialist. She states that this has worked very effectively, and that Dr Healy has never mentioned any shortcomings in relation to it.

Training of teachers in ABA

Mr O'Moore referred to the fact that both models provide that before taking responsibility of a class, the class teacher would receive ABA training. Ms. Cotter said that both Ms. Balfe who was in charge of the Model B class, and Ms. Daly who was in charge of the Model A class had ABA training. She said that Ms. Daly had done the Profexel course and had attended Dr Tierney's course.

In relation to Ms. Aisling Foley who has taken over the Model B class since Ms. Balfe's departure from the school has apparently attended Dr Tierney's course at Trinity College at the end of 2005 or beginning of 2006. She took over that Model B class in September 2005, and Mr O'Moore was keen to know what training she had in ABA prior to that date, given the requirement of Model B that a teacher would prior to taking over the class have ABAS training. To this, Ms. Cotter stated that Ms Daly had had four weeks of training under Ms. Balfe while a teacher on the summer programme. She was supervised by Ms. Balfe at that time. This meant that she received twelve days training while on the summer programme. Ms. Cotter regards that as having been satisfactory because Ms. Daly was a qualified teacher, and the training she got from Ms. Balfe was very much catering for the needs of those particular children, and there was follow up with Dr Healy in September. She regarded it as an appropriate starting point for taking responsibility for the class (T.56, Qs..271-272)

She stated that she had spoken to parents and that they had been happy about this situation (T.56, Q.265)

IEPs

Each child has an IEP which is prepared in consultation with parents, the class teacher and a multi-disciplinary team. The IEP outlines each child's strengths, weaknesses and priority learning needs.

Dr Healy as the ABA consultant has an input as well, according to Ms. Cotter, since behaviour programmes which Dr Healy supervises are very much part of the plan; but she went on to say that while she had given Dr Healy the opportunity to attend IEP meetings she had felt that it was not necessary for her to be present since she meets the parents on her visits to the school. I have already set out some of the evidence surrounding this question when dealing with Dr Healy's evidence (see Day 26 e.g.)

The differentiated National Curriculum ("DNC")

Ms. Cotter stated that the DNC is delivered in the Model A class, and that the amount of it that each child accesses is dependent on the individual strengths and weaknesses of the child. But that bearing in mind the 'triad of impairments' there are certain priority areas such as communication, socialisation and self-help skills. She stated that each child would have input in the area of visual arts because they are so effective in the area of communication. Physical education is also a priority, and the children would link with mainstream classmates in these areas. Language and literacy are covered, including by programmes which have been designed by Dr Healy. Mathematics are also dealt with by a combination of programmes designed by Dr Healy, and others by the class teacher. She described also how social, personal and health education is provided, including by reference to programmes provided by Dr Healy, as well as other areas covered by the curriculum, such as arts, computers and physical education.

Integration

In 2006 S was 2nd on the waiting list for St. Joseph's Newtownmountkennedy, and apparently there were three available places for September 2006. Ms. Cotter says that at the end of 2004 or commencement of 2005 she received a call from S's mother to enquire if there was a place for S at St. Joseph's. At that stage there was not a place for him (T.56, Q.292-293).

She states that in November 2005 Ms. Sinnott had telephoned her and spoke about a child at St Catherine's who had challenging behaviours. She did not identify at the time that it was S about whom she was telephoning, but spoke about a child with severe challenging behaviour and enquired if his needs could be met at St. Joseph's. Ms. Cotter states that firstly she did not know who the child in question was and did not know the challenging behaviours she was talking about, and that she would need to see the reports on the child, and that in any event it would not be her decision.

Ms. Cotter stated that an integration plan is developed for each individual child depending on their abilities for that to happen. It appears that at lunch time between 12.30 and 1pm all the children of the school are together. But generally, access to mainstream peers is managed on a phased and gradual basis depending on how ready the child is for it.

Ms. Cotter stated that during her time as Principal at St. Joseph's they had received one child who had previously been attending St. Catherine's. She described how that child had fared in relation to the change of placement. She stated that when a place became available she had met the parents in order to plan how best to manage the transition. A clear plan was put in place. The class teacher had access to his reports so that his background and needs and strengths could be ascertained. The parents and child came to St. Joseph's to meet the class teacher, and the Special Needs Assistant on an informal basis, so that the child could get to know the class and become comfortable in those surroundings. The teacher also met the teacher from St. Catherine's so that information could be exchanged. The child's time spent during the school day at St. Joseph's was also gradually increased after the commencement, as he became familiar with the new placement.

She described this transition from St. Catherine's as having been very effective, and that the child seems to be very happy. This child is also accessing mainstream for half an hour per day. This integration now forms part of his regular day at school since it is important that he knows what is to happen during the day at school.

Summer programme

Since 2003 the school year for children with autism has been extended to cover twenty days in July. During those days what is referred to as "the summer programme" is in place. It is more activity based than the normal programme. This is overseen by Ms. Balfe even though she is no longer teaching at the school, or some other teacher that the children are familiar with. There will be a Special Needs Assistant for each child as well.

Refusal of access to St. Joseph's by Mr Alan Willis

Ms. Cotter stated that it was not her decision that access to St. Joseph's Newtownmountkennedy should be refused for Mr Alan Willis, who had expressed a wish to visit the school in relation to his report on S, and that it was the decision of the Board of Management. She went on to state that the decision was based on the fact that there was no formal application for S to attend the school, and the Board had felt that the school could be inspected by the Department's Inspectorate, and did not want to agree to his visit to the school. There were in fact two refusals of permission for Mr Willis to visit the school, one in February 2005 and a second in September 2005. Ms. Cotter stated that on the 28th September 2005 she had a conversation with S's mother about this. She stated in answer to Mr O'Moore that at this meeting with S's mother she would probably have said to her that if S was enrolled in the school there was a chance that such a visit might take place (T.56, Q. 305). It appears that on the day following this meeting, namely the 29th September 2005 S's parents wrote to her, enclosing a completed application form including an assessment from NEPS, and expressed gratitude to Ms. Cotter "for agreeing to meet with Alan Willis and ourselves" and they enquired when on the 10th or 11th October would suit her. However it appears that Ms. Cotter spoke to the Chairperson of the Board subsequently and the decision not

to allow the visit to occur remained the position (T.56, Q.306) She clarified that it was Mr Willis who was being refused a visit and that the parents would have been welcome to visit. Ms. Cotter stated that she agreed with the decision of the Board of which she was a member. She went on to confirm that other psychologists, such as those engaged by the Department or NEPS had been allowed to visit, but she stated in this regard that the NEPS psychologist would be connected to the school whereas Mr Willis was not.

Mr O'Moore then explored the question of whether the school is in fact independent of the Department in matters concerning these proceedings. She stated that it was. But it appears that before the letter was sent to S's parents indicating a refusal of access for Mr Willis on the second occasion in September 2005, a draft of the proposed letter setting out the decision of the Board of Management was sent to the Department. Ms. Cotter says that it was not in order to seek the Department's approval for the letter but to inform the Department of the Board's response to the request (T.56, Qs. 324-330). She was not aware of any other correspondence that would have been sent to the Department in this way (T.56, Q. 334), but Mr O'Moore produced to her two letters each dated 24th November 2004 and each addressed to S's parents, which are part of the Department's Discovery of documents in this case. It would appear that in one respect (Question 2 therein) the text of the letter sent to the Department contained four lines of text, whereas the letter actually sent to S's parents contained five lines of text. Ms. Cotter acknowledged that she must have sent the first version to the Department before sending the second version to S's parents. She acknowledged that her evidence at Q.334 was incorrect and apologised for that.

Ms. Cotter stated that the letter was being sent to the Department not for advice but for information purposes as to what was available at St. Joseph's. However, further questioning revealed that she had in fact sent the letter to a person in the legal services section of the Department. Mr O'Moore suggested that the real purpose of sending the letter to legal services section ahead of sending it to S's parents was to get their approval of the letter before sending out the letter to S's parents. She agreed that this was so, but she went on to state that she was not intending to be untruthful, but that she would, as Principal, from time to time look for advice from legal services, and that on this occasion she did so (T.56, Qs.350-356). Mr McDonagh intervened to say that in fact the person in the Department to whom the letter was sent did not in fact work in legal services but in the special education section. He acknowledged that it did not affect the thrust of Mr O'Moore's questioning in this regard but he felt the clarification ought to be made. Ms. Cotter believed that in fact this person was in legal services when she was communicating with her. Mr O'Moore suggested that this episode indicated that the Board of Management was not acting independently of the Department in the matter of access to the school by Mr Willis. Ms. Cotter stated that it was an unusual situation that access would be sought to the school by an educational psychologist and that in an unusual situation she would regularly communicate with the Department. She agreed that ahead of the Board's decision she was in touch with the Department for advice, and that the advice was that it was a matter for the Board of Management to decide (T.56, Qs. 368-373)

Model B class being phased out for 2007/2008

It emerged also in cross-examination that there are now two Model A classes and one Model B class at St. Joseph's, but that at the time Ms. Cotter was giving her evidence, the Model B class was being phased out, since two of the three Model B pupils were going to a secondary school in September 2007, which would leave just one pupil for that class until that child leaves the school. That will leave two Model A classes at the school. Ms. Cotter believed that if S was to commence at St. Joseph's he would attend a class in which Ms. Daly would be the class teacher. Given that Model B involves a more intensive element of ABA within its framework, Mr O'Moore asked whether in those circumstances the amount of funding available for ABA supervision was going to be reduced for the school. Ms. Cotter replied that she did not know but that what she knew was that she had a guarantee that ABA funding would be available to cover the needs of the pupils for as long as they needed it (T.56, Qs. 391-412)

Delivery of Therapies at St. Joseph's Newtownmountkennedy

When questioned by Mr McEnroy on behalf of the HSE, Ms. Cotter described how the therapies were delivered at St. Joseph's. She stated that Beechpark Services provide the services of an occupational therapist, and a speech and language therapist on one day per week, and that they have available also the services of a psychologist and a behaviour specialist. These guide the class teacher on how to help the child in those areas of need, and regard is had to the child's IEP in this regard. The psychologist is also available to advise the teacher and to ensure that the child's reports and psychological assessments are reviewed and kept up to date. She stated also that the behaviour specialist would also work with the teacher and with the parents at home (T.56, Q. 437). She stated that this input by way of assistance to the class teacher was of benefit to the children. She went on to state that the child's education benefited from this input. She said that the relationship between these therapists worked well and that it was a collaborative or team approach based on the needs of the children, and that no one therapist had primacy on delivery, and that the class teacher was the person who co-ordinated the contributions of each team member. She believes also that if one therapist was to dominate decision-making in relation to provision, it would impact negatively since that one professional would be focussing on their area of expertise (T.443-444) She believes that this collaborative approach at St. Joseph's has had been a very positive feature of the education at St. Joseph's (T.56, Q.456)

Mrs Catherine Daly

Mrs Daly is the Acting Deputy Principal at St. Joseph's Newtownmountkennedy. She has worked at that school since 1983, and is a qualified national teacher, having obtained a Bachelor of Education Degree from Carysfort College. She later obtained a Higher Diploma in Education Administration in UCD in 1995. In 2003/2004 she studied for a Diploma in Special Education at St. Patrick's College, Drumcondra. She has done the on-line Profexel ABA Course referred to already. She also attended a ten week course in ABA run by Dr Tierney at Beechpark Services. She also did a course in verbal behaviour with Dr Carbone in Mullingar. She has more recently completed an introductory two day TEACCH course, and a five day practical workshop in Tralee in May 2006.

From 1979 until 2001 her teaching experience was in mainstream classes only. In 2001 she commenced teaching children with mild general learning disability. It was not in an autism specific class. While teaching that class she attended at St. Patrick's College for a Diploma course in Special Education. She completed that course by the time she started to teach an autism specific class at St. Joseph's. She has worked in consultation with Ms. Clare Egan and Dr Olive Healy in relation to ABA implementation in the classroom. They provided both training to her and to the Special Needs Assistants working under her supervision. She has found Dr Healy very helpful and stated that her expertise and consultations were very much appreciated (T.58, Qs.1-47)

ABA qualifications

When cross-examined by Mr Holland she confirmed that she held Dr Healy's expertise and assistance in very high regard. She also accepted that Dr Healy was much more highly qualified in ABA than she is and that she has taught her a lot, and that her own level of expertise has improved greatly as a result. Mr Holland suggested that Dr. Healy's qualifications would "dwarf" her own, to which Mrs Daly said that at the start that would be so but not now. But Mr Holland pointed to the fact that Mrs Daly had done only the Profexel course and Dr Tierney's course whereas Dr Healy had achieved a Ph.D in ABA and is a full-time practitioner in ABA. However, Mrs. Daly is of the opinion that the courses which she has done, combined with her diploma in special education, as well as her training from Dr Healy have all contributed to helping implement ABA effectively in her classroom (T.58, Qs. 50 – 58) Mr Holland put it to her that even

Dr Tierney himself had stated that his course did not confer any qualification or competence in ABA, but Mrs Daly stated that she was not saying that this course conferred any particular competence, but that it was part of what she called "a composite of education" which she found helpful, especially in the area of learning about functional assessment of behaviour and learning the terminology in relation to ABA (T.58, Q.59-60).

TEACCH training

Mrs Daly took over the Model A class at St. Joseph's in 2004 and was aware at that time of the components of Model A, a main one of which is TEACCH. At that time Mrs Daly had done no course in TEACCH, but had taken over the class from her predecessor (who had TEACCH training) who had the class set up in relation to TEACCH and passed on all the information which Mrs Daly felt she needed in order to keep that class going with TEACCH. She later did a 2 day course in TEACCH in April 2006 and a 5 day course in May 2006 (T.58, Qs.85-91). She was aware since February 2006 that she may be called to give evidence in relation to a placement for S in her class, and Mr Holland suggested that she had done nothing to get training in TEACCH until she became aware that she might be called to give evidence in this case and that this was the reason why in 2006 she had decided to do the courses in TEACCH. Mrs Daly did not agree and stated that it was not correct to say that she had done nothing, since she is a believer in ongoing training and that up-skilled herself by reading every book she could on autism, whether in relation to ABA or TEACCH or any other area which she needed to study, and that it was not correct to say that she had done nothing until she heard about this present case. She went on to say that in her first year in that class she had regarded ABA as a priority and had put her effort into learning about that. She was also very interested in verbal behaviour and targeted that area also. She went on to say that in 2006 she had the opportunity to study TEACCH even though she believed that what she had learned from her predecessor was enough.

Dr Healy's conversation about S on the 23rd February 2006

She recalls having a conversation with Dr Healy who said that she was due to go to court on the following day to give evidence about a boy on the waiting list and who had challenging behaviours. It was suggested by Mr Holland, in accordance with evidence given by Dr Healy on Day 27 (see T.27, Qs.368-374) that Mrs Daly had expressed concerns about having S if he had self-injurious behaviour, and was of the view that a placement for S at St. Joseph's was inappropriate and that she would not have the skills to cope with him. Mrs Daly responded by saying that before that day she had never heard of S, and that it was Dr Healy who brought up the topic of the Court case, and that she could not talk about a child whose reports she had not seen and a child she had not met, and that under the enrolment procedures she had no role. Her recollection of the conversation is that Dr Healy had mentioned that S was on the waiting list, that he had severe challenging behaviours and that there was "no way that our school was a suitable placement for him". Mrs Daly said that this is what Dr Healy had said to her, and that she had not said it to Dr Healy because she did not even know S at that stage (T.58, Q.114). There was some further question and answer in relation to this conversation at Qs.134 – 137, but I do not believe it alters in any material way what Mrs Daly recalls of the conversation, but it is appropriate nevertheless to refer to it.

Mr Holland then asked whether she would agree with the proposition that such a child would be difficult to accommodate at St. Joseph's, to which she responded by stating that she is not in a position to comment since she knows nothing about S, has seen no reports and has not met him, and that she would not be in a position to make that decision in those circumstances (T.58, Q.115). She added that in her Model A class she was teaching children with autism many of whom have challenging behaviours and that she, her staff and Dr Healy have dealt with these "quite successfully" (T.58, Q.119).

Therapies

Mr McEnroy asked her how the therapists participate in the provision made for children in her class and she gave evidence about that very much in line with what Ms. Cotter has stated and I do not propose to detail that evidence except that she clearly agrees that the collaborative approach and the eclectic programme available there works well and the children benefit.

Ms. Patricia Joyce

Ms. Joyce is a qualified national teacher at St. Joseph's Templaraine. She originally qualified as a Montessori teacher in 1983. She obtained also a Diploma in Special Education. Having spent a few years in the United States she returned here and taught in a school for socially disadvantaged children and those with a mild mental disability. It was a residential school.

From 1988 until 2002 she ran her own school in which the children had a mixed range of disability and social disadvantage, including some with behavioural needs.

In 2002 she applied for and got a job as a teacher at St. Joseph's Templaraine for a class for children with autism. Part of her function was to set up that class. She started there in September 2002, but it was not until December 2002 that the first child could attend, as the class had to be set up physically. It was not until this time that she heard about ABA, and she made enquiries about it and was in due course referred by the Department to a course starting at the Saplings School in Kildare and given by Dr Ken Kerr.

