

## THE HIGH COURT

2005 No. 1381 J.R.

S. McD (A MINOR SUING BY HIS NEXT FRIEND, M. McD)

APPLICANT

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

RESPONDENTS

**Judgment of O'Neill J. delivered the 29th day of July 2008.**

1. The applicant was born on 20th May, 1996. Early in his life, in 1999, he was diagnosed as suffering from a pervasive developmental disorder within the autism spectrum and mild developmental delay. In the year 2000, he commenced school in a national school in a class for autistic children. There were six children in the class and three special needs assistants. At the same time he commenced home tuition. This was for two hours per day, Monday to Friday during school terms. The tuition involved using the Applied Behavioural Analysis (A.B.A.) and the Treatment and Education of Autistic and related Communication Handicapped Children (T.E.A.C.C.H.) methods and was given by a tutor trained in these methods of teaching. The A.B.A. programme addressed core academic areas including reading, writing and mathematics and also self help skills, care of the environment, social skills and language. This tuition was paid for by the first named respondent. Each year the applicant's parents applied for the grant for the tuition. Their applications were granted each time until September 2005.
2. The applicant progressed very well under these arrangements, to the point that in 2006, he was considered by all the professionals dealing with him suitable for inclusion in a mainstream class in September, 2006. The applicant's parents were naturally very pleased with this state of affairs and were fully supportive of the decision to move the applicant to a mainstream class in September, 2006.
3. By a letter dated 27th September, 2005, the first named respondent intimated a very significant change to the arrangements that had prevailed in the preceding years. The relevant part of that letter reads as follows:

*"The Department has for some time been carrying out a review of the home tuition scheme as it currently pertains to children with special educational needs. The Department considers that school-based education provision is the most appropriate intervention for all children, including those with special educational needs. In this regard, home tuition is only intended as an interim measure until a suitable school placement is secured.*

*In the circumstances the Department has discontinued the practice whereby children who are in full-time education provision would also be able to avail of home tuition grants. Therefore any new applicants for home tuition who are in full-time educational placement are not being provided with home tuition grants also.*

*The Department accepts that in the case of your child it has to date provided a home tuition grant even though your child is attending school on a full time basis. You should note that the Department will not be in a position to continue to do so on a permanent basis going forward.*

*However, rather than withdraw the home tuition grant without further consideration being given to the needs of your child, the Department can confirm that it will continue to provide a home tuition to you in respect of your child until the 22nd of December 2005.*

*In addition to providing you with the home tuition grant, the Department is also referring details of your child's case to the local Special Educational Needs Organiser (SENO) for your area. Since the 1st January 2005 SENOs have been employed in each county and are responsible for ensuring that an appropriate education is provided to all children with special educational needs. In addition, the SENOs are responsible for co-ordinating and facilitating delivery of educational services to children with disabilities at local level. One of the main roles of the SENOs is to act as a focal point of contact for parents/guardians and schools, and process applications for resources for children with disabilities who have special educational needs.*

*With this in mind, the Department has requested the school to make contact with the SENOs in order that the capacity for the school to meet the needs of your child will be examined with a view to ensuring that an appropriate educational response is available to your child in the school which s/he is attending, without the need for home tuition to be provided in addition to the educational response being provided by the school.. (sic) In this regard, it is envisaged that the process will involve discussions between you, as the parents, the school and the SENOs.*

*Your local SENOs is..."*

4. Notwithstanding the fact that the applicant had been in receipt of the home school tuition grant since 2000, his parents learned for the first time in the above letter that the first named respondent considered that the scheme "an interim measure", until such time as a suitable school placement was secured. The applicant's parents were very aggrieved by this withdrawal of the home tuition grant, believing as they did, that the applicant's progress had in large measure been achieved through it and that his continuing progress depended on it. Through their solicitor, they engaged in correspondence with the first named respondent in an attempt to get her to reverse the decision.
5. The second named respondent withdrew the speech and language therapy and the occupational therapy services that the applicant had been in receipt of from the "B" Outreach Service as of March 2007. These services had, according to the second named respondent, been provided for six months only for the purpose of assisting the applicant with his transition into a mainstream class. Following assessments of the needs of the applicant by members of the "B" Outreach Service team it was concluded that discharge from the service and integration into mainstream school was the most appropriate course for the applicant.
6. The first named respondent refused to revisit her decision to withdraw the home tuition grant and on 19th December, 2005, the applicant obtained the leave of this Court (Peart J.) to pursue by way of judicial review the reliefs sought in these proceedings. In summary, the reliefs sought are an order of *certiorari* quashing the decision of the first named respondent to withdraw the home tuition grant; a declaration that the first named respondent has failed to protect and vindicate the applicant's constitutional right to education under Articles 40.3, 42.3.2 and 42.4 of the Constitution; a declaration that the respondents have failed in their statutory obligations pursuant to the Education Act, 1998 (the Act of 1998) to provide for and maintain an appropriate education for the applicant; a declaration that the respondents failed in their statutory obligations to the applicant, a person with special educational