Her class at St. Joseph's Templaraine

She described the child who was in the class which she had set up as being non-verbal, and that she worked on communication skills with him on a one to one basis, but in addition she worked with him on junior class books since she realised that at some stage he would be moving to mainstream. She dealt with integration at that stage by bringing children from a mainstream class into her class, initially for game activity and for art. This gradually progressed to a point where she could bring the boy into that mainstream class for some very limited activity. (T.59, Qs. 51-56)

She described how when a new child was coming to the school she would access whatever reports were available for the child, and that she would then meet the parents. She also has the benefit of services from Beechpark Services once every month and they would have input whereby they would attend an IEP meeting. This happens twice per year, whereby they would observe the child and identify needs. As it happens, there has not been a child for which ABA was recommended as a core element of provision, but that if such a recommendation was to be made, she would be happy to do further training in that regard. Equally, in such a situation she would be happy to work with an outside ABA Consultant to assist her in relation to it. But at the moment she does not run any ABA programme in Templaraine. She makes no claim to be an expert in ABA (T.59, Qs.59 - 70).

In cross-examination, Mr Holland asked her if she was aware that her class was described in this case as being a Model A class. She replied that this was broadly correct. It was only in the few months prior to her evidence in July 2006 that she had first become aware of the Model A framework as such. She had not been familiar with it prior to that (T.59, Qs. 98-99).

She confirmed that up to the time at which she applied for the job at St. Joseph's Templaraine she had never taught any children who had been diagnosed with autism (T.59, Q.101). She also stated that when she was setting up the class nobody had given her any sort of template or guideline as to what sort of provision would be in place, although it appears that in September 2002 her Principal drew her attention to the fact that an ABA course was starting (T. 102-105). She was essentially left to her own devices. She agreed with Mr Holland that it would have been helpful if she had been given some guidelines when setting up the class she was

to teach in. In fact she agreed also to Mr Holland's suggestion that it was extraordinary that this was not done (T.59, Qs. 112-115). She was aware that she was not setting up an exclusively ABA class such as that at Saplings, but she stated that she was teaching just one child between 2002 and 2005 and that there elements of ABA used, but it was not a full ABA programme. IN so far as she uses aspects of ABA such as discrete trial she receives assistance from Beechpark Services for the design of the ABA type intervention (T.59, Qs. 207-212). Her use of ABA such as it is not supervised by any ABA expert.

The IEP

She stated that when her pupil started in 2002 an IEP was drawn up in early 2003 and that a psychologist participated in the preparation of that IEP, as well as the child's parents. No therapists were involved at that stage. But the IEP set out what the child needed in terms of social skills, sitting still skills, and communication skills. This IEP was a short document which set the targets to be met and some specifics as to how they would be met (T.59, Q.141). Some of the specifics would have been by discrete trial method though she was unaware that this is what it was called at that time. It was something that she was using in any event with the child, though she was not recording it in accordance with ABA methods. She believes that the use of PECS was mentioned in the IEP, but could not recall if TEACCH was mentioned (T.59, Qs.144-146).

Mr Holland asked her whether ABA itself features in the discussion of what is needed for the child when the IEP is being discussed and prepared. She said that this was correct. She went on to say that the methodologies discussed are initially one to one instruction in most instances, and also whatever follow-up exercises are determined for the particular child with particular needs. She stated that some aspects of TEACCH and ABA are used, but that PECS is not used particularly as it has not been appropriate – presumably for the children she has actually dealt with. She also finds that her Montessori training has been very useful in dealing with social skills and social development.

Mr Holland put Dr Grey's evidence to her that he had failed to find any research which validated the use of Montessori principles with children with autism (see T.31, Q.244). She said that she accepted that he had done that research, but held to her view that nonetheless she had found her Montessori experience was successful with the child she was teaching (T.59, Qs.238.-245).

TEACCH

She has recently done a course in TEACCH on the occasion when a team came from Division TEACCH in North Carolina, and had previously in December 2005 attended a TEACCH course in Athlone.

She told Mr Holland in cross-examination that TEACCH was first used in the class during the year following its opening, which would be sometime in 2003 presumably. She said that she had set up the workstations in the classroom and that the class was set up in a TEACCH way even though she did not realise that at the time since she had no TEACCH training at the time, although she was aware of TEACCH. It appears that she had read about it and that she had the benefit of talking to a colleague who provided her not only with reading material but also some hands-on help in relation to TEACCH (T. 59, Qs. 148-157).

In relation to PECS she stated that while she had PECS training, she had not used PECS with the child because she had done a lot of work with him in relation to communication skills, and he did not need that programme.

Parents visiting St. Joseph's Templeraíne

Parents whose children might be about to attend the school have come to the school to observe the provision there. She recalled that S's father had visited the school recently. She is happy that parents should do so, since they want to see what is done there (T.59, Qs.74 -82).

Dr. Mitchell Fleming

Dr Fleming was called to give evidence on behalf of the Health Service Executive.

He is a clinical psychologist. He has experience in a range of positions since obtaining his primary degree in Psychology from Trinity College in 1978. Since his credentials are not in any way in dispute I do not propose to set out his career, qualifications and experience in complete detail. He is a Fellow of the Psychological Society of Ireland, and is currently President-elect of that Society for 2007/2008.

In 2001 he became Specialist Principal Clinical Psychologist at Beechpark Services. In January 2006 he left that post and moved to St. Paul's Services for Children on the Autistic Spectrum, but while there he managed Beechpark's Psychology and Behaviour Specialist Services for children with autism spectrum disorder. He was part of the management team there and Chairperson of that service's Policy Committee. In that capacity he was involved in the assessment and diagnosis of autism in children referred. He also runs an ABA course with Dr Tierney at Trinity College for parents, teachers and Special Needs Assistants.

Beechpark Services

Beechpark Services is a service coming within the overall Health Service Executive and is fully funded by it. It has its headquarters in Tallaght, Dublin, but the services are divided into three regions. The service provided is a multi-disciplinary approach to children with disabilities, not confined to autism. Among its range of services, it supports outreach schools and classes for children with autism, for which provision is made by the Department of Education. Children are assessed by the multi-disciplinary team in order to establish particular needs and suitability for, *inter alia*, these classes, and appropriate clinical support is given to the best of its ability. There are two outreach schools on the Beechpark Campus at Stillorgan, Co. Dublin.

Multi-disciplinary approach

He stated that parents are always invited to be involved in meetings about their child, and he regards this as essential for success in the preparation of any plan for the child. When setting up an IEP, the teachers and Special needs Assistants are involved in addition to members of the multi-disciplinary team. He regards it as a collaborative approach, where the teacher may prepare the IEP but would be supported by clinicians available from Beechpark.

ABA

Dr Fleming stated that Beechpark is very supportive of ABA and recognises its importance. While generally speaking there would be an open attitude to ABA he went on to say that he was aware that some members of staff, such as occupational therapists and speech and language therapists have been somewhat reluctant to consider ABA "because they have often felt that there have been other establishments in the State who have seen them as having no role to play within the system that they operate". During his time at Beechpark he tried to encourage these staff members to become involved in and become aware of ABA (T.59, Q.434). At a later point in his evidence he dealt with this matter again when asked about it by Mr McEnroy, during which he stated that some occupational and speech and language staff were reluctant to become involved with pure ABA schools "because they felt that they were subjected to certain restrictions in terms of how they ought to practice" (T.59, Q.477).

He sees ABA as an a very positive and useful approach, and has a pivotal role to play with young children, such as S, whose attention span may be short and focussed on their own agenda. He believes that it has been of enormous help in helping them to adapt and to learn, and a valuable tool. At a later stage, he stated that he would be amazed if Beechpark was to be described as being anti -ABA (T.59, Q.449).

He went on to describe the balance to be struck between the application of ABA and other programmes for children with autism. He said that ABA was a very flexible approach which can be used in the delivery of programmes for children, and gives a framework in which to operate and which can be applied to almost any approach being used and by a multi-disciplinary team. He described how where an IEP has been prepared in which certain clearly set out goals are set out, ABA can be used to try and achieve these goals. It is one of a range of methods which he has found to be useful (T.59, Q.438).

Later in his evidence he spoke of the behaviour specialists at Beechpark Services, who are in the main psychology graduates who have been employed to provide support to parents and schools in relation to aspects of behaviour, such as the management of challenging behaviour by using functional analysis and multi-element programme plans, and also the development of skills by the use of behaviour techniques. Dr Fleming and a senior psychologist colleague provided supervision for these psychology graduates while he was at Beechpark Services. That colleague had worked as a manager at "a replication Lovaas site" in the United States, and Dr Fleming stated that they were very fortunate to have had the benefit of his expertise (T.59, Qs. 443-447).

ABA as the only approach

Dr Fleming's view is that it is not the only approach. On the other hand he is aware that many people, including psychologists and parents who believe that the ABA approach is the sole and only approach that can be used for children with autism. He himself has a broader view that it is a very valuable tool and one which he could not be without, but that it is not the only tool. He went on to say that the approach to be used will depend on the goals to be achieved, and by way of example where the child's cognitive skills, as opposed to behaviour issues needed to be developed, a more traditional approach to teaching intervention would be appropriate (T.59, Q.439)

Dr Fleming gave evidence of his early learning of ABA as part of his undergraduate studies in psychology at Trinity College in the late 1970s, where he was lectured by a Dr Leo Baker who was a strong advocate of behaviour methods. He stated also that many of the strongest advocates in this country today are people who came through that undergraduate programme. He mentioned Dr Kevin Tierney in this context (T.60, Q.1) He recalled that as part of his work on his thesis at that time he looked at trying to increase the social interaction of two small children with Down's Syndrome in their pre-school, and he used ABA techniques which produced tremendous outcomes. He used these techniques with equal success during his subsequent work as a care staff member at a child and family guidance service run by the St. John of God Brothers. He has been involved in many ABA programmes and has always seen very positive outcomes, and he understands very well how people can become very enthusiastic about ABA, and it has often been his intervention of choice, but that it would also have certain limitations (T.60, Q.1)

Is ABA the only scientifically validated approach

He says that there is a vast bulk of evidence behind it as a scientific approach, and he lauds those responsible for ABA for conducting this research, whereas other approaches have much less of a research base (T.59, Q.440).

As to intensity or number of hours of ABA as an intervention, Dr Fleming stated that there is no consensus in the literature and that views vary on the subject. He also stated that it is rare to see a study commenting on the fact that there is correlation between intensity of hours and outcome. But he stated also that for a child like S, some intensity was necessary since he was not a child who "learn from six minutes a day", and that he needs a lot of structured programming which is tailored to his needs (T.59, Q.509). He added that with some children you can overdo intensity and that the child can become frustrated and get switched off.

Mr McEnroy asked Dr Fleming if there was a legitimate professional dispute among psychologists on the subject of ABA. In a lengthy response, he said that there clearly was dispute, and that this was unfortunate. As to whether this was legitimate, he stated that this must be looked at in context. He went on to say that people delivering Lovaas-type ABA programmes would believe that there is a right way of doing it and a wrong way of doing it, and that they are insistent that things be done according to the way they should be done, and have genuine concerns about people "tinkering with programmes". He went on to say that ABA is very much a science based approach to the delivery of programmes, and that the particular talent or skill which you want to develop will determine the particular ABA methodology which will be used. By way of example he stated that if one wanted to teach a child to dress using discrete trial instruction, there will be a particular programme for that, and that this will be applied in a particular way, and that it has a lot to do with precision and getting it right, and that if one fails to do it properly then it will not work. His experience is that ABA personnel usually insist that it be done according to what he called "programme integrity", and that from his own experience, if you want to get outcomes it must be done right. He does not believe that there is dispute among psychologists about this.

On the other hand he stated that psychologists do not favour such an approach, and that, for example, psychologists not working in the area of autism, but perhaps in the area of mental health, may not avail of ABA techniques, and get concerned with these issues.

He went on to say, in answer to Mr McEnroy, that among psychologists there is a difference of opinion as to whether ABA should be used as an exclusive provision, or whether other strategies should be included. He acknowledged that those in favour of exclusive ABA have their particular way of delivering ABA which is exclusively ABA, and that this gained in popularity because it was seen to produce good outcomes, and people wanted to repeat that (minus the use of 'aversives' of course) in order to gain similar outcomes. But Dr Fleming went on to say that his belief is that within general psychology there is an acceptance of the need to deliver intervention according to the way that they ought to be delivered but that they ought not to exclude other appropriate interventions which may be useful to develop certain skills in the children, and that the approach should be tailored to meet a particular child's needs. His own personal opinion, and he stressed that it was his personal opinion, was that he favoured a more inclusive approach to the delivery of different techniques, selecting techniques appropriate to the child's needs. These would include PECS, which he said was based strongly on ABA beliefs, and also TEACCH, and where necessary sensory integration (T.60, Qs. 81-84)

He went on to say that there is a range of strategies which can be used to meet the needs of the child. He mentioned again that the Lovaas programme had been shown to have produced positive results, and that many people were happy to continue and replicate that model, but that others and some reviewers have looked at a variety of approaches and have been flexible in their use of these different approaches. He referred in this context to a review undertaken by the National Research Council Commission on educating children with autism. He stated that this body had reviewed different approaches, taking each area, such as social skills, communication skills, and repetitive problems, and looked at the triad of impairments, and they selected evidence which related to each area, and came up with a multitude of approaches that they felt were appropriate depending on the evidence available (T.60, Q.85)

He went on further to say that if one is looking for evidence of one model which seems to cover all aspects of autism, then one might look to the Lovaas model for that; but that if one is looking for an approach that looks at the child's needs from a variety of points of view and consider each of those needs in their own context, then one might look at the work of the National Research Council Commission which recommends different approaches for different needs which have been shown to be successful (T.60, Q. 85).

Parental Choice

Mr McEnroy asked Dr Fleming how he would respond to parents of a child who came to Beechpark Services and had the strongly held and bona fide opinion that the sole methodology they wanted and would accept for their child was what I will refer to as the Lovaas model of provision (exclusive ABA provision), and nothing else. Dr Fleming stated that he would advise that such a programme was very good, that it has been studied and has good evidence. But he would go on and say that there is also a "combined set of approaches" depending on their child's unique needs "which is just as effective" but that they need to look at the research for these approaches in order to see the overall picture. He would say also that there is no one study that says that ABA is the only method, and would say that it is not the approach which Beechpark would be advocating or recommending as the sole approach. He stated, however, that he would recognise where the parents might be coming from, but that he would not be recommending that sole approach for the child (T.60, Q.86)

He went on to say that he would respect the parents' wishes, and would inform them of the availability of what they wanted for their child outside what Beechpark provides. He accepts that parents have the right to choose the educational approach that they want for their child "assuming that the State would consider it to be an appropriate educational service" (T.60, Q.87).

The eclectic approach

Dr Fleming states that his understanding of the eclectic model or combined skills approach is simply that ABA techniques are used alongside others which are not classified as ABA. He mentioned a verbal technique for in connection with social skills, and he went on to say that people in ABA would not call this an ABA approach but that he would have no problem combining such a technique with a technique such as ABA where the child is rewarded for complying and behaving in an appropriate way. He said that ABA is a flexible and broad approach which can be used in many areas such as marketing, teaching, and the treatment of depression, and is not necessarily used in a structured and rigid way. It was in use according to Dr Fleming up to fifty years ago in other areas, and before autism was even defined in 1943 by Leo Cameron (T.60, Q.3)

TEACCH

He states that he does not know so much about TEACCH, but is familiar with some of the literature in relation to it. It is an approach used frequently in the outreach classes run by Beechpark Services. To his knowledge its use is combined with ABA, and he believes that TEACCH in fact evolved from people who work in what he called "the ABA tradition". He mentioned a comparative study by Mesibov and Cathcart in relation to TEACCH, and an article by Lord and Schopler (1989) in relation to an experimental group of children, but that there is little literature of calibre. But in talking to parents he, as a professional, finds it very hard to ignore the results reported in these pieces of study, but went on to say that they must be viewed with caution since there was no control group as part of the study. But he would not rule TEACCH out as an intervention when he speaks to parents even though there is no hard scientific evidence for it (T.60, Q.5).

Use of therapies with ABA

He believes that the use of therapies such as occupational therapy and speech and language therapy works well alongside ABA. They co-exist well together (T.59, Q.441). He went on to say that ABA is a broad set of principles, and that it can be used ably by these therapists by such as the Verbal Behaviour programme and the Hanen programme for speech and language, and that many of the skills that an occupational therapist may wish to develop such as fine motor skills or gross motor coordination skills can be dealt with under ABA techniques and approaches (T.59, Q. 441).

He went on to say that the extent of the ABA to be delivered will depend on the needs of any particular child and the goals which have been set, and that ABA does not come "in a fixed package" and that the needs of the child and the best interests will determine the approach (T.59, Q.442).

Mr McEnroy asked Dr Fleming whether there is any body of evidence that supports the claim that speech and language and occupational therapy or other health-related support must be delivered through what Mr McEnroy described as "pure ABA". He replied that he was aware that the Lovaas method would often insist that everything must be done according to that particular method, but he is not sure that this amounts to scientific evidence for that, but he is aware of literature which does not encourage parents to avail of services other than ABA. But he is aware of other research (Harris et al. 1983) which compared speech and language therapy approach with ABA, and found that a speech and language approach was in that case superior. That article is apparently referred to in Prof. Alan Carr's book to which reference has been made already. But he says that there is a mixed body of evidence (T.59, Q.479).

Dr Fleming went on to say that he was not aware of any evidence that indicates that it is wise for one member of a multi-disciplinary team to take precedence over another in how to deliver a service, and that most of the evidence shows that people need to work in a respectful fashion and with good team work in the delivery of service to the child (T.59, Q.483).

Development of Beechpark Services

Dr Fleming stated that after he joined Beechpark in 2001 the management team had felt that the service brief was very wide and beyond their capability to deliver, and that over the years they had tried to carefully decide what they did and what they did not do so that when parents came to them for help they could be very clear to them about what they could and could not provide (T.59, Q.450). He stated that they provide a service for children who meet certain criteria, namely, in the main, children with mild learning disability or above that, and who live within what used to be the Eastern Health Board region and who are below the age of eighteen years.

He made the point that since 2001 parents and other service providers have extremely high expectations in terms of what type of service should be provided. He believes that such people are entitled to expect that level of service to be delivered immediately, and that Beechpark had tried very hard to match those expectations (T.59, Q.455).

Later in his evidence, Dr Fleming described the years since 1998 as a learning experience for all professional involved at Beechpark Services, and that autism has introduced a whole variety of different approaches into the field of education, and that all have worked very hard to keep abreast of new developments in their particular areas. He described it as an exciting time, and that he has learned a tremendous amount about different approaches of which he would not have previously been aware. He does not believe that this learning process is over, but that a good start has been made, yet there is a large number of children for whom they still struggle to provide a good service for. He stated that there were some children who respond well to certain approaches and others who are not

responding and it is a struggle to find new approaches and new ways to help them to reach their potential. He stated that there is a range of interventions available and that it will depend on the needs of any particular child which ones are used.

Later in his evidence he stated that the numbers attending Beechpark Services after 2001 may have quadrupled, but that staffing levels only doubled. The increase in the workload happened very suddenly and he readily stated that they had been "caught wrong-footed" (T.62, Q.180). He has no difficulty concluding that the staff, including himself, were overworked by their efforts to keep a satisfactory level of service. He also said that Beechpark was no different from any other part of the health service which would like to have had more resources in order to deliver a better service (T.62, Q.183). He agreed with Mr Holland that a consequence of a lack of resources was the speed with which multi-disciplinary assessments could be carried out, and secondly the making available treatments by speech and language therapists and occupational therapists (T.62, Q. 186).

Ms. Gráinne Bray, the current Acting director of services at Beechpark stated that the fourfold increase in recent years for services at Beechpark is the result of earlier assessment of autism taking place in children. She stated also that while they always had sufficient numbers of behaviour specialists or nursing specialists, the difficulty of recruitment was in the area of speech and language therapists and occupational therapists, and psychologists, and that this was a nationwide problem

Recruitment of therapy staff

Dr Fleming stated that at Beechpark was always trying to recruit staff from all over the world, especially for occupational therapists and speech and language therapists. Due to a shortage of such therapists here, it was necessary to try and recruit from abroad and they had some success in doing that (T.59, Qs. 467-472).

These therapists will meet the child and the parents and will do an assessment in order to try and identify the child's needs. They will then set intervention goals or objectives, and attempt to meet these. They will often work with the child or with the child's teacher and family, and it is a collaborative approach which he regards as the best approach (T.59, Q.473). He stated also that the psychologist will work in the same collaborative way.

But Dr Fleming also stated that the demand for therapeutic series was very high around the time that is relevant for these proceedings. He could not recall exactly what was available at that time but he knows that the demand was very high. Because of this it was his policy to always be upfront with parents who came looking for services as to availability of services. Indeed, S's father stated in his evidence that Dr Fleming had been very frank and realistic with him in this regard (T.60, Q.98-101).

As far as resources were concerned, Dr Fleming stated that it was always a question of rationing them out as best they could while still ensuring that an effective service was delivered. For that reason they had a strong preference for using what he called 'shared approaches' like training courses (i.e. the Hanen More Than Words course and the Early Bird Programme, by way of example) because this was a way in which one person could impart their knowledge and skill to a wide range of parents (T.60, Q.102).

At Beechpark, they were always trying to get more professionals in order to meet the demand for services. But Dr Fleming stated that it was his experience that many such professionals chose to leave Beechpark after short periods of time due to the pressures that they were working under. Because of the pressures these young professionals were working under due to demand, Dr Fleming had considered that he as Manager should try and protect them as best he could so that they did not 'burn out'.

By the time Dr Fleming left that post, the situation as far as personnel had improved somewhat as a result of the recruitment which had been ongoing, but there was this high drop-out rate occurring as well.

The assessment of S by Beechpark Services

Dr Fleming was part of the group of professionals which assessed S on 12th August 2003. On that occasion S was seen with his parents for the purpose of assessing his suitability for a pre-school placement at Ballyboden in September 2003. Briefly, the criteria for that service is that the child has a diagnosis of Autism (the degree thereof being irrelevant), and has a degree of intellectual or learning disability which is mild or better than mild. In other words, children with an autism diagnosis but who have a moderate or severe general learning disability are not eligible for, say, Ballyboden outreach pre-school, because it caters only for children with mild learning disability.

By that time S had already been assessed in September 2002 by Dr Joan Mitchell, consultant child psychologist, Dr Caroline Noone, Senior Registrar, Ms, Sarah Burns, Senior Speech and Language Therapist, Dr Peter Reid, Principal Clinical Psychologist at the Lucena Clinic. That assessment had reported that S had significant delays and deficits in areas of communication, socialisation, imaginative play, and a diagnosis of autism was made.

On the 12th August 2003, Dr Fleming and Dr Moira Kennedy observed S over a period of two hours or so. They conducted what he called a play-based assessment whereby some carefully selected toys are placed around a room, and the child is allowed to come into the room and play with these toys while they speak to the parents. This provides an opportunity to observe how the child plays with the toys. This enables them to gain an insight into how he might respond to different pieces of play and so forth, and they can form some impression of the child. They also conducted the Vineland Adaptive Behaviour Scales (Expanded Form) test which has already been referred to in the evidence of Dr Willis and Ms. Hughes, and which Dr Fleming described as "an assessment conducted by interview with his parents". They had also wanted to conduct a cognitive test since part of the admissions criteria for the Beechpark pre-school at Ballyboden is that the child will have a mild general learning disability, rather than a severe general learning disability, but this proved not to be possible to perform on that occasion (T.60, Q.14).

The 'Vineland' test of adaptive behaviour/daily living skills

He described this test as an internationally recognised instrument for assessing adaptive behaviour – being in relation to everyday skills. It covers four areas, namely, communication (both receptive and expressive, and written communication skills), daily living skills, social skills, and finally motor skills (both fine and gross). He mentioned that there is a final section also for maladaptive behaviour but he was unsure if they had completed that with S. This test is useful because it allows parents to tell the assessors exactly what they see their child using on a regular basis. He uses the 'expanded form' of this test because it enabled a lot of detail to be gathered from which a programme can be designed with interventions for appropriate goals and targets (T.60, Q.16).

Observation of S's behaviours

These observations are set out in the Beechpark report dated 27th August 2003. That report states that S showed little interest in relating to unfamiliar people and that he seldom made eye contact, but that he showed a healthy curiosity in and explored the toys laid out in the room. He was observed to "mouth and chew certain toys such as a ball, plastic toys and the wheels of a car. He also approached his mother for a hug or cuddle and was seen to place a hat on his father's head. He was also observed taking an interest in an electric fan in the room and liking the sensation of air blowing in his face. He blew bubbles and burst them on the floor with his

feet, and assembled a number of simple jigsaws which he seemed to enjoy. It is noted that he played with most toys in a functional way. It was noted that he had a few functional words such as 'good', 'bye', 'go', but it is noted also that much of his speech was unintelligible, and that when playing alone he sang, imitating a song which his mother sang, and he 'babbled' to himself while wandering around the room.

The report in this section related to behaviour concludes as follows:

"Overall, [S] impressed as a happy and easygoing little boy who was content to occupy himself. Attempts to administer conventional psychometric tests were unsuccessful. [S] refused to sit down and look at materials presented to him. When encouraged to do so he became annoyed i.e. struggled to get away and slapped out. On occasion, he banged his body against the wall and kicked out. Toward the end of the assessment he became tired and indicated that he wanted to go by saying 'go', opening the door and turning off the light. His parents found it easy to distract him and he was easily consoled. It was observed that he liked to look at his reflection in the window and on shiny laminated surfaces. He also tends to look at objects from an unusual angle."

In relation to the inability to conduct the psychometric/cognitive test due to S becoming upset, Dr Fleming stated that this was quite usual and that such assessments are often best done on a second or third visit and in more familiar surroundings. He stated that once it becomes apparent that it was not the best time to do that test, he would leave it in the hope that they would be able to see him again (T.60, Q.19). At a later point in his evidence (T.60, Q.69-70) he stated that this assessment was not a complete assessment. The purpose of the assessment was to see if S was suitable for the school at Ballyboden, but that a crucial piece of information required was the results of a cognitive assessment which they had not received from the Lucena Clinic. He had attempted to do this on the 12th August 2003 but had not been able to as already stated. He went on to say that he had been very conscious that S's mother is herself a psychologist, and that when he had suggested a further meeting to carry out the cognitive assessment she had indicated that she was in the process of having such an assessment carried out privately and that she would be happy to let him have a copy of that report in due course, and therefore he did not pursue the matter (T.60, Q.70). He believes that this assessment is that which was done by Dr Albert Reid, and while he cannot recall if that was the name given to him at the time by mother, he could recall not having heard of the name mentioned, and that she had told him that she had got the name "from somewhere or other".

The scores on the Vineland Adaptive Scales (Expanded Form) Test

His composite score on this test, when the score in each domain are taken into account, is 58. The report states that these results indicate that S has low adaptive levels in the four main areas of the Vineland, achieving an adaptive behaviour composite score overall of age equivalent of 1 year and 7 months. S was at this date aged 3 years and 3 months old. In his evidence, Dr Fleming stated that on the Vineland scale age equivalents tend to be "a bit on the crude side", and are not precise, but are good indicators, and also that standard scores themselves are good indicators but they are not 100% accurate, especially in the early years when they can actually overestimate. Later in his evidence he stated that it was in the two/two and a half age range that these scores could over-estimate the abilities of a child with very significant learning difficulties (T.61, Q.49). It is for this reason that he prefers to use a good cognitive assessment if he can (T.60, Q.22). But he clarified later during cross-examination that at the age S was when this Vineland adaptive skills test was performed, it would not tend to over-estimate as much as at the two year level. Nevertheless he believes that practice has indicated that a much better picture of the child is got if both the Vineland test and a cognitive assessment are carried out (T.61, Q.51).

His report notes that S's strengths were most apparent in the Daily Living Skills., which measures abilities such as getting dressed, washing, putting away toys, knowledge of dangerous things, understanding money and time and social skills. It goes on to state that he was able to feed himself fairly independently and drink from a cup, take off shoes and socks and put them on, indicate when he needs to use the toilet and flush it. He will also put away toys, usually when it is expressed firmly or incorporated into a song.

In relation to the Motor Skills Domain, S is reported to have no obvious difficulty with walking, running, jumping, using stairs and kicking a football, and is a cautious child who does not usually bump into things or fall over easily.

In summary the report notes that S impressed as an endearing easygoing little boy with a diagnosis of autism, and likes to work to his agenda and attempts to formally assess him were unsuccessful. Results of the Vineland are said to indicate that S has "a mild delay in the area of adaptive behaviour".

Recommendations for S

These are set out as follows in the Report:

"General Learning

1. [S] would benefit from an Early Intervention Programme. Various options regarding the provision of early services were discussed with his parents. Following consideration, his parents have decided that they would like him to remain in mainstream pre-school for the coming year where he could receive the support he requires. This pre-school is not currently resourced for children with special education needs, though it is understood that they are willing for him to attend the school, provided the resources are made available. To facilitate this, it is recommended that [S] obtain a minimum of 15 hours special tuition (i.e. Home Tutor) a week.
2. A meeting should be held involving his parents, school staff and home tutor to draw up an individual early education plan for [S] for the coming school year.
3. [S's] parents have expressed an interest in sending [S] to an outreach class. Arrangements have been made to put his name down for Templaraine Outreach Class, Arklow for September 2004.

Social/Domestic Skills

1. Encourage [S] to use common household objects for make-believe activities. Show [S] how this can be done. Using 'silly' examples may help [S] remember that objects can have more than one function. For example, using a saucepan or sieve as a helmet/hat, using a wooden spoon as a tennis racket, using a whisk/spoon as a microphone, or a tennis racket as a guitar and so on.
2. Encourage [S] to put the toothpaste on his brush independently. This may also improve his fine motor skills.

3. Have [S] imitate a relatively complex task (e.g. making a sandwich) as it is being performed by an adult.
4. Using visual cues (e.g. smiley faces) in conjunction with visual supports, encourage [S] to start to label emotions such as happiness, sadness, fear and anger in himself.

Language Skills

1. Encourage [S] to follow instructions requiring two actions.
2. Encourage [S] to imitate the sounds of adults immediately after hearing them.
3. Encourage [S] to wave bye-bye.
4. Encourage [S] to indicate 'yes' and 'no'.
5. Encourage [S] to verbalise an interest in his environment. If going for a spin in the car, [parents] could say 'Look [S] - look at the cows in the field' or 'Look at the ship in the sea' and so on.

Fine Motor

1. An emphasis should be placed on developing [S's] hand-eye coordination (Use of materials such as: Jackson and Reeve's Visual Perception Materials, Roll-N-Write activities and Hand-EYE Coordination Manual: available from ETC Consult, Leeson Park, Dublin 4)
2. Pre-writing activities such as beading, threading and paper-folding will improve [S's] fine-motor skills.
3. Using thick crayons, encourage [S] to draw/scribble as often as possible. Over time, this will help him to feel more comfortable with a pencil in his hand.
4. Engaging [S] in the following activities will also improve his fine motor skills (and pencil grasp):
 - Tracing lines, pictures, letters, numbers. Use arrows or colour cues to him trace the figures (sic)
 - Helping him to cut with (child- friendly) scissors: cutting shapes, curved lines, pictures and dotted lines.
 - Water activities: carrying and pouring water into buckets and containers. Water could be dyed with food colouring to make it more exciting for children of [S's] age.
 - Lacing: a pegboard or cardboard punched with holes. [S] could weave through the holes using a shoelace for example.
5. Have [S] trace a pattern in sand, cornmeal, finger paint etc. the textures give the child kinaesthetic feedback."

Dr Fleming gave evidence in relation to these recommendations by reference to his contemporaneous notes taken at the time of assessment. By reference to these he stated that the view was that any intervention programme for S would have to be fairly firm and directive, because he was a little boy who wanted to do his own thing. He believed also that an up to date occupational therapy report and speech and language report would be useful at that time. He considered also that PECS and TEACCH would provide that firm and consistent method of intervention.

He stated that three options were discussed:

Option A was to remain in his then-current pre-school (Pixies) with support from Beechpark;

Option B was that he should attend the pre-school at Ballyboden already referred to; and

Option C was to start S at the Outreach Class at Templeraíne in September 2004 (when there would be a place available - over a year after this assessment date see T.62, Q.214-216).

He says that these options were discussed and that he asked the parents to phone them back and let him know what their choice was. These were the contents of the notes which he says he made at the time of the assessment meeting. When cross-examined about these options, he did not rule out the possibility that there were other options discussed, but that certainly these ones were (T.62, Q.210).

In his cross-examination of Dr Fleming, Mr McDonagh referred to the aspect of Option A which involved support from Beechpark Services, because of the evidence that no such support had been given by Beechpark Services. This had been said to be through a lack of sufficient resources. But Mr McDonagh referred to the 'recommendation' part of his report where under the heading of 'general learning' he referred to the fact that Pixies pre-school was not at that time resourced with special needs staff, and to what is then stated, namely: This pre-school is not currently resourced for children with special education needs, though it is understood that they are willing for him to attend the school, provided the resources are made available. To facilitate this, it is recommended that [S] obtain a minimum of 15 hours special tuition (i.e. Home Tutor) a week"

The figure of 15 hours Home Tuition which is included in this recommendation is something which apparently emanated from S's parents themselves (or at least from a telephone conversation from S's father on the 15th August 2003), as appears from Dr Fleming's evidence given on Day 60, Q.49. They were at that stage getting 10 hours Home Tuition Grant and wanted this increased to 15

hours, and sought a recommendation in that regard according to Dr Fleming's notes at the time. Mr McDonagh sought his confirmation that a logical interpretation of this was that the hours recommended (15 hours) was to facilitate his attendance at Pixies pre-school, and he confirmed that this was his understanding of what was written in his notes, and this is what he recommended. He added that it would be common practice for parents to obtain home tuition grants from the Department of Education, and to use that funding to obtain a place in a pre-school (T.62, Q.70). The recommendation for 15 hours was not for 15 hours on top of the 10 hours Home Tuition grant already in place. However, given that the parents already had 10 hours sanction at this stage, and had written to the Department seeking to have that increased to 20 hours, I cannot exclude the possibility that what the parents at least had in mind was a recommendation that, together with the 10 hours they already had, would be one for 25 hours, in the hope that they might achieve something less – maybe the 20 which they were seeking.

When commenting further in relation to his recommendations, Dr Fleming stated that when they had met S, an obvious possible intervention for S was ABA, and that this would form part of the structured framework of provision, but that he needed the sort of structure which TEACCH provides, while implementing an ABA approach as well. He said also that S had some language, and they had considered that PECS would enhance those skills. He would have looked to the speech and language therapist for views in relation to this also, if they had reached the point where Beechpark was to provide services for S. He went on to state that Ms. Kennedy and he had formed the view that S was a visual learner, and that this would have contributed to his recommendation for PECS. His notes also had noted that S's parents had reported that S had made good progress since Easter 2003 (T.60, Qs. 34-40).