needs as defined by the Special Educational Needs Act, 2004 (the Act of 2004) and with a disability under the Disability Act, 2005 (the Act of 2005) and a declaration that the respondents have failed to vindicate the rights of the applicant under Article 2 of Protocol I of the European Convention on Human Rights Act, 2003. Orders of *mandamus* were sought directing the respondents to comply with the subject matter of the foregoing declarations. Relief under the European Convention on Human Rights was not pursued at the hearing. The grounds upon which the leave was granted may be summarised as follows:

1. That s. 7 of the Act of 1998 imposes a statutory duty on the first named respondent to provide support services and a level and quality of education appropriate to meet the needs and abilities of the applicant and to plan and coordinate support services.
2. That s. 13 of the Act of 2004 imposes on the first named respondent a duty to make resources available for the education of persons with special educational needs and *inter alia* for the greater involvement of parents in the education of children with special educational needs.
3. That the Act of 2005 provides for the assessment of health and education needs occasioned to persons with disabilities by their disabilities and it is for the first named respondent to make provision for those needs.
4. That the first named respondent, in deciding to withdraw the home tuition grant, applied a policy decision without any regard or any adequate or proper regard to the particular circumstances and needs of the applicant and was made without notice to the applicant or to his next friend and represented an invidious discrimination against the applicant and was detrimental to his welfare.
5. That the first named respondent is responsible for providing appropriate education and support services to the applicant and, in withdrawing the home tuition grant from the applicant, the first named respondent has failed to provide the appropriate educational facilities, health services and support services for the applicant under the Act of 1998 and the Act of 2004.
6. That the first named respondent's failure will result in the breach of the applicant's right to an inclusive education pursuant to the Act of 2004 and/or his personal right to be educated.
7. That the guarantees under Article 40.3 and Article 42 of the Constitution to provide for and maintain a suitable education for the applicant have been violated.
8. That the respondents have breached their statutory obligations under Article 2 of Protocol 1 of the European Convention on Human Rights Act 2002.

7. The relevant constitutional provision in these proceedings is Article 42.4 of Bunreacht na hÉireann which provides:

*"The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."*

8. The relevant statutory provisions are ss. 2, 6 and 7 of the Act of 1998 and ss. 1, 2 and 13 of the Act of 2004.

9. The objects of the Act of 1998 are set out in s.6 in the following terms:

*"6 Every person concerned in the implementation of this Act shall have regard to the following objects in pursuance of which the Oireachtas has enacted this Act:*

*(a) to give practical effect to the constitutional rights of children, including children who have a disability or who have other special educational needs, as they relate to education;*

*(b) to provide that, as far as is practicable and having regard to the resources available, there is made available to people resident in the State a level and quality of education appropriate to meeting the needs and abilities of those people;*

*(c) to promote equality of access to and participation in education and to promote the means whereby students may benefit from education;...."*

10. Section 7 outlines the functions of the first named respondent as follows:

*"7(1) Each of the following shall be a function of the Minister under this Act:*

*(a) to ensure, subject to the provisions of this Act, that there is made available to each person resident in the State, including a person with a disability or who has other special educational needs, support services and a level and quality of education appropriate to meeting the needs and abilities of that person,*

*(b) to determine national education policy, and*

*(c) to plan and co-ordinate -*

*(i) the provision of education in recognised schools and centres for education, and*

*(ii) support services.*

*(2) Without prejudice to the generality of subsection (1), each of the following shall be a function of the Minister:*