At a later point in his evidence, Dr Fleming stated that while these three options were discussed with the parents, he could not recall any mention of the ABA pre-school at St. Catherine's as a preferred placement for S, but he could not be certain about this, because in her capacity as Senior Psychologist at St. Catherine's, S's mother was having discussions with Dr Fleming about the establishment of services at St. Catherine's for children with autism and severe learning difficulties within St. Catherine's, and these meetings had been ongoing for some time. But he could not recall if at the assessment meeting, she had mentioned the St. Catherine's pre-school possibility for S (T.60, Q.110-113).

It appears that three days following this assessment, S's father phoned to say that they had discussed the three options referred to above and had decided that they would keep S at Pixies pre-school (Option A), and that they had considered that the school in Ballyboden was too far away from where they lived, and that for the following year they were likely to consider the outreach class at St. Joseph's Templeraíne. It is noted that S's father had said that he was keen to obtain one to one support/tuition for S which is autism specific, and that at that time they had 10 hours of home tuition in place but that they would like to have 15 hours per week and asked for a recommendation for that. Dr Fleming has noted that he told father that this was something which he and Ms. Kennedy would consider together and that if it was considered appropriate they would consider including it in their recommendations. This recommendation is in fact included in the recommendation set out above under 'General learning' (T.60, Q.49).

Early intervention

Dr Fleming has stated that it is his view and the view of most people working in the area of autism that early intervention is "most appropriate". He added that he considered that it is essential, and that the younger it is started the greater the progress that can be made. He added that the evidence for this is not as strong as he would like it to be but that "it seems to be intuitive nonetheless" (T.60, Q.52)

As far as intensity of provision is concerned he stated that there is much debate about the optimum level of intensity of intervention which should be provided, but that they know that it somewhere between 20 hours and 40 hours. He thought the optimum may be between 20 and 30 hours per week for young children of S's age (T.60, Q.52).

Later in his evidence, and just prior to an intervention by Mr Holland in relation to where this particular piece of evidence might be leading to, Dr Fleming stated that everybody at Beechpark Services places great emphasis on early intervention, and that it is a matter of regret that that they cannot always respond to the level of demand as quickly as they ought to, but nevertheless it is something which they aspire to and strongly believe in (T.61, Q. 17).

Parental involvement and training

He stated that it is important to think of the child in the context of the family unit, and that is why at Beechpark Services there is a focus on provide training and courses for parents, such as the Early Bird Course, the Hanen More Than Words course, and also what has been referred to as Dr Tierney's ABA course at Trinity College, this being important so that parents can assist the child in the home in relation to communication skills, socialisation and so forth, in a way which is complementary to the work being done by teachers and therapists (T.60, Q.54).

He made reference to the recommendations made in relation to language skills above where the parents are recommended to encourage S in relation to communication such as encouraging him to say 'bye-bye' or to indicate 'yes or no'. He stated that in ABA such strategies are referred to as "incidental teaching", but that these methods have been known already, although he went on to say that perhaps ABA science has provided evidence for the effectiveness of some and little effect of others (T.60, Q.58)

Behaviour Specialists at Beechpark

One of the services which Beechpark Services provide is that of a behaviour specialist. Dr Fleming stated that the requirement for someone to be considered for the post of behaviour specialist is that he/she would have an Honours Degree in Psychology or a similar area. All such persons to date who have been engaged in that position have been Honours Psychology graduates. At a later stage he stated that these behaviour specialists are students of post-graduates, and that they arrive with different levels of expertise. Some would already have a considerable knowledge of ABA, but others may not, and that Beechpark has a role in training and supporting them.

He stated that their role is to deliver behavioural programmes either to develop skills in children or to solve behaviour difficulties such as challenging behaviour. Functional assessments are carried out, as well as functional analyses in order to ascertain why a child is exhibiting these behaviours. Thereafter a multi-element plan will be devised and put into place. One of these elements is a positive behaviour programme in order to teach the child an appropriate way in which to communicate needs, since the inappropriate behaviour is the child's way of communicating due to deficits in the area of communication. The other area dealt with by these behaviour specialists is in the area of training of Special Needs Assistants (T.60, Q. 77).

Supervision of Behaviour Specialists at Beechpark

Each behaviour specialist at Beechpark Services is supervised by a psychologist. Dr Fleming was the supervisor until he left. It was apparently agreed between him and Ms. Kennedy that he should do this supervision, since it was thought by her that his experience in ABA was superior to hers. In addition to that supervision, there is what Dr Fleming referred to as peer supervision which takes place once a fortnight, and this is done by the person already referred to who had come from the United States where he had been on a

Lovaas –type behaviour centre, Mark Lattimer (T.61, Q.8)

He went on to say that these behaviour specialists interact with the child's teacher and also the parents, adding that with autism behaviour issues constitute a very major part of the concern. In that regard, Dr Fleming has tried to increase awareness of other approaches to address complex behaviours in a way that would most effectively deal with the presenting issues, rather than simply focussing on ABA. He stated that the teaching of a skill was often part of solving a behaviour problem, since the learning of the skill can help to eliminate the behaviour at issue (T.61, Q.9). A multi-element plan is put in place which consists of four areas. Firstly, they can modify or adapt the environment to accommodate the behaviour. Secondly, they can teach the child more appropriate ways to communicate what he/she wants or do not want. This is referred to as positive programming. Thirdly, there is direct intervention, which is what to do when the problem presents. Fourthly, there can be a need to de-escalate behaviours when they occur, for example when the child loses his/her temper. This can sometimes, though rarely, involve physical intervention (T.61, Q.10).

The Reliefs sought by the plaintiff in the 2nd Amended Statement of Claim delivered on the 19th May 2006

Damages

(1) Damages (including aggravated, exemplary/punitive damages) for breach of the plaintiff's constitutional rights, negligence and breach of duty, including breach of statutory duty.

(2) Damages for breach of section 3 of the European Convention on Human Rights Act, 2003.

DECLARATIONS AS TO THE PAST AND PRESENT

General

(3) A declaration that the Defendants, in failing to provide for free education and health care services for the Plaintiff appropriate to his needs as a child with autism and in discriminating against the Plaintiff with respect to the provision of appropriate educational and health care facilities vis-à-vis other children have deprived the Plaintiff of his constitutional rights pursuant to Articles 40, 41 and 42 of the Constitution and in particular Article 40.1, Article 40.3.1-2, Article 41, Article 42.1, Article 42.2, Article 42.3.1-2, Article 42.4 and Article 42.5 and are also in breach of the Plaintiff's statutory rights and are in breach of the Defendants' statutory obligations and in particular the obligations set upon the Defendants pursuant to the provisions of the Education Act, 1998, the Child Care Act 1991, The Equal Status Act, 2000 and the Health Act 1970, as amended and consolidated.

(4) A declaration that the provisions of sections 6 and 7 of the Education Act, 1998 are incompatible with the fifth named defendant's obligations under the European Convention on Human Rights.

The Plaintiff's Needs

(5) A Declaration that the plaintiff, as a person with a diagnosis of autism and special educational needs, at present requires and has since October 2002 required the following educational and health/therapeutic provision:

- (i) Applied Behaviour Analysis for 30 hours per week;
- (ii) Speech and language therapy for 2 hours per week;
- (iii) Occupational therapy for 2 hours per week.

The Health Services Executive ("The HSE")

(6) A Declaration that the plaintiff, pursuant to sections 51, 52, 53 and 56 and 60 of the Health Act 1970, as amended, and/or as a person with eligibility within the meaning of those sections and/or pursuant to Sections 6 and 7 of the Education Act 1998 is entitled and has since October 2002 been entitled as against the Health Services Executive to health services as follows:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week.

(7) A Declaration that the plaintiff is entitled, and has since October 2002 been entitled, as a child within the meaning of section 3 of the Child Care Act 1991, to:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week.

(8) A Declaration that the third and fourth named defendants ("The HSE") have failed to provide adequate occupational therapy for 2 hours per week and speech and language therapy for 2 hours per week and education through the methodology referred to as Applied Behaviour Analysis for 30 hours per week, to the plaintiff, since October 2002, according to his need for same, pursuant to the third and fourth named defendants' statutory duties to provide same and the plaintiff's statutory right to receive same, as a person with eligibility, pursuant to sections 51, 52, 53, 56 and 60 of the Health Act 1970, as amended.

(9) A Declaration that the third and fourth named defendants ("The HSE") have failed to provide adequate occupational therapy for 2 hours per week and speech and language therapy for 2 hours per week to the plaintiff, and education through the methodology referred to as Applied Behaviour Analysis for 30 hours per week, since he was diagnosed in October 2002, according to his need for same, pursuant to the third named defendant's statutory duties to provide same and the plaintiff's statutory right to receive same, pursuant to section 3 of the Child Care Act 1991 and/or Sections 6 and 7 of the Education Act 1998.

(10) A Declaration that the HSE has not satisfied the requirements of the aforementioned duties by the provision of occupational therapy and speech and language therapy in St Joseph's Newtownmountkennedy, County Wicklow and St. Joseph's Templaraine, County Wicklow, because the provision of same is not appropriate for the needs of the plaintiff.

The First Named Defendant

(11) A Declaration that the plaintiff, pursuant to Sections 6 and 7 of the Education Act 1998, as a person with a disability and special educational needs, within the meaning of that section, is entitled to a level and quality of education and to support services and appropriate to meeting the needs and abilities of that person, namely:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week.

(12) A Declaration that the first named defendant has failed to provide adequate occupational therapy for 2 hours per week and speech and language therapy for 2 hours per week and education through the methodology referred to as Applied Behaviour Analysis for 30 hours per week, to the plaintiff, according to his need for same, pursuant to the first named defendant's statutory duties to provide same and the plaintiff's statutory right to receive same, pursuant to sections 6 and 7 of the Education Act 1998.

(13) A Declaration that in the provision of Applied Behaviour Analysis, speech and language therapy and occupational therapy to other children in the State, the first defendant has treated the plaintiff less favourably than other persons, contrary to section 5 of the Equal Status Act, 2000.

(14) A Declaration that the first named defendant has not satisfied the requirements of the aforementioned duties by the provision of occupational therapy and speech and language therapy and educational provision available in St Joseph's Newtownmountkennedy, County Wicklow and St. Joseph's Templaraine, County Wicklow, because the provision of same is not appropriate for the needs of the plaintiff.

(15) A Declaration that in the provision of therapies and education in St Joseph's Newtownmountkennedy, County Wicklow and St. Joseph's Templaraine, County Wicklow, the first named defendant has failed to take account of parental choice.

The first, second, fifth and sixth named defendants

(16) A Declaration that the plaintiff, by virtue of Articles 40, 41 and 42, of the Constitution of Ireland is entitled to the provision of:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week

(17) A Declaration that the first, second, fifth and sixth named defendants have by failing to provide:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week.

Failed to comply with their duties to the Plaintiff pursuant to the provisions of Articles 40, 41 and 42 of the Constitution and in particular Articles 40.1, 40.3.1-2, Article 41, Article 42.1, Article 42.2, Article 42.3.1-2, Article 42.4 and Article 42.5.

(18) A Declaration that the first, second, fifth and sixth named defendants have not satisfied the requirements of the aforementioned constitutional duties by the provision of occupational therapy and speech and language therapy in St Joseph's Newtownmountkennedy, County Wicklow and St. Joseph's Templaraine, County Wicklow, because the provision of same is not appropriate for the needs of the plaintiff.

(19) A Declaration that in the provision of therapies and education in St Joseph's Newtownmountkennedy, County Wicklow and St. Joseph's Templaraine, County Wicklow, the first, second, fifth and sixth named defendants have failed to take any or adequate account of the rights of parental choice as recognised by Article 42 of the Constitution.

DECLARATION AS TO PROVISION INTO THE FUTURE

(20) A Declaration that the vindication of the Plaintiff's said constitutional and statutory rights require that the plaintiff's special educational and health needs be met by the provision of:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week.

for the coming school year, commencing in September 2006

and/or until such time as those currently supervising the said provision determine that the plaintiff no longer requires the said provision.

MANDATORY INJUNCTIONS:

(21) If necessary, a mandatory injunction requiring the third and fourth named defendants to comply with their statutory duties pursuant to sections 51, 52, 53 and 56 of the Health Act 1970, as amended, thereby providing the plaintiff with:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week.

(22) If necessary, a mandatory injunction requiring the third and fourth named defendants to comply with their statutory duties pursuant to section 3 of the Child Care Act 1991, thereby providing the plaintiff with:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week.

(23) If necessary, a mandatory injunction requiring the first named defendant to comply with its statutory duties pursuant to sections 6 and 7 of the Education Act 1998, thereby providing:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week.

(24) If necessary, a mandatory injunction requiring the first named defendant and the third and fourth named defendants to comply with their statutory duty pursuant to section 3 of the European Convention on Human Rights Act, 2003 to discharge their functions, in respect of the aforementioned statutory duties in a manner compatible with the fifth named defendant's duties under the European Convention on Human Rights and in particular, Articles 1, 8, 13 and 14 and Article 2 of the First Protocol thereof, thereby providing the plaintiff with:

- i. The provision of Applied Behaviour Analysis for 30 hours per week;
- ii. The provision of speech and language therapy for 2 hours per week;
- iii. The provision of occupational therapy for 2 hours per week.

Conclusions

I have set out the nature of the reliefs which the plaintiff seeks against the defendants in these proceedings, as they appear in the second Amended Statement of Claim delivered in May 2006. In order to succeed in obtaining any of these reliefs, the plaintiff must discharge the onus of proof which is upon him to satisfy the Court by evidence that the defendants have, in relation to the claims in negligence, breached any duty of care which they may have to the plaintiff, and that, as a consequence of such breach, the plaintiff has suffered damage and/or loss; that in relation to the claims arising from their statutory duties, they have failed to discharge those statutory duties in a way which entitles the plaintiff to damages; and in relation to claims arising from constitutional rights and rights under the European Convention on Human Rights and Fundamental Freedoms, that the defendants have breached those rights and failed to vindicate same, and will continue to do so into the foreseeable future by the failure to make an appropriate provision of primary education for S.

The question of whether the Court ought to grant the declarations sought and the mandatory injunctions which are sought does not arise until such time as the Court is satisfied that a sufficient evidential basis has been established by the plaintiff for the contention that what is capable of being provided under the Model A framework of provision false short of an appropriate primary education provision for S.

The standard of proof by which this onus must be discharged is on the balance of probability.

There is a distinction to be drawn at this stage between the claims for damages which have been brought in respect of the alleged failure of relevant defendants to act more speedily in relation to the provision of a multi-disciplinary assessment through Beechpark Services following the diagnosis of autism being made by those in the Lucena Clinic in December 2002 and to provide appropriate intervention including therapies, and those claims which arise out of the Department of Education and Science's provision of the Model A framework of educational provision for the plaintiff's primary education from age six. I propose to deal first of all with the latter, and to leave until later the issues arising from alleged delay in relation to early intervention.

Preliminary remarks

In his closing submissions, Mr O'Moore commenced by saying that at its heart this case is simple one. Surprisingly, for a case during which oral evidence was given over the course of sixty four days – evidence which I should say was often complex, technical, intellectually challenging and difficult – I find myself essentially in agreement with him.

My reason for agreeing with his comment is that the Department of Education and Science has put forward the Model A framework for autistic specific primary education provision at either of two conveniently located national primary schools for S as constituting an appropriate educational provision for S. Putting it at its simplest, the Court must be satisfied that, as a matter of probability, this does not constitute for S an appropriate primary education provision. It seems to me that until such time as the Court is so satisfied, all else, bar the claims to be considered later on in relation to the failure to act more quickly and appropriately following diagnosis, falls away.

It is clear also that the Court is not required to decide whether a model of primary education provided exclusively through ABA methodology is itself an appropriate educational provision. Whether it is or is not has nothing to do with whether Model A is appropriate or not, and it is for this reason that in my conclusions I will not have reached conclusions on many aspects of ABA which were put forward and canvassed in relation to the merits or otherwise of education delivered through only ABA. This case is not about deciding which of two models is to be preferred, but only whether what is proposed by the Department can be classified as an appropriate educational provision for an autistic child, S who has reached the age of six years.

It will have been seen that when deciding on how to best to approach the preparation of my judgment, I have come to the view that it was best to set out in considerable detail the evidence which has been given. That has proven to be a very lengthy and painstaking exercise, but one which with hindsight I do not regret, because if I was to have proceeded to simply outline in a brief way the chronology of events and refer only to such evidence as supported the conclusion which I have arrived at, it might easily appear that I had failed to consider all the very relevant evidence given over such a long period of time. The only regret which I have is that

the task undertaken by me in this way has taken far longer than I had first hoped would be the case, and I am only now in a position to deliver judgment, given the many other necessary demands on my time in the intervening period since the evidence and submissions concluded.

In setting out my conclusions I will hopefully not revisit in great detail the evidence already set out in a reasonably comprehensive way. Nevertheless I will of necessity be referring to some. One part of the evidence which I have not set forth in exhaustive detail is what I will refer to as the academic debate arising in the learned articles and studies which have been referred to and debated by a number of the witnesses called. Those research pieces have been interesting and helpful to the Court in gaining an understanding of the debate which is undoubtedly out there between professionals and academics as to the relative effectiveness of different approaches to helping children who have been diagnosed with autism. I will of course be referring to that debate in due course, but intend to do so in a general way only and not by referring to any in detail.

Also at the heart of this case is the plaintiff himself. That must never be overlooked since it is his education and welfare which is at issue. He speaks to this Court through his parents, and I would like to say something about them. There was some suggestion made during the course of this hearing that this case was being brought not simply in order to obtain some reliefs which are seen as being of benefit to S's education and welfare but also for the purpose of pursuing a collateral motive. It has been suggested in the cross-examinations of Harry Cullen and of S's mother and father that these proceedings are part of a wider campaign by parents in the Wicklow area to achieve a greater level of funding for the facility at St. Catherine's, and as part of a wider campaign to achieve recognition by the Department of Education and Science of exclusive ABA as *the only appropriate educational provision* for children with autism.

While I have no doubt from the evidence of mother and of Harry Cullen that there is a group of parents of children with an autism diagnosis who have come together as an advocacy group or lobby group and who, certainly by 2003 was engaged in a campaign towards this objective, I accept what was stated by Counsel for the plaintiff at various times during this case, and what has been stated by mother in her evidence, that this case is one brought solely for the purpose of pursuing the entitlements, as she and her husband see them, of the plaintiff. Father, in his evidence, stated that he had been unaware of such a group. It would not be surprising to me that such a group should exist given the obvious concerns which such parents will inevitably have to achieve for their children a method of education for their children which they believe has been empirically shown to be the most effective method of education for such children. I leave aside any suggestion that these proceedings are in any way motivated by such a collateral objective.

To find otherwise would in my view attribute to S's parents an unwarranted lack of bona fides in their pursuit of this litigation. That would run counter to the view which I have formed of both mother and father that they are parents who have demonstrated to this Court an extraordinary commitment to the education and welfare of their son in very difficult circumstances. I could refer usefully to the fact that at a point well into this case, and after mother had recently by then given birth to her second daughter, I made it clear, lest they might have thought otherwise, that it was not necessary that they attend Court on a regular or even daily basis in order to avoid any suggestion that by their absence I might infer a lack of commitment on their part to this case. I was acutely conscious throughout this lengthy hearing that the work commitments of each of them, and their domestic responsibilities, especially given the arrival of a new baby, might well render their attendance at Court on so many days possible only with the greatest inconvenience.

Despite my giving the assurance that nothing of that kind would be inferred if they were absent, they regularly attended to hear the evidence being given. They are to be commended in the highest terms for this. It cannot have been easy. Their efforts in this regard are consistent with the doggedness with which they have pursued their efforts to achieve what they consider their son needs from the time that his diagnosis was confirmed in November/December 2002 when he was aged two and a half years.

That opinion is not in any way diluted in any by the fact that I have commented in relation to some of mother's evidence that perhaps she had more awareness of ABA prior to August 2003 than she has accepted in her evidence, or by the fact that in her evidence she made no reference to the fact that she had sat on the panel from St. Catherine's which interviewed Bridget Sinnott for the post of ABA Manager for the pre-school which opened its doors to pupils in February 2004. At the end of the day, while these matters were the cause of controversy during the case, they are peripheral to the principal issue which the Court must decide. These matters have in no way affected the weight which I have given to her evidence.

Exclusive ABA model versus eclectic model of provision

I should say something of a general nature about some of the witnesses who have given expert testimony during this case and the evidence relating to research.

There can be no doubt that some of the witnesses called to give evidence in support of the plaintiff and those called on behalf of the defendants take polarised positions in relation to their views as to the appropriateness of ABA as an exclusive methodology and the appropriateness of an eclectic approach, be that Model A or otherwise.

Some of these views have been couched in what I will call extreme terms, such as the views of Ms. Bridget Sinnott, and Dr Olive Healy and Dr Ian Grey on the plaintiff's side, in as much as they are of the firm view, based as they see it on the clear empirical evidence from research, both as to the effectiveness of intensive or exclusive ABA, and as to its greater effectiveness compared to any eclectic approach. Their view is that there is no scientific evidence which supports effective outcomes from the eclectic approach, and that without such clear evidence of effectiveness, it cannot be regarded as effective and therefore appropriate for the education of any child who has autism. Mr Alan Willis takes a similar though not identical position.

The contrary position, as taken by Ms. Hughes, Dr Mangan, Ms. Ring and Dr Fleming is that while ABA as one possible intervention has its rightful place as an effective method of intervention, perhaps particularly in the management and modification of challenging or inappropriate behaviours, it is not the only appropriate form of intervention to address the triad of impairments associated with autism, and that there are a number of well recognised programmes or methods which can and have been used, as required, in order to address the needs and deficits of any individual child, such as TEACCH, PECS, sensory integration, and other play-based interventions such as floor time to name a few. In their view each child must be looked at and considered individually in order to decide what intervention or group of interventions will be effective and appropriate at any particular time and for each child, and that there is not what has been sometimes in this case referred to as "a one size fits all" type of intervention to be used with every autistic child to the exclusion of all others.

Just as Ms. Sinnott, Dr Healy and Dr Grey would never recommend an eclectic approach for any child, the evidence has been that Ms. Hughes, Dr Mangan and Dr Fleming would never recommend an exclusively ABA approach for any child. That demonstrates the polar opposite positions taken in this case. While these two viewpoints are diametrically opposed, I am satisfied that each is a legitimate viewpoint held by professionals from each persuasion. Nevertheless each exposes its proponents to the accusation that they lack

objectivity when advocating the adoption or rejection of either. The defendants have asserted that those who advocate only the ABA approach have a closed mind at this stage to the possibility that an eclectic approach can for an individual child be appropriate, and that the Court should be cautious in attaching full weight to this view. In my view, it would be unfair to attach too much weight to that submission, since that view is one which I believe is genuinely held by people with expertise in their area, and they are entitled to hold it.

Equally, the plaintiff points to the fact that Ms. Hughes has stated in her evidence that she has never made a recommendation of anything other than an eclectic provision, and that Dr Mangan is firmly of the view also that such is an appropriate model of provision. It has been suggested also that this recommendation for S was made by them in the full knowledge that the Department of Education and Science was in favour of such recommendations, and that the independence of Ms. Hughes's opinion must therefore be called into question. I see no basis for questioning either her independence or that of Dr Mangan, simply because they may have been aware of the Department's view or, for that matter because they earn significant income from work they are asked to do either by NEPS or by the Department. To conclude otherwise would be to impute a lack of bona fides and professionalism which is unwarranted by any evidence which I have heard.

It is not unusual for professionals in any discipline to take different positions and to hold different views, and to do so legitimately as professionals and experts in their field. There will often be research which supports each viewpoint. Sometimes indeed the same research will be regarded by each side of the debate as supporting their opinion, since statistics can sometimes be read differently from each perspective. In this case there has been extensive examination of the research produced, and experts have drawn different conclusions from statements and statistics within it. In some instances the methodology of the research itself has been impugned. I will deal with some of that research in due course, as required, but I should just say for the moment that I accept the bona fides of the witnesses on each side with regard to their interpretation of this research, and their entitlement to have regard to it in support of their opposite positions. But my conclusion is that there is a legitimate debate as to the conclusions to be drawn from it, as there is so often in matters of this kind.

While on the subject of the research, I should add something else which is relevant to the particular debate which has taken place for the purpose of this case. It is this. The point has been often made in this case that ABA is a science, whereas teaching in its conventional sense is an art. For present purposes I accept that distinction. Those who are proponents of and practise the ABA approach to the exclusion of all others have undoubtedly been able to carry out scientific studies which demonstrate effective outcomes for their approach. The manner in which under exclusive ABA data is collected systematically in relation to each child, in terms of goals targeted and outcomes makes it easy for such data to be turned into research as to the effectiveness or otherwise of particular strategies.

The Court has been told that there are literally thousands of studies of various kinds which demonstrate on a scientific basis the effectiveness of ABA in producing effective outcomes for children with autism. Dr Fleming in his evidence accepted that the scientific or research basis for ABA is far more extensive than that which exists for the eclectic approach. In terms of sheer volume of research this is not really in dispute, even though it may well be the case that comparative research, in which the outcomes from the ABA approach are compared with the outcomes from an eclectic approach, is by comparison small.

It would appear to be the case, and I have certainly formed this view from the evidence which I have heard, that one reason at least for this phenomenon is to be found in the very nature of the eclectic provision itself which cannot, by virtue of its very nature, lend itself to the kind of scientific examination and study which can result in studies from which definite conclusions can be drawn. By this I mean that it is in the nature of eclectic provisions in any case that the interventions provided will vary from child to child and are not constant. An eclectic model of provision for one child will always be different from another, because its emphasis is on providing something which is tailor-made for each individual child depending on the needs of each child. For example, child A may need more ABA content in his/her daily programme in order to address, say, a behavioural issue, and may be seen as benefiting from PECS and TEACCH, whereas child B may have less need for ABA in the programme, no need for PECS, but would benefit from TEACCH. Each input will therefore vary depending on the needs of the child.

I should add that each of the dishes available on the a la carte menu of provisions within the eclectic approach, such as TEACCH, PECS and so forth are individually considered by those experts called by the defendants to be well recognised and in common use both here and internationally as achieving good outcomes for children, even if there has been less research study carried out on such effectiveness than there has been for ABA.

While it might be possible to compare the outcomes from what is provided to one particular child by way of eclectic provision, with the outcomes of another child to whom an exclusively ABA programme of intervention has been provided over the same period of time, the result of such a study can do no more than establish that in those two cases a better outcome was achieved by one child over the other.

Even in that example, there will be shortcomings from a research point of view, since there will inevitably be unknown variables which cannot be taken into account, such as what was being provided to each child outside the school environment, such as by the child's parents at home. From a scientific point of view such an unknown variable must contaminate the capacity to rely on the result as evidence in favour of one over the other. Such a difficulty is magnified significantly when a group of children are in each group. Whereas those in the ABA group may well be receiving only ABA and in that sense, albeit that each child is individual and therefore different in terms of their level and range of deficits, are receiving intervention by the same methodology, the children assigned to the eclectic group must of necessity be receiving intervention which is not identical in each case, since, only by way of example, one child's IEP may have more TEACCH within it than PECS, while another may have PECS or other available interventions. Each will be receiving what has been decided as appropriate for him or her. In fact there would be potential ethical issues arising, if for the artificial purposes of a study only, all children were to be given an identical eclectic provision from the menu of available interventions, regardless of their individual needs. In addition of course, the unknown variables, such as the nature of any home interventions, would be magnified across any group of children.

I mention all of this because in this case much has sought to be made in the plaintiff's evidence of the lack of any reliable research basis for the effectiveness of the eclectic model of provision, either per se or by way of comparative study. For the reasons which I have outlined, and in spite of its volume and the conclusions reached, even allowing for differences of interpretation, I am not satisfied that the research results contended for by the plaintiff in relation to effective outcomes for ABA, and the shortage or even absence of such research in favour of the eclectic model, are in themselves sufficient to demonstrate effectiveness and appropriateness only of the ABA methodology as an educational provision. As I have said, there is a legitimate and respected difference of opinion among professionals in this area, and the debate is ongoing.

Autism

Autism has been described in this case as being a development disorder, in which a triad of impairments, first attributed to Lorna Wing, are evident, those being in the areas of communication, socialisation, and stereotypical or rigid behaviours. Degrees of autism will vary from child to child. The spectrum of autism ranges from mild or high functioning autism to severe or profound autism.

Another feature of this unfortunate condition is that because the child has difficulties communicating as normally developing children communicate, he/she will make their wishes and needs known in ways that are seen as inappropriate and this includes what have been referred to as 'challenging behaviours, which at times can be aggressive and potential harmful both to the child and to others. The Court has heard a good deal of evidence as to the form that such challenging behaviour may take, and in S's case, did take. Also associated with autism in many cases is a general learning difficulty, which can range from mild to severe. Another associated feature is low muscle tone which can impact negatively on the child's ability to form words and vocalise, as well as do many simple things which pose no difficulty to normally developing children, such as holding a pencil or a spoon, to take but two simple examples.

S's mother, though not a lay person in the sense that she happens to be a psychologist, nevertheless described it in layman's terms and terms that were readily understood by me, as "a wiring difficulty" in the brain, whereby the capacity of the child to process information was impaired. In other words, while S may know that he wants or that he needs to do something, he cannot plan how to get it or do it. Of necessity that is an oversimplification, but it describes in a pithy way the source of many difficulties experienced by a child with autism.

The evidence has indicated that in times past many children who would now be diagnosed with autism were treated as suffering what was then referred to as mental handicap. It would appear that while in the 1940s autism became a recognised diagnosis, it was not until the 1970s that diagnoses of autism became more common. In the United States, it appears that in the 1980s much study was undertaken into what interventions should be put in place to address deficits, which led to the study by Prof. Lovaas, often referred to in this case, the results of which were published in 1988, which was claimed to show excellent effectiveness in addressing deficits associated with autism through the application of Applied Behaviour Analysis.

By the 1990s, even in this country, much more had become known about the diagnosis and treatment for autism, but it has been long recognised that it is a lifelong condition, even though the deficits associated with the diagnosis can be addressed and reduced to the point where many children as they grow and develop into adulthood can be helped to live and cope with some degree of independence in a mainstream environment. The ability in this regard will depend on the degree of autism, the degree of learning difficulty associated with that, the stage at which they are diagnosed, and, linked to that, how early intervention has occurred, and of course the level of success achieved, particularly in the area of education and daily living skills.

The result of the increased level of awareness of autism among professionals and parents has led both in this country and elsewhere, to an enormous and rapid increase in the incidence of autism diagnosis. One view has suggested that autism as a condition is on the increase. Another view is that it is not that incidents of autism have increased, but rather that it is now being recognised and diagnosed more frequently than before. I do not have to decide, fortunately, which view is correct, but the fact is that such diagnoses are now being made more and more frequently, and it is possible, according to the evidence which I have heard, to identify the 1990s as a period where in this country this rapid increase in diagnosis of autism was on the increase. Prof. Alan Carr in his book: *Child and Adolescent Clinical Psychology* (2006 edition) – a work to which witnesses in this case have been referred by Counsel states at page 355 that "the prevalence rate for autism, the most common of the pervasive developmental disorders, is 10 per 10,000 and autism is more common in boys".

It would appear to be the case that this rapid increase in the incidence of autism diagnosis throughout the 1990s in this country, as elsewhere, put great strain on those agencies whose task it was to make diagnoses, and make recommendations for intervention and treatment, both in terms of provision of therapies and education and general welfare. It could be said that they were taken by surprise in the sense that they were lacking the resources both in terms of finance, facilities and relevant personnel. Those facilities and personnel who were in place were overwhelmed by the increase in demand for services. Dr Mitchell Fleming has given evidence in this regard, as did Ms Bray.

While there were relevant agencies in place, and a range of education and support services available for children with autism, both in terms of diagnosis, therapies, and educational provision in special schools and in special classes attached to mainstream schools, the increased demands upon these services prompted the then Minister for Education and Science in 2000 to set up a Task Force to review the range of educational provision and support services available for children with autism, to assess the adequacy of the then current educational provision and support services, and to make recommendations for the development or adjustment of existing policy approaches, educational provision and support services in order to ensure what is described in the Task Force Report itself as "the delivery of an appropriate, effective and efficient educational service to children with autism". That Report, which issued in October 2001, has been referred to frequently during the course of this case. In the area of clinical and support services, it identifies the many shortcomings that existed in the provision of education and other clinical services, while at the same time noting certain increased funding measures put in place by the Government during the late 1990s and the work being done by health boards and other specialist service providers to recruit additional therapy personnel to cope with demand. The Report emphasises also the central importance of parents in relation to what provision is made for their child, and for the need for parents to be supported, as well as the need for early intervention in terms of diagnosis and delivery of services, including pre-school education.

It examines also the range of different educational approaches and interventions, and in doing so describes both ABA and TEACCH under the heading "Main Approaches" (para. 6.3), which, it is stated, "have undergone numerous studies and have been found to result in progress in learning and a decrease in autistic behavioural characteristics". It is noted, in relation to TEACCH that it "can incorporate other strategies, e.g. PECS and ABA" (Para. 6.3.2).

S's diagnosis

It will be evident from the evidence given by Mr Alan Willis on behalf of the plaintiff and that given by Ms. Hughes for the Department of Education and Science that there is some controversy surrounding S's actual diagnosis, not in terms of his being on the autism spectrum or not, but rather about where he is on that spectrum, and the classification of his general learning disability. It will be recalled that Ms. Hughes carried out the Child Autism Rating Scale test and she states that he achieved a score of 38.5 on that test which, according to that test, places him in the 'mild to moderate' range.

However, in her report she has stated at its commencement that the CARS result "suggests a moderate/severe degree of autism", and later on page 9 of her report states that it places him "within the lower end of the severely autistic range...", and when giving her evidence in relation to her findings she stated that this score indicated that he was "at the lower end of the severe and the upper end of the mild to moderate" (T.43. Q.52). I am aware, even though Dr Reid was not called to give evidence, that in his report he has described it as 'moderate' rather than 'mild to moderate'.

When she was cross-examined about this, as I have set forth in her evidence summary, she accepted that by reference only to the CARS testing system it places him in the 'severe' range of autism, given that the test describes scores between 37 and 60 as indicating severe autism. But she went on to state that it was wrong to rely solely on the score achieved on that test, and that clinical judgment must also be used in order to reach a final conclusion as to where on the spectrum his level of autism places him. In her view he was so close to the cut-off point between mild/moderate and severe that it was fairer to him that he should be seen as being in the mild to moderate range, and that no test was absolute, and that the CARS testing system was designed to be used alongside clinical judgment (e.g. T.50, Qs.10-13; 14, 23, and 68).