*(a) to provide funding to each recognised school and centre for education and to provide support services to recognised schools, centres for education, students, including students who have a disability or who have other special educational needs, and their parents, as the Minister considers appropriate and in accordance with this*

Act,

*(b) to monitor and assess the quality, economy, efficiency and effectiveness of the education system provided in the State by recognised schools and centres for education, having regard to the objects provided for in section 6 and to publish, in such manner as the Minister considers appropriate, information relating to such monitoring and assessment;...*

*(f) to do all such acts and things as may be necessary to further the objects for which this Act is enacted."*

11. "Support services" are defined in s. 2 of the Act of 1998 as including all or any of the following:

*"(a) assessment of students;*

*(a) psychological services;*

*(b) guidance and counselling services;*

*(c) technical aid and equipment, including means of access to schools, adaptations to buildings to facilitate access and transport, for students with special needs and their families;*

*(d) provision for students learning through Irish sign language or other sign language, including interpreting services;*

*(e) speech therapy services;*

*(f) provision for early childhood, primary, post primary, adult or continuing education to students with special needs otherwise than in schools or centres for education;*

*(g) teacher welfare services;*

*(h) transport services;*

*(i) library and media services;*

*(j) school maintenance services;*

*(k) examinations provided for in Part VIII,*

*(l) curriculum support and staff advisory services, and*

*(m) such other services as are specified by this Act or considered appropriate by the Minister;"*

12. The Preamble of the Act of 2004 proclaims that the Act is "to make further provision, having regard to the common good and in a manner that is informed by best international practice, for the education of people with special educational needs". "Special educational needs" are defined in s. 1 as "... in relation to a person, a restriction in the capacity of the person to participate in and benefit from education on account of an enduring physical, sensory, mental health or learning disability, or any other condition which results in a person learning differently from a person without that condition and cognate words shall be construed accordingly;"

13. Section 2 of the Act of 2004 provides for the right of a child with special educational needs to be educated in an inclusive environment. It states:-

*"2. A child with special educational needs shall be educated in an inclusive environment with children who do not have such needs unless the nature or degree of those needs of the child is such that to do so would be inconsistent with*

*(a) the best interests of the child as determined in accordance with any assessment carried out under this Act, or*

*(b) the effective provision of education for children with whom the child is to be educated."*

14. In the as yet unimplemented s. 13 of the Act of 2004, the duty of the first named respondent to make resources available is contained in subs. 3:

*"(a) that the provision of resources by the State in fulfilment of its duties under Article 42 of the Constitution (being the resources available to the State and allocated by it in a manner consistent with common good) shall be such as to ensure the equitable treatment of every child in the State,*

*(b) that the objective of the educational provision made by this Act is to ensure that children with special educational needs have the same right to avail of, and benefit from, appropriate education as do their peers who do not have such needs."*

15. The central issue that arises for determination in these proceedings is whether the decision by the first named respondent to terminate the home tuition grant amounted to a breach of the State's constitutional and/or statutory obligations to the applicant. This necessitates a consideration of the extent of the State's constitutional and statutory obligations towards the applicant and whether the first named respondent breached any of these. In other words, the decision of the State to withdraw the home tuition grant must be considered in the context of what is argued by the applicant to be violations of his constitutional and statutory rights.

16. Counsel for the applicant, Ms. Walley S.C., submitted that the decision to withdraw the home tuition grant represented a blanket policy decision and not a decision based on the applicant's special educational needs and, as such, was in breach of the applicant's constitutional and statutory rights and was ultra vires. She further submitted that the withdrawal of the home tuition, which focused on the needs of the applicant, addressing communication skills, social skills and socialisation, would render the applicant incapable of functioning in a mainstream class and that this would amount to a denial of his constitutional and statutory rights. Ms. Walley S.C. submitted that the first named respondent had flagrantly breached a duty owed to the applicant under s. 7(1) of the Act of 1998. Notwithstanding the fact that s. 7 is headed the "functions of the Minister" it was submitted that, in the context of the Act as a

whole and given the mandatory wording of s. 7 of the Act of 1998, that this section imposed binding duties on the first named respondent. Those duties of the first named respondent under s. 7 of the Act of 1998, it was submitted, have been enhanced by the rights under s. 2 of the Act of 2004 and it was irrelevant that s. 13 of the Act of 2004 has not yet come into force.