Alan Willis in his evidence stated that he had tested autism by using the Gillian Autism Rating Scale, and that he agreed with Ms. Hughes's opinion that S had a moderate to severe degree of autism (T.5, Q.26). He later stated that S does not have mild to moderate autism (T.5, Q.33).

At the end of the day, nothing really hinges on the question of whether S is categorised as being in the lower end of severe and the upper end of mild to moderate range, or whether he is placed in the moderate/severe range. As Dr Fleming stated in his evidence, the crucial question is really whether or not a child is on the autism spectrum at all. S clearly is, and I do not consider it necessary to conclude that question, even if it was possible to do so as a matter of probable fact.

The much more important and relevant area of controversy surrounds what category of general learning difficulty S labours under. I have set out the evidence given by Mr Willis in order to reach his conclusion that S has a greater level of learning disability than can be described as 'mild'. His view is that he has moderate to severe learning difficulties if one looks at the entire profile, pointing, inter alia, to his low range of verbal skills, his adaptive skills scores, yet taking into account at the same time, the low average/ average range of non-verbal skills.

The relevance of this controversy, as already adverted to, is that Model A specifies that allocation to that model of provision "is based on professional evidence that references a mild degree of learning difficulty".

When S was assessed at the Lucena Clinic, including by the application of the Vineland Adaptive Behaviour Scales test, he was described in its report as having "moderate to severe language delay and pragmatic disorder" and that "he has some difficulty processing sensory information". He was described as "showing a significant general delay in most areas of his adaptive behaviour". He was aged 2 years and 2 months when this assessment was done.

He was assessed at age 3 years and 3 months at Beechpark Services, including by reference to the Vineland test for Adaptive Behaviour. The summary conclusion taking account of the scores achieved under different areas of testing was that S has "a mild delay in the area of adaptive behaviour". It will be recalled that it had not been possible to carry out any psychometric testing on that occasion. As I have already referred to when outlining Mr Willis's evidence in this regard, Dr Fleming stands over his categorisation of S as having a 'mild deficit' in the area of adaptive behaviour, and is of the view that he has a mild level of general learning disability when everything is taken into account.

Ms. Hughes assessed S at age 4 years and 4 months, though she did not test for adaptive behaviour, something for which she is criticised by Mr Holland on behalf of the plaintiff. A number of psychometric tests were conducted and on which she has reported. I have already set out her conclusions under various headings, and she has concluded that he has a mild general learning disability when the results of the assessment are looked at in the round, taking into account his undoubted strengths in the non-verbal area, as well as his noted severe delay in his verbal cognitive skills.

By way of conclusion in relation to learning ability, I am satisfied that much of the apparent disagreement between Mr Willis hinges on the difference between the banding system which is said to exist in parts of the U.K. and which Mr Willis uses, and that which is used here and in Northern Ireland by Ms. Hughes and Dr Fleming. For the purpose of allocation to Model A, it is obvious that the appropriate banding system should be that in use here, and for this reason I am satisfied that for the purpose of Model A allocation, S suffers from a mild general learning disability. I have set out earlier in this judgment most of the evidence given in relation to this question by the various witnesses, and I need not refer in particular detail to that again, but refer to it generally as set forth. In relation to the faults found by Mr Holland in relation to the assessment by Ms. Hughes, I accept that some was found to have occurred, but none sufficient to undermine the integrity of her assessment and report.

Challenging behaviours

As I have already referred to, a difficulty associated with autism is that the child will exhibit from an early stage inappropriate behaviours, referred to as challenging behaviours. These behaviours stem from the deficit which a child with autism has in the area of communication, particularly in the area of expressive language. It has been explained during the evidence that because the child has difficulty in expressing in words what he/she wants or does not want, these wishes and needs are expressed by behaviours, which can include inappropriate and aggressive behaviours, such as tantrums, hitting out at others, and self-harm. S exhibited such behaviours at an early stage. In that regard mother gave evidence that when S started to attend the nursery school at Pixies in September 2001, he being at that stage only one year and three months old, she had felt obliged to inform the lady in charge there that S was inclined to scream when distressed because he had already been noticed to have language delay. At this stage the parents had thought that perhaps S had a hearing problem which may be causing his language development and had his hearing tested. But no hearing difficulty was detected. In April 2002, Speech and Language Therapist, Sinead Ní Dhúill noted that S presented with atypical behaviours. She notes also in her report that if he is not understood he starts to scream. On the other hand, Ms. Burns from the Lucena Clinic, as part of its assessment, went to Pixies and observed S there on the 3rd October 2002. It is noted in the Lucena report that on that occasion S was seen to engage in what is described as 'rough and tumble play' with other boys, but that otherwise he does not play with the other children in his group. This report states also that S's general behaviour has not posed difficulties at Pixies. It must be borne in mind of course that this observation is during the course of only one day, and is simply a snapshot of that day's behaviour, and cannot in my view be seen as diluting the evidence of S's parents as to his behavioural pattern over a longer period up to that point. I accept their evidence as honestly given and unexaggerated.

In her evidence which I have set out earlier mother explained how these behaviours had been causing much distress and upset in the home, and how they caused distress and difficulty especially for her daughter (S's older sister). It will be recalled that behaviours could include head-banging, and that on occasion when S could not access a solid surface against which to bang his head, an available solid object might be someone else's head. The extent of the problems caused by these behaviours in the home and the need that they be managed and modified are obvious.

These challenging behaviours have had other knock-on effects for S, as for other children with autism. For very obvious reasons it makes contact with other children and people generally problematical. This affects the development of socialisation skills as his access to other children in particular must be carefully managed. It is difficult for such a child to make friends in the way normally

developing peers will do, whether in school or elsewhere. In addition, and in a more far-reaching way, these challenging behaviours will inhibit access to learning normally, and compound the difficulties already existing due to whatever level of general learning disability has been diagnosed. Such a child, as S is, has special educational needs which must be provided, together with whatever other therapeutic interventions are deemed appropriate to his needs, such as speech and language therapy, occupational therapy, physiotherapy, and maybe nursing and sensory integration therapy.

In the Beechpark Report prepared as a result of the assessment which took place on the 12th August 2003 when S was aged three years and two months some behavioural problems are noted. It will be recalled that Dr Fleming reported that he had been unable to do any psychometric testing because S would not sit down and look at material presented to him, and that when encouraged to do so "he became annoyed, struggled to get away and slapped out".

It will be recalled from the evidence that for the school year 2002/2003 the parents received sanction for a Home Tuition Grant, starting with five hours per week, increased to ten hours in June 2003, and later increased to fifteen hours in January 2004, but not without much effort and determination by them. This grant was discontinued at the end of the school year in July 2005 when S's attendance at St. Catherine's became full-time.

By the time S started to attend St Catherine's pre-school in February 2004 on a part-time basis, he was receiving educational intervention in three locations. Firstly he had home tuition in accordance with the number of hours sanctioned. In fact he had more than the sanction, because the parents gave some additional home tuition themselves. He had a half day placement at Pixies, and also a part-time ABA placement at St. Catherine's from February 2004. Some ABA was also being applied in the home setting.

Mother described in her evidence what life was like at home during the summer of 2003. I have already set out her evidence in this regard, and need not do so again, except to say that life was very difficult and part of this was due to S's behaviours, including his broken sleep pattern which meant that he had to be watched at night in case he would get out of bed and harm himself since he had no sense of danger. The parents regard this period as a period in which S deteriorated in many ways.

Ms. Sinnott has described in her evidence the rate of challenging behaviour present when he commenced at St. Catherine's in February 2004 and what it consisted of. I have already set forth that evidence. She stated also that these levels had reduced by April 2004, but increased again then. Between April 2004 and September 2004 reductions were again achieved as I have set out, but there was again a serious deterioration commencing around October 2004.

It was decided at the time, in consultation with Ms. Sinnott at St. Catherine's, that more consistency of provision was required for S, and for that reason he was withdrawn from Pixies, so that his education was being dealt with in one location, apart from whatever was done at home. It was considered that the spread of provision was causing an increase in challenging behaviours. Graphic evidence has been given, which it is not necessary to repeat, about the nature and frequency of these behaviours when he started in St. Catherine's in February 2004, how they decreased to some extent thereafter, but increased significantly in the autumn of 2004. It has been stated that his behaviour stabilised in 2005.

Much has been made by Mr McDonagh on behalf of the Department of Education and Science about the nature of the evidence given by mother and by Ms. Sinnott concerning the number and nature of the challenging behaviours exhibited in the class setting at St. Catherine's. It will be recalled that the evidence given was to the effect that he would indulge in challenging behaviours such as banging his head against a wall up to 100 times per half day. That was a startling piece of evidence, when one considers the injury which such activity must cause to a young child, and it certainly raised the issue of challenging behaviour and how it should be managed to a new level of concern for me when I heard it. It later transpired, which I have referred to earlier, that this evidence was not intended to convey that on each of 100 occasions he succeeded in hitting his head of a wall or other hard object, and that it included unsuccessful attempts or wishes to do so. That is not to minimise the potential danger which each unsuccessful attempt poses were he to have succeeded in his objective, but nevertheless it is evidence which should have been volunteered by the witnesses concerned, since, without it, the Court would clearly have formed an inaccurate impression of the reality. I cast no criticism on Counsel in this regard, whom I am certain were taken equally by surprise. I should add that I have not taken this evidence as in any way diminishing the importance which must be attached to the issue of challenging behaviour in the future management of his behaviours.

I have heard a lot of evidence as to how behaviour programmes and strategies have been put in place for S through ABA methodology at St. Catherine's. These have been successful in reducing these behaviours, and his parents are fully justified in having confidence in the effectiveness of what has been provided in this regard at St. Catherine's, and the Court can well understand why they would want this regime of provision to continue into his primary school provision, rather than risk, as they see things, his regression to inappropriate and challenging behaviours. From their perspective ABA has worked and continues to work for him, and they are naturally fearful that any change to the method of provision will cause him to regress. I understand that fully.

I am in no doubt that whatever educational provision is put in place in the future will have to have at its core a programme which can continue the progress made to date, in order to ensure that there is no regression in the area of behaviour. ABA is such a programme and one which has been shown to be effective for S in the area of behaviour management and change. That is not disputed.

Professionals involved will have to be fully cognizant of the risk of regression, which, if it was to happen, would again impact significantly on S's ability to access meaningful education. I have formed the view from the evidence that the management and continued control of S's challenging behaviour is the single most important factor to be taken into account in ensuring that his education is appropriately delivered. Apart from its impact on his capacity to socialise and make friends with normally developing peers as he progresses through life, it impacts also on his ability to integrate into a mainstream classroom so that the aim of inclusion at some point into a mainstream setting can be achieved. It is also critical to his ability to learn, and to the reduction of his level of deficit in all areas. ABA is provided for as part of the menu of provision available under Model A.

S's progress

Ms. Sinnott has during the course of her evidence produced a 'grid' chart which notes S's progress over a range of areas since his commencement at St. Catherine's pre-school in February 2004. She has stated in her evidence that his progress overall since he started there is very good. Dr Healy is of the same opinion, as is Dr Grey. Dr Grey attributes this rate of progress to the fact that S has received ABA, and went on to say, as I have referred to in his evidence, that he would have made even greater progress had interventions been put in place soon after diagnosis in 2002.

S's parents' confidence in the placement at St. Catherine's is also evidence that they are satisfied that he has made such good progress since he started there that they wish it to continue. Mr McDonagh has sought in cross-examination to impugn the reliability of the progress shown on this chart in a number of ways, such as by its reference to progress in the completion of puzzles. There has

been some dispute as to whether this refers to puzzles generally or to jig-saw puzzles, to take a simple example. This was because Dr Reid apparently noted in November 2003 when he assessed S that he could do 'puzzles'.

The suggestion has been made that the starting point on the grid exaggerates in some respects the level of deficits which S had at that stage, and that the progress demonstrated by the time the grid was completed is thereby distorted. In my view, while I have considered this carefully, there is nothing to be gained by trying to cast doubt on the integrity of the statistics shown on the grid to record his progress from Day one at St. Catherine's. The general consensus is that he has made very good progress in many areas, and not simply confined to behaviours, a view with which Ms. Hughes agrees.

The aim of integration for S

There appears to be a general consensus among professionals that one of the purposes or aims behind a special education provision for children with autism is that they should access mainstream peers as soon as they are equipped to do so, and as soon as possible, and that their education should lead in that direction. The point at which integration, even partial integration, is possible for any particular child will vary, since each child will have particular needs and levels of deficit, and some will make faster progress towards integration than others. Mr Willis stated that an objective of ABA is that the child will integrate with normally developing peers, but only if and when it is appropriate for the child, and he explained some of the ways in which this is achieved through the direct teaching of pre-requisite skills for socialisation (T.8, Q.535-536). His view as of the time he assessed S was that he was not yet ready for inclusion in a mainstream classroom even on a part-time basis, and would not be able to access the curriculum. Ms. Deirdre Muldoon, who is a speech and language therapist and currently runs an Early Language Intervention pre-school in Dublin, where some ABA is implemented, along with some TEACCH and PECS, has an ABA integration programme in place for some children in her pre-school with the aim of integration. This is achieved on a gradual basis, as and when she decides that the child is able to do it. I have set forth in her evidence earlier in this regard (T.7, Qs. 329-341). Dr Tierney also agreed that integration is desirable as soon as it is appropriate.

In June 2005 St Catherine's prepared a document entitled 'Special Classes for Autism at St. Catherine's special school', and as I have set out in the evidence of Ms. Sinnott, the aim of integration is clearly set out, as is the fact that St. Catherine's will facilitate a child's move to mainstream when the child has acquired the necessary pre-requisite skills to do so. Some eleven children have gone to mainstream settings as I have described in her evidence, including one to St. Joseph's Newtownmountkennedy. There is no need to refer again to all the evidence which Ms. Sinnott gave in this regard but it is beyond any doubt that she does not consider that S is ready, certainly at the point at which she was giving her evidence just over one year ago now, to start to access mainstream provision. But it is clear that in principle she accepts that integration is an aim to be achieved as soon as the child is ready. She opined that it could be two to three years before he may be ready. I refer to all her evidence in relation to this. Dr Healy in her evidence also agreed that integration was an ABA aim, depending on the child's ability to cope with it. I have set out her relevant evidence in this regard already. Like Ms. Sinnott she stated that S was not yet ready and that it could be two years or so before he could be (T.25. Q.427).

Ms. Hughes, Dr Mangan, and Ms. Cotter all favour the child accessing mainstream provision as soon as possible. I have set out their evidence in this regard and there is no need to repeat it. Dr Mangan believes that even at the time she assessed him in October 2004 he would have benefited from some access to mainstream and that this could be on a gradual basis as she described. Dr Mangan referred to the aim inclusion is part of what is included in Model A, and there is no need to refer in detail again to what I have already set forth. She is also of the view from the reports which she has read about S, that he is a boy who could begin to access mainstream peers. Ms. Cotter also, in relation to St. Joseph's gave evidence about what plans are made within that school for gradually integrating children into mainstream classes, and she spoke of the child who moved to that school from St. Catherine's and stated that the move was satisfactorily achieved and that this child is gradually accessing integration with mainstream peers.

Difficulties with change

A recognised feature of children with autism is that they are rigid and inflexible, in the sense that consistency and certainty is important in many areas of their life. It is important that the daily routine is clear and consistent because they can react adversely to unexpected change in their routine. This can lead to regression in terms of behaviour and stability generally. It has been stated in evidence that in a school context a lack of adherence to a definite routine can impact badly on the child's ability to learn. Both parents and Ms. Sinnott have stated that S does not adapt easily or well to change. On the other hand mother appears to have stated to Dr Fleming at the time they met him at Beechpark that S did not have particular problems in this area at that time. Nevertheless I accept that as a matter of probability there is no reason why S would not have difficulties in this area, but it is another matter altogether to go further and conclude that this reason is itself sufficient to decide that no educational placement other than St. Catherine's should be countenanced. All experts have agreed that integration into mainstream on a gradual basis is an aim of autism specific education. I have heard no evidence to the effect that it is necessary that a child with autism should never be moved from one school to another at any time during their education. Ms. Sinnott has given evidence of the fact that even within an exclusive ABA provision programmes and strategies are put in place to prepare a child for integration, so that the child can be assisted in the difficult task of changing the educational environment. Ms. Hughes has stated that since change is part of everyday life even for an autistic child it is desirable that the child is exposed to some change from time to time in order to prepare the child for life in a normal environment as he or she grows older.

It is also a fact of life that even within an exclusive ABA environment teachers and tutors will for many reasons leave and be replaced with others. This is a form of change also. I am not saying that one should ignore the difficulty the child may have with a change in his or her routine in this context, but I am satisfied that it can be managed in the best interests of the child.

It does appear however that at St. Catherine's no great efforts have yet been made, as of the time this case was being heard, to put in place strategies and programmes which would have prepared S in any way for a change in his educational placement from September 2006. Ms. Sinnott stated that he was a long way from being ready to be moved into a mainstream school, even one with an autism specific class. There seems in my view to have developed a fixed idea that he should not be moved, and that therefore no steps were taken even to anticipate that this may be required. I am not prepared to accept on the basis of the evidence which I have heard that any difficulty which S, along with other such children, will inevitably have with change, means that the ground cannot be laid where that change is managed as best as possible to ensure that the child can move to another environment in a carefully managed and controlled way.

I have heard, for example, that there was a child whose parents, at short notice, took up a place in another school, and even though the child had not received the sort of preparation for that change by putting in place the sort of programmes Ms. Sinnott spoke about, that child's move to the other placement was achieved satisfactorily.

Model A Framework

I have set out Dr Mangan's evidence in relation to the development by her of the Model A framework of educational provision. She

described it as providing a menu which can be used to match the learning, social and behavioural needs of the child to particular interventions, and that it gave professionals options which may be appropriate to the needs of any particular child. I have described what Model A is by reference to the evidence given by Dr Mangan and I have set that out in detail earlier, and I do not propose to repeat it. But I will of course refer to the model of provision available within it.

It states that allocation to this model will be for a child who has a mild degree of learning difficulty. I am satisfied that on the basis of the evidence given as to S, that he is appropriately placed within the mild category of learning disability.

It states that "in the main" the degree of autism evident in a child allocated to this model will be 'mild to moderate'. This is not prescriptive therefore, and I am satisfied that when all the evidence is considered, particularly that related to S's strengths, S is appropriately placed in that category even allowing for his undoubted deficits at time of diagnosis in the area of communication and social skills. I am not satisfied that when looked at in the round the evidence supports placing him in the severe category, and I accept Ms. Hughes's evidence that when clinical experience is added to the actual scores achieved by S on the tests applied, he is not in the severe category of autism.

It states that the model facilitates the placement of children with broadly similar learning needs and degrees of autism in the same class where the curriculum can be delivered in a setting which facilitates shared as well as individual learning, and where social and behavioural objectives can be targeted. These are all elements which in my view on the evidence can enable S to benefit educationally. It may well be the case that he will need more attention to individual learning for some time in the future. This is accommodated in the model. Equally, when he reaches a point where less individual attention is required as he demonstrates improvement both educationally and in terms of socialisation, the class teacher will be able to meet the need to include more shared learning, leading to the possibility of more mainstream exposure on a gradual basis as deemed necessary, as has been explained in the evidence given. This seems to me to be an appropriate element to be included for S as he develops.

The model states that children will work towards integration on a gradual basis. Both in terms of the curriculum and in terms of socialisation. This is agreed by all the experts whom I have heard to be a desirable aim, even if some of those experts agree that S is not at the present time ready for this inclusion. Model A has within it sufficient flexibility to permit the discretion of the class teacher to make decisions in consultation with parents as to the timing of any gradual move towards inclusion or integration. It is not prescriptive whereby a child might be placed in a mainstream environment when he or she was not able for that. This seems on the evidence to be an appropriate element to be included in any provision for S.

This model provides for the involvement of teachers, parents, therapists, educational psychologists and any other professionals dealing with S in any decisions about the specific targets to be aimed at in relation to S's education, and that the menu of interventions included in Model A can be selected from time to time for use as the need is evident. All of this envisages the preparation in conjunction with parents of an Individual Education Plan. Again I am satisfied that the evidence is that all these elements are appropriate and necessary for S, and are appropriate for him in the provision made for his education and welfare. This flexibility seems to me to be highly desirable.

The model provides a menu of possible interventions using a combined skills/eclectic approach, and that any one or a combination of such interventions can be used "depending on the needs of the pupil". It provides for the use of ABA "as a core element in the programme in some cases", and that in other cases ABA may be used as a smaller component of the programme offered, and that "this would be agreed on the basis of professional advice and in agreement with parents".

I am satisfied that ABA itself is an appropriate intervention. Clearly the plaintiff's advisers and his parents agree that it is, and the defendants are also of this view. The only point of distinction between the parties is that the plaintiff's advisers believe that it must be the sole and exclusive method of educating the child, and the plaintiff's advisers and parents have concerns that those delivering the ABA element in the schools delivering ABA only as part of an eclectic provision are not and will not be appropriately qualified and trained to do so.

The model also provides that TEACCH would be introduced as an integral part of the programme, and in particular a visual time-table. Again, I am satisfied from the evidence that TEACCH is itself an appropriate intervention which has been in use for many years. There is no evidence which persuades me that TEACCH is not appropriate for children with autism. It may not be sufficient as a sole intervention, but that does not mean that it is not appropriate as part of a larger programme. In fact Mr Willis, who gave evidence for the plaintiff is himself trained in TEACCH.

The use of PECS is included as part of the programme if appropriate. While there is some evidence that the research basis for the effectiveness of PECS is weak, there is no doubt that it is widely used with children with autism by professionals in this area.

Model A also allows access to speech and language therapy if deemed appropriate to the needs of any particular child, and that this would be provided in the school, as well as occupational therapy. Nobody in this case is suggesting that these therapies are not appropriate for a child with autism.

The model then goes on to provide that there will be access to multi-sensory experiences, and for emphasis on the development of self-help skills to promote pupil independence. Given the nature of the deficits experienced by children with autism, albeit the degree varying from child to child, it is entirely appropriate that such provision be included in a model of educational provision.

Finally the model envisages a graduated model of integration with non-autistic peers in order to promote social and language development. It envisages also that where progress has been achieved by such gradual exposure to non-autistic peers, a more extended exposure may be planned. This integration process is to be supervised by the Special Needs Assistant, but directed by the class teacher. Again, given that all experts, including those called for the plaintiff, agree that integration or inclusion with mainstream peers is a goal ultimately to be aimed at achieving in the interests of the child, the inclusion of this provision for a graduated process of integration must be appropriate.

Ms. Hughes has stated in her evidence that what is contained in Model A accommodates what she has recommended for S.

In my view the criticisms levelled at Model A on the plaintiff's behalf that it is too vague and unspecific to be regarded as an appropriate educational provision for S are not valid for the purpose of denying the model's appropriateness in the context of whether or not the Minister of Education and Science has failed constitutionally to make an educational provision appropriate for children with autism and in particular for S. The criticisms levelled at the Model in terms of what it provides for in relation to level of training of teachers in, for example, ABA, do not in my view speak to the question of whether the provision itself provided by the model is an appropriate provision of autism specific education.

The quality of teachers and tutors will inevitably vary depending on the teachers and tutors available in any particular school. The same applies to any mainstream primary school. Some mainstream primary schools will be regarded by parents as having better or worse teachers than other schools. Class sizes may vary from one school to another, so that pupils in a school with smaller class sizes may be perceived as having the benefit of a better education.

It must be remembered also that the Minister for Education and Science is obliged under the Constitution to *provide for education*, and not to *provide education*. The Minister does not run the school. The Board of Management has responsibility for the hiring of teachers. The Minister will provide the school building and will pay the salaries of teachers employed in them, and so long as provision is made by the Minister for "appropriate education" his constitutional duty is discharged. The fact that one child or a group of children attend a school where the quality of education may be different from another, or less than optimal, or the class size is greater than another school or schools elsewhere, does not mean that the Minister has failed to *provide for* an appropriate education as required by the Constitution.

Given the wide range of differences between all children with autism, where no single child will have identical needs, and each will need to be considered separately in order to decide exactly what intervention is needed and from time to time as progress is made and as the child grows, it seems obvious that the model of provision decided upon by the Minister must be broad in nature in order to accommodate those differing needs in such children.

There is nothing to suggest that the Minister has acted in some irrational way by making provision in a way that simply cannot be appropriate to meet the needs of children with autism. What has been decided upon, and in the light of advice from and consultation with experts in this area, and following the Task Force Report 2001 is that Model A, as well as other models such as Model B, Model C and so on, contain within them the ability to provide an appropriate education for such children, depending on need and objectives. It is deliberately flexible in order to take account of these differences. The Minister has the responsibility under the Constitution to make these decisions, and he has done so having taken advice. What those opposing the eclectic approach to provision wish to establish is that what he has come up with is not appropriate because in their view the only appropriate method of intervention for S, and indeed for all autistic children, is ABA to the exclusion of all others. The Minister, having taken appropriate counsel on the matter is entitled to have a different view.

The Minister set up the Task Force on Autism which reported to him in October 2001. That report is a comprehensive report dealing with all aspects of autism, including making recommendations in relation to primary education provision. In that regard there are undoubtedly criticisms therein in relation to the position pertaining up to the date of that report. It highlights a lack of adequate educational provision for such children, describing it on page 151 as "grossly inadequate". The reasons identified for that state of affairs are "inadequate planning, insufficient funding and the lack of response to research over past years." The report expresses the hope that the recommendations contained in the report in this regard "will allow these and other shortcomings to be addressed". That chapter in the report concludes with sixteen policy recommendations.

But at paragraph 8.5 (page 161) it deals with the "Primary Curriculum" in the following way:

"Whenever possible, the guidelines of the Primary School Curriculum (1999) should be used. However, since the majority of children with ASDs, including those with AS/HFA have an uneven learning profile, it is necessary for their teachers to access a range of materials to meet their students' curricular needs. Assessment of all relevant areas of development, mental health, and learning will determine the level and the particular focus of the teaching in any of those areas. An appropriate curriculum should, therefore, be drawn up, based on the student's present level of functioning, and on the teacher's knowledge and understanding of how the ASD is affecting the child's learning style. This will be facilitated by additional information from relevant multidisciplinary clinicians and parents. The child's level of intellectual functioning will be one important determining factor regarding the extent to which the Primary Curriculum can be usefully adapted."

The report goes on to make recommendations as to features of a curriculum for children with ASDs, and sets out certain curricular areas. In my view Model A can be seen as addressing these recommendations.

It is also worth noting the reference to a differentiated national curriculum for children with ASDs, and the reference to "teachers". I say that because it is clear from the evidence adduced on behalf of the defendants and which I have already set forth that some of the shortcomings which the Department of Education and Science has identified in what is provided in schools where only ABA is provided is that the child is not provided with education from a differentiated national curriculum, and in most cases what is provided is provided by personnel who are not qualified "teachers" in the sense of not being qualified national school teachers. In the Minister's view, and it is a view that he or she is entitled to have, education must be provided from the national curriculum, albeit one differentiated to take account of the particular needs of each child with intellectual disability and/or autism, and that education at primary level must be delivered by a qualified national teacher. Model A accommodates these concerns, and in the Minister's view makes provision for an appropriate autism-specific educational provision.

At risk of repeating myself unnecessarily, I repeat that the Minister has considered the question of ensuring that provision is made for appropriate education for children with autism. The Task Force Report identified serious shortcomings in the educational provision over past years and made recommendations. It made recommendations. The Minister is not obliged to accept and implement each and every recommendation, but is obliged in discharge of his constitutional obligations to make appropriate provision. In my view, he or she can be seen as having taken steps to address the shortcomings and took advice from appropriate experts as to what provision should be made for autism specific education. Certain frameworks for provision have been decided upon, which include the provision of ABA as a core element in some cases if needed, but not to the exclusion of all other types of programmes and interventions.

I have already made comments about the difficulties in comparative studies between an exclusive ABA provision and an eclectic model of provision as far as effectiveness of outcome is concerned. The fact that there may be little such comparative research which shows an eclectic model providing better outcomes than the exclusive ABA model does not preclude the Minister deciding that an eclectic approach is an appropriate provision. Each component within the eclectic model, including ABA as required by any particular child, is recognised by professionals consulted by the Minister, and by the Task Force as being valid, useful and effective. The Minister is entitled to accept the advice received that Model A, and the other eclectic models described, are appropriate in a general way for children with autism, and to provide for that. It would have been within the decision-making power of the Minister to opt for exclusive ABA to the exclusion of all other methods, if, for example, he or she received advice in favour of such provision, or if he or she was of that view regardless of advice, but for the reasons which have been stated, that decision has not been made, and it is clear from the Task Force report that such exclusive ABA was not something recommended.

S's needs have been described in several reports. In his evidence Dr Fleming stated that ABA should form part of an intervention for S, and that he needed also the sort of structure which was available through TEACCH as well. He also said he could benefit from

PECS.

In my view his needs are accommodated within Model A, and any shortcomings which the plaintiff's parents and advisers identify in relation to lack of precision and specifics as to training in ABA, do not affect the decision which the Minister has made. Neither is that decision contaminated by the Minister from time to time having provided funding for some ABA schools on a pilot basis.

For all these reasons I have not been satisfied by the evidence adduced by the plaintiff that the eclectic provision, and in particular Model A for S, is not an appropriate autism-specific provision. His parents may well prefer if he could continue with his primary school education under the exclusive ABA model which they say, and I accept, has served him well to date, but that does not mean that if he cannot do so because there is not such a school in his area, and that the only provision of autism specific education adjacent to where he resides is one which is delivered through an eclectic model, that his rights to appropriate education under the Constitution have been breached, provided that available provision is an appropriate one.

It follows from this conclusion that the reliefs which the plaintiff seeks must be refused, and it is unnecessary to consider whether, in the event that the Court had concluded otherwise, the Court could in any event make mandatory orders to compel the Minister for Education and Science to make provision for an exclusive model of education available at St. Catherine's or at some other school convenient to him, or to make the declarations sought.

The issue of damages arising from delay in the provision of early interventions

Towards the commencement of my judgment I have set out the chronology of events in S's life following the first suspicions by his parents that there was something unusual in his development. I refer again in general to that summary of the evidence.

By the twelve month check-up with the public health nurse in June 2001 they thought that there was some hearing difficulty, but tests carried out removed that as a concern. Sr. Lydia, who examined S in a private capacity, appears to have noted the possibility of autism at that time though not communicated that possibility to the parents. She would not in any event be qualified to make such a diagnosis, being an audiologist.

In February 2002 (S being then 1 year and 8 months old), the public health nurse again examined S for his eighteen month check-up, and noted no speech and poor attention span. Her notes of this examination made reference to a suspicion by Sr. Lydia eight months previously of autism. The public health nurse noted also that if S was autistic then a referral for clinical diagnosis should be made by the GP, Dr Devereaux. This, according to mother, was not said to her and she went on to say that if it had been she would have made sure that it was done immediately. The following month in March 2002 S's mother sought an examination by Ms. Ní Dhúill a speech and language therapist. Mother thought that he had a language difficulty since a hearing difficulty had been ruled out earlier. She suggested to mother that Dr Devereaux refer S to the Lucena Clinic in order to rule autism either in or out, and mother has stated that it was Ms. Ní Dhúill who first mentioned autism as a possibility. It will be recalled that the letter of referral sought an appointment on an urgent basis, but the letter received by Lucena Clinic contains a note thereon, made following receipt: "Discussed at team meeting on 3rd May. Priority routine multi disciplinary assessment".

In my view this is the point at which culpable delay by the health bodies should be deemed to commence, given that there can be no room for doubt about the state of knowledge even then of the need for early intervention in the event of a positive diagnosis of autism being made. I have already set out that assessment took place at Lucena on the 5th September 2002 – four months later. Four months must be seen as a very long period of time in the life of a child who was in May 2002 just short of two years of age. In the context of the need for early intervention, valuable time was being wasted. While the assessment was carried out on the 5th September 2002, it was a further three months before the report was completed. Without a confirmed diagnosis of autism the parents could not attempt to access support services, so it was important that both the assessment and the report be completed at the earliest possible moment. As I have set forth earlier, the report states that S presented with significant delay and irregularities in the areas of communication, social interaction and imagination and play, and that he has a moderate to severe language delay and pragmatic disorder, as well as difficulty in processing sensory information. It went on to make recommendations, including a referral to Beechpark Services.

Some assistance was given to the parents in the form of courses such as 'Hanan – More Than Words', as I have stated, but nothing was yet in place specifically for S. I have set out in some detail the sense of frustration felt by the parents during this time of delay in the provision of therapeutic assistance for S. There is no need to repeat it. But it is a fact for the reason already set forth that once Lucena referred the case to Beechpark, it ceased whatever speech and language therapy services had been made available to S, on the basis that it was now a Beechpark case. That ignored the fact that it would not be for another eight months before an appointment would be available at Beechpark in August 2003.

I have already set out the struggle experienced by the parents in securing a Home Tuition Grant, first for five hours per week, and subsequently increased to ten hours per week in June 2003, and later in January 2004 to fifteen hours per week, all regarded by the parents as being inadequate. I have dealt already with the recommendation in the Beechpark Report of fifteen hours home tuition grant.

By the autumn of 2003 all that was available for S was the Home Tuition Grant from the Department of Education and Science. No therapies were available to him from the health bodies.

One can readily understand why these parents had sought solicitor's advice in June 2003. I have already dealt with the evidence relating to the summer of 2003, the serious sense of frustration felt by the parents during that time, as well as the difficulties being experienced by S in terms of his relationships at home and his behaviours.

In February 2004 he commenced his attendance at the pre-school at St. Catherine's. Funding for therapies was provided on a per capita basis for the six children attending that pre-school, but full-time educational placement there for S was not approved until February 2005. It appears to be the case that the funding for therapies provided by the HSE was availed of by St. Catherine's in order to fund his part-time placement from February 2004.

The plaintiff pleads that the delays in diagnosis and the provision of appropriate therapies and appropriate pre-school education from February 2002 until February 2004 amounts to negligence and breach of duty including statutory duty on the part of the defendants, and that since S suffered injury as a result of this, it should sound in damages, both general damages and special damages.