17. Counsel for the first, third and fourth named respondents, Mr. McDonagh S.C., contended that appropriate provision was being made for the applicant's educational needs and that the decision to withdraw the applicant's home tuition grant was not made without notice to applicant and there was no failure to take his needs into account when making the decision. It was submitted that the applicant had been referred to the local Special Educational Needs Organiser (S.E.N.O.) in order for his needs to be dealt with in the school but that the applicant's parents had failed to engage with the S.E.N.O. Mr. McDonagh disputed that s. 7 of the Act of 1998 imposed any binding statutory duties on the first named respondent. In the alternative, to the extent that any duties were imposed, he argued that such duties were not enforceable or actionable at the suit of an individual such as the applicant. Mr. McDonagh S.C. pointed to s. 7(4) of the Act of 1998 which obliges the first named respondent to have regard to a number of factors in carrying out her functions, which in his submission, amounted to the exercise of a discretion. He contended that the conferral of functions on the first named respondent did not impose liability on her in respect of any failure to carry out those functions, at the suit of an individual, but the first named respondent was accountable politically to the Oireachtas, in respect of the discharge by her of functions under s. 7(4) of the Act of 1998 and beyond that, to the people through the democratic process.

18. The Acts of 1998 and 2004 represent a statutory expression of the first named respondent's constitutional obligations and of a child's right to free primary education as guaranteed in Article 42.4 of the Constitution. These Acts cannot diminish a child's constitutional right to a free primary education but may enhance it. In light of this legal framework, the logical starting point is to consider whether the applicant's constitutional rights were breached and then to proceed to assess whether there has been any violation of his statutory rights.

19. Primary education is not defined in the Constitution. There are a number of cases which provide assistance in defining the term. The first time "education" was considered by the courts was in *Ryan v. Attorney General* [1965] I.R. 294. Kenny J. construed the term as follows at p.310:

*"The education referred to ... must ... be one of a scholastic nature. It seems to me, therefore, that the fluoridation of the public water supply (even if it be harmful) does not interfere with or violate the rights given to the family and to the parents by Article 42 of the Constitution."*

20. On appeal to the Supreme Court [1965] I.R. 294 Ó Daláigh C.J. gave the term a wider meaning than purely scholastic endeavours at p.350:

*"Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral."*

21. This broader view of education was echoed by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 where he stated at p.65 that the purpose of the constitutional obligation in Article 42.4 is:

*"... to provide for free, basic, elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be."*

22. In *Sinnott v. Minister for Education* [2001] 2 I.R. 545, Keane C.J. approved the judgment of O'Hanlon J. in *O'Donoghue*. At p.625 stated:

*"Although it is not contended in this case, as it had been in O'Donoghue v. Minister for Health [1996] 2 I.R. 20, that the first plaintiff is ineducable or that the free primary education referred to in Article 42.4 is confined to education in the purely scholastic sense, the basis upon which O'Hanlon J. arrived at that conclusion is of considerable assistance in resolving the matter which is at issue, i.e. the age, if any, at which persons in the situation of the first plaintiff cease to be entitled to free primary education..."*

23. Having set out the reasons why O'Hanlon J. adopted a broad formulation of education he stated at pp. 627-628:

*"The materials referred to in this judgment are also considered exhaustively by Barr J. in the judgment under appeal. He approved of the statement of the law by O'Hanlon J. in that case and applied the principles laid down to the facts of the present case which are, of course, similar in many respects."*

*I am also satisfied that the statement of the law by O'Hanlon J. in O'Donoghue v. Minister for Health [1996] 2 I. R. 20 is correct. It is not material in this context that the respondents did not proceed with their appeal in that case, since it would be open to this court in the present case to disapprove of the decision."*

24. He made the following observations on the meaning of primary education at p. 637:

*"...I do not think that any useful guidance can be derived from dictionary definitions as to what is meant by the expression 'primary education'. Its meaning, in the vast majority of cases, is clear. It denotes the stage of a child's education lasting from ages six to twelve and does not extend to the kind of training and human development that takes place from birth to age four. The latter normally takes place in the home and not in a school setting. The primary school curriculum in this country has since 1831 had as its central component education in literacy and numeracy, and now includes as already noted, in addition, mathematics, social and environmental studies, music and physical education. In addition, Irish is a compulsory subject in the primary school curriculum. It should be noted, however, as pointed out in Director of Public Prosecutions v. Best (2000) 2 I.R. 17 that the curriculum, as it now exists, represents more than the 'minimum education, moral, intellectual and social' which it is the State's duty to ensure that children receive pursuant to Article 42.3.2."*