In my view, once S was referred by his GP, Dr Devereaux, to the Lucena Clinic in May 2002 in order to see if S was autistic or not, there was a duty of care owed to move with reasonable dispatch, given the known importance of early diagnosis and early intervention in the event of a positive diagnosis. While some margin of appreciation must be allowed to a body such as Lucena Clinic

in relation to the time within which such a diagnosis can reasonably be made, given the inevitability that there will be a waiting list of some kind for such diagnoses, the delay of six months which occurred between May 2002 and a diagnosis at the end of November of that year and referral to Beechpark then, was unreasonable in the context of a child who upon referral in May 2002 was only aged one year and eleven months. That six months represents a large period of time in his life. That delay had consequences, particularly if one bears in mind the further delay which then ensued between referral to Beechpark in November 2002 and ultimate assessment there in August 2003, by which time S was clearly suffering from a lack of appropriate inputs in terms of therapies. The parents were left to their own devices, and they did the best they could with the limited knowledge and resources at their disposal.

I am satisfied that the Court can approach the question of this claim for damages on the basis of negligence rather than on the more difficult basis, from a legal point of view, of breach of statutory duty.

The Department of Education and Science sanctioned a Home Tuition Grant of five hours per week in December 2002 following diagnosis. That was increased as I have already set forth. While this level of grant fell very short of what the parents felt was appropriate, it is a matter within the Department's discretion, and cannot in my view be seen as a breach of duty, including statutory duty. The parents had through their own efforts put in place some nursery schooling at Pixies in November 2001, followed by pre-school at Pixies, and in August 2003 following assessment by Beechpark Services, chose to leave S there rather than take up the less attractive option of a place at an outreach school at Ballyboden which was too far from where they lived. St. Joseph's, Templaraine was not a known available option until September 2004, when S would be four years old. S commenced at St. Catherine's ABA pre-school in February 2004 but without funding for that being in place from the Department of Education and Science. While it is true that this Department did not provide for a pre-school placement for S until funding for a full-time placement was sanctioned in February 2005, the fact is that S was in a pre-school placement at Pixies and had a certain measure of home tuition in place, even though at the start the sanction from the Department was merely five hours per week until June 2003 when it increased to ten hours.

To their credit these parents minimised as far as they could the consequences for S of this lack of educational placement by the Department near their home for S. I am not satisfied that any failure by the Department of Education and Science specifically lead to identifiable adverse consequences for S's development given the great efforts of these parents to otherwise provide pre-schooling for him. I am not therefore satisfied that a claim for damages against that Department can succeed, either on the basis of negligence or breach of statutory duty.

I should also state briefly that I am not satisfied that the Department of Health and Children has any statutory function in relation to education, in spite of the submissions made to an extent by the plaintiff that there is an overlap between the provision of therapies and education in the case of a child with autism, given the link between the deficits for which therapies are recommended for amelioration, and the impact of these deficits on the autistic child's ability to access education. As far as I am concerned, therapies are health related, and the responsibilities of the Minister for Health and Science must be confined to that area, and not extended into the area of education, which is the sole remit of the Minister for Education and Science.

In order to succeed in negligence against the Department of Health and Children, and the named parties who now are part of the Health Service Executive, the plaintiff must establish that he was owed a duty of care by these entities, that there has been a breach of that duty of care, and that as a result of that breach he has suffered injury. Once all these matters are established the plaintiff is required now to go one step further before damages can be awarded, and satisfy the Court that in all the circumstances it would be just and reasonable that the defendants should be held to owe such a duty of care.

This last consideration arises from the judgment of Keane CJ. in *Glencar Exploration Ltd v. Mayo County Council* [2001] 1 ILRM 481, when in relation to the extent of a duty of care, he stated:

"There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J at first instance in *Ward v. McMaster*, by Brennan J in *Sutherland Shire Council v. Heyman* and by the House of Lords in *Caparo Industries plc. v. Dickman*. As Brennan J pointed out, there is a significant risk that any other approach will result in what he called a 'massive extension of a prima facie duty of care restrained only by undefinable considerations...'"

As I have stated already, I am satisfied that once S was referred by his General Practitioner to the Lucena Clinic for diagnosis, the necessary proximity existed between that entity and the plaintiff in order to give rise to a duty of care towards him.

That duty extended at that stage to completing a diagnosis within a time-frame which was reasonable given his age and the recognised importance of early intervention should a positive diagnosis be made in due course. The fact that diagnosis was not completed until the end of November 2002 and reported on the 9th December 2002 means a delay from referral to diagnosis of about seven months. That is a long time in the plaintiff's life at that stage. It follows in my view that a delay of seven months in formal diagnosis is an unreasonable delay, and does not adequately address the duty of care owed.

The Lucena Clinic must be taken to know the importance of an early diagnosis in such cases, and to be aware of the importance of early intervention thereafter. The diagnosis is the only key which has the potential to unlock the package of ameliorating measures to which the plaintiff would be entitled after diagnosis. In my view it was foreseeable by them that delay in diagnosis would as a matter of probability impact adversely on the rate at which any deficits would be reduced, and that his progress would be delayed as a result.

Having made its diagnosis the Lucena Clinic referred the plaintiff on for assessment by Beechpark Services, the body within the Health Service Executive with expertise in the area of autism. It is that body which makes recommendations for intervention depending on the particular needs and deficits identified as existing. In my view, once a diagnosis has been made, the need for early intervention is clearly recognised including by those at Beechpark Services, even though, I accept, Dr Fleming stated at one point that he had some doubts about the research basis for when exactly intervention should commence. He accepted that early intervention was essential and most appropriate, and that the evidence for this seemed to be 'intuitive'.

The fact that Beechpark Services was unable to see S until the 12th August 2003, albeit through lack of adequate resources, is in my view a breach of their duty of care to the plaintiff. They are the experts in the area of autism. They must be taken as knowing exactly how important it is to assess and make recommendations for a child such as the plaintiff, and while some degree of allowance or margin of appreciation must be made for the numbers of children with whom they had to deal, no such margin could be put so wide

as to condone or justify the delay from November 2002 until August 2003 in the assessment and recommendations being made. In my view this was a further breach of the duty of care owed to S, and in circumstances where the consequences of delay for S were known and recognised by the personnel in question.

The finding of the existence of a duty of care and a breach thereof amounts to a finding of negligence. I want out of a sense of fairness to those at Lucena Clinic and Beechpark Services to say that to the extent that such delays as I have found to have taken place have taken place as a result of a lack of adequate resources at their disposal to cope with the enormous increase in demand for services, there is no suggestion being included in my finding that the personnel did other than their very best to cope with this increased demand upon their services under very strained and difficult circumstances. The plaintiff's father in his evidence was very fair when he stated that Dr Fleming had been very honest and open with them about the problem with resourcing, and Dr Fleming in his evidence, as I have set forth, stated that he regretted very much that Beechpark Services was not always able to respond to the level of demand sufficiently quickly.

The question then arises as to whether it has been established that S has suffered injury, loss and damage as a result of the breaches of the duty of care. The plaintiff's parents have given evidence of how difficult life was at home in various ways which I do need to revisit. During 2003 his behaviours developed to a worrying extent as has been described. This situation continued during 2003, and it will be recalled that there was even difficulty at the Beechpark assessment in August of that year in administering any psychometric testing because S would not remain seated. These behaviours subsided to an extent following the meeting with Ms. Rosalie Seymour at that time, but even following commencement at St. Catherine's in February 2004 challenging behaviours worsened greatly during the summer of 2004, even allowing for the misunderstanding created by the referral even of attempts at self-harm and attempted challenging behaviours of all sorts being classified as actual incidents of challenging behaviours.

I accept the plaintiff's parents evidence of how difficult life was at home during this period, and I am satisfied that there was delay following diagnosis in having interventions put in place to address matters of this kind, in spite of the making available to the parents of certain courses which were of some general assistance to them. But the fact is in my view that they were left to their own devices.

But in assessing the question of injury and therefore damages, it is important to confine that to injury to the plaintiff. Appallingly difficult as life must have been for the parents, and for S's sibling sister during this time, that is not something which can sound in damages. Everyday, sadly, people suffer appalling injuries in accidents of all kinds on our roads and in workplaces, and these injuries place extraordinary burdens on those with whom the injured person lives thereafter. That is not, however, something which can be included in a claim for damages by the injured party. It is the same in the present case. What the Court must look at is the injury, if any, to S which has resulted from the delay which the Court has found to have taken place.

It is safe to conclude that if diagnosis had occurred earlier, referral to Beechpark would have occurred earlier, and if the latter in turn had concluded its recommendations earlier, then, in theory at least, the package of measures to which the plaintiff was entitled could have been unwrapped much earlier. It is likely that if there had been intervention put in place twelve months earlier to assist S in the area of expressive language, for example, his challenging behaviours may never have reached the level that they did, and his parents and those interacting with S may have been better equipped to deal with them in a way which was positive and helpful for the future.

If speech and language therapy had been made available earlier, by having diagnosis and assessment completed earlier, then S, as a matter of probability, would have been more advanced in the area of communication than he was by February 2004 when he commenced at St. Catherine's. I have no doubt that in spite of the existence of a home tuition grant the plaintiff was disadvantaged by February 2004, and that injury in its broad sense to the plaintiff resulted.

In a similar way I am satisfied that the delay in occupational therapy being provided which resulted from the delayed diagnosis and recommendations caused an equivalent delay in the addressing other deficits.

In my view there was a twelve months period of time which was lost to the plaintiff and that this was significant in terms of what he might have gained in reduction of deficits during that time. I am satisfied that this impacted on his life at home and on his development both in physical terms and in terms of learning, and particularly in terms of language and adaptive behaviour. The details of these matters has already been outlined in my summary of the evidence given by the various witnesses.

As far as damages are concerned, this finding must be counterbalanced by the fact, as confirmed by both Ms. Sinnott and Dr Healy (independently of each other) that S's progress during his time at St. Catherine's has been very good. However the point reasonably to be made in my view is that given that he has made very good progress from the baseline at which he entered St Catherine's, it is reasonable to conclude that he would have progressed even further in terms of deficit reduction if intervention had commenced twelve months earlier. Nevertheless one must not discount the fact that he has made very good progress, and there is no evidence to suggest that this very good progress will not continue into the future, in spite of the fears which the plaintiff's parents for any educational placement which is not an exclusive ABA placement.

I have already set out my conclusions in relation to Model A, and there has been no hard evidence adduced to this Court in relation to any student under Model A who has failed to make progress. The evidence in that regard has been simply speculative by reference to the vagueness of the model, the vagueness as to training requirements for teachers and tutors and so on. I have dealt with that already.

The remaining question to be asked under *Glencar* {supra}, namely is it just and reasonable that a duty of care of such a scope be found to exist on the Health Service Executive in its dealings with S, must in my view be answered in the affirmative. It was known by May 2002 at the latest that he potentially was suffering from autism and it was important that the fact be established quickly. It was known by all concerned from that point onwards that early intervention was essential. It was known that lack of early intervention at that sort of age has adverse implications for deficit reduction. While accepting the reality facing the HSE personnel that they did not have sufficient resources to address adequately the demand on services, this alone is insufficient in my view to reduce the scope of the duty of care given the extreme vulnerability of the children with whom they are dealing. The duty of care in relation to such vulnerable and dependent children who are in need of urgent attention places a particular onus upon those with responsibility, to provide relevant assistance within reasonable time-frames. It is just and reasonable that this be so given the nature of autism.

General Damages

It is difficult to put a monetary value upon the consequences of this delay in providing interventions. The damages to be awarded must be modest in my view given my finding that S has in fact made very good progress. Nevertheless there has been a period during which the stress and distress to S accompanying his challenging behaviours during 2003 went unaddressed and undiminished, and some of this may have been avoided had interventions and other assistance been available to him and his parents. The assessment of

damages is inevitably an imprecise science, and must also ignore the stress and anxiety suffered by the parents and sister of the plaintiff during this time.

I assess general damages in the sum of €50,000 to reflect in a general way the loss of twelve months in the provision of appropriate interventions, and the impact of that on the rate of S's developmental progress at a critical time, and on his behaviours.

Given my findings in relation to the personnel concerned, I find no basis for awarding exemplary or punitive damages, either from the manner in which personnel in the HSE bodies dealt with the parents, or in the manner in which this litigation was defended by the HSE.

Special Damages

As far as special damages are concerned, there is no doubt that the parents have been put to expense in seeking appropriate interventions for S in the absence of any such being provided for them up to February 2004 when S commenced at St. Catherine's. I am satisfied that no claim can be made under this heading in respect of any period after that date, given that St. Catherine's received funding for therapies for S. The fact that this funding was used, and, I am satisfied, with the knowledge and agreement of the parents, for the provision of teaching in the ABA pre-school, and not for therapies, absolves the HSE from any liability for special damages under this heading from February 2004.

The Court was handed a schedule of special damages. The basis of calculation has not been put in issue by the defendants, even though liability itself was denied. The plaintiff claims special damages under a number of headings. I shall deal with them in the order set forth in the schedule produced:

Home Programme

December 2002 – June 2003

During the period December 2002 (diagnosis) and June 2003 the plaintiff received from the Department of Education and Science a Home Tuition Grant which funded five hours tuition per week.

But the parents did not consider this to be adequate for S and put in place an additional eleven hours of home tuition per week, one of which was by Sabrina Hughes, who did six hours in total.

Six hours' home tuition was given by Ms. Sabrina Hughes, and the remaining ten hours was given by S's mother. In the schedule of special damages, calculation of loss has been calculated by allocating the five hour Home Tuition Grant to the tuition provided by S's mother and a claim is made in respect of six hours for Sabrina Hughes and the balance of five hours for S's mother. In my view this is not a correct method of calculation. In my view the Home Tuition Grant must first be allocated to the person actually hired by the parents to provide tuition for S, and not to the plaintiff's mother. That leaves one hour per week for Ms. Hughes which S's parents funded themselves over that period of twenty four weeks. That amounts to €650.88 based on the figures supplied.

In relation to the balance of the claim for this period, it is for the ten hours per week home tuition supplied by S's mother. Firstly I have mother's evidence that she gave tuition to S during this time. I do not doubt this for one moment. But I am not satisfied that as a matter of law she is entitled to be paid for giving this assistance to her son at home. The plaintiff's loss must be mitigated, and to the extent that S is fortunate to have a mother who is a qualified psychologist, her availing of her own expertise in relation to additional home tuition is part of that process of mitigation of loss. I am not satisfied that her provision of tuition to her son is something for which she can be expected to be paid by way of a claim for special damages.

July 2003

By this time the Home Tuition Grant from the Department had been increased to ten hours per week. During this month, Ms. Sabrina Hughes provided six hours per week, the balance being provided by S's mother. It follows on the basis of what I have just said that there is no sum to be recouped by way of special damages under this heading.

August 2003 – January 2004

During this period the Home Tuition Grant was ten hours per week, and S was provided with fourteen hours by Ms. Finola Keogh, and ten hours by his parents. There is a shortfall of four hours to Ms. Keogh after the Home Tuition Grant is taken into account, and I propose allowing a claim by way of special damages for the balance of four hours per week for her, amounting for this period to €1735.68, given the fact that a delay had occurred in the provision of interventions due to delay in diagnosis and recommendation, and it is reasonable that efforts be made to address the consequences of that delay for S by getting in additional tuition so that he made as much progress as possible as quickly as possible. For the reasons already stated I am not making any provision for what was provided during this period by the parents for their son.

January 2004 – April 2004

During this period the Home Tuition Grant was increased to fifteen hours per week. Fourteen hours per week was provided by Ms. Keogh, and since this is covered by the Grant, nothing further arises by way of special damages.

September 2005 – June 2006

During this period there was no Home Tuition Grant in place since July 2005, because in June 2005 S had reached the age of five years. His parents nevertheless continued to have tuition provided on the basis of ten hours per week by Ms. Anne Marie Lawlor. Even though S had been a St Catherine's ABA pre-school since February 2004, I believe that the parents were justified in continuing to provide some home tuition in order to make sure as far as they could that the consequences of the delay in diagnosis and recommendations for intervention be minimised as much as possible. I will therefore allow the sum of €7600 claimed for this period as set forth in the schedule provided.

Therapies

I propose allowing the claim for speech and language therapy, and occupational therapy up to the time when S commenced his attendance at St. Catherine's pre-school in February 2004. This is because until that point in time nothing was provided for S other than what the parents were able to provide from their own resources. I am satisfied that it was necessary that therapies be sourced from wherever possible after diagnosis, in the absence of anything being provided to S through the health boards.

Thereafter however the situation is different. As will be recalled, the Department of Health and Children provided a per capita payment to St. Catherine's for therapies for each child attending the pre-school there, including the plaintiff. That payment of €15,000 per pupil was one intended to be used for the provision of therapies. The Department of Health and Children has no function in relation to the funding of education. The fact that the management at St. Catherine's decided, for pragmatic reasons as they saw

them, to use this money for the purpose of funding the pre-school ahead of sanction from the Department of Education is not something which in my view should result in the Health Service Executive having to pay again for therapies for which funding was already being provided to St. Catherine's. There has been no clear evidence of exactly what therapies have or have not been provided to S while he has been at St. Catherine's. It is impossible to arrive at any conclusion as to the adequacy or otherwise of therapies provided there through the funding provided. The only therapies claimed in respect of a period prior to February 2004 are €700 in relation to Ms. Rosalie Seymour in July 2003, and I allow that.

The total of special damages allowed therefore amounts to the sum of €10686.56, which sum when added to general damages of €50,000, gives a total sum of €60686.56 for which there will be judgment entered against the Health Service Executive, which body has been substituted for the third and fourth defendants as originally named in these proceedings.

I will dismiss the remainder of the plaintiff's claims.