*That is not the form of 'primary education' to which the first plaintiff was found to be entitled in O'Donoghue v. Minister for Health [1996] 2 I. R. 20 by O'Hanlon J. and to which Barr J. found the first plaintiff in this case to be entitled. The latter's needs at this stage of his life still do not extend significantly beyond the basic skills which more fortunately endowed children acquire in the home between birth and four."*

25. Geoghegan J. said the following at p.724 in his consideration of the term "education":

*"The word 'educate' in its Latin derivation refers to bringing or leading out. If a handicapped child, unlike a normal child, cannot naturally acquire skills in the home but has to have special training to acquire them then I cannot see why that special training would be inappropriately described as 'education'. At any rate I do not think that health therapy and education requirements are mutually exclusive of each other. They can overlap and can be given a double if not treble description. I, therefore, find no fault in the trial judge's interpretation of 'education' in the case of an autistic child."*

26. Another illustration of the acceptance of a wide and adaptable definition of the term primary "education" is to be found in the following passage from Murray J. in the same case at pp. 681-682:

*"This is not to say that the content or nature of the education to be provided for cannot be interpreted in the light of present day circumstances. The nature and quality of the primary education to be provided is a more abstract concept with connotations of standards and values. Historically there is no doubt that many persons who suffered from mental or physical handicap were not capable of benefiting from the kind of education that was traditionally available. However, with greater insight into the nature of people's handicaps, the evolution of teaching methods, new curricula as well as new tools of education there is no doubt that the nature and content of primary education must be defined in contemporary circumstances. That means where children are capable of benefiting from primary education (however its content is defined) the State has an obligation to ensure that it is provided free to children who can benefit from it including those who suffer from severe mental or physical handicap."*

27. As pointed out by Geoghegan J. in *Sinnott* at pp. 718-719:

*"This formulation of words by Ó Dálaigh C.J. [in Ryan] legitimises (if such legitimisation were ever required) a reinterpretation by this court of the expression 'primary education' in the light of modern knowledge of the educational requirements of handicapped children which are totally different from that which was perceived in 1937."*

28. An alternative view of primary education was expressed by Murphy J. in *Sinnott* at p.675 as follows:

*"In my view primary education as identified in the Constitution is education provided for children the age limits of which were determined historically by the Education (Ireland) Act, 1892, which required parents to send their children between the ages of 6 and 14 years to receive certain schooling. Primary education is provided by teachers in classrooms. It was and is a basic scholastic education in the sense that it is a first stepping stone on a career which may lead to secondary level and ideally graduate to the third level. It is distinguishable from secondary level education on the one hand and nursery schools, or any other form of pre primary education, on the other."*

29. Mr. McDonagh submitted this passage from the judgment of Murphy J. was a correct statement of the law.

30. It is apparent that there are two opposing views as to the meaning of primary education. One is a narrow formulation confined to scholastic pursuits. The other is a broader concept encompassing the full development of a child.

31. The applicant is now in a mainstream class thereby availing of the normal scholastic classroom education. A question arises as to whether he can continue to avail of this scholastic education without the provision of home tuition and, if not, would his constitutional right to a free primary education be violated?

32. If one adopts the broader definition of education, socialisation and the learning of skills necessary to integrate with society would have to be considered a part of primary education. In primary education, a child moves from the exclusive care of family into a school setting and there commences the process of encountering and engaging with society. Children without disabilities naturally learn how to react to and assimilate with their peers and teachers in the classroom. In contrast, autistic children do not learn these skills naturally and must be taught these intensively through methods, such as A.B.A. Socialisation and integration with society are essential developmental steps or milestones in the life of every human being. Whether viewed in the context of a narrow definition or a broader definition of primary education, learning these steps must be considered part of primary education, because if a child does not learn the skills or arts necessary to integrate with peers and society in general, the child will be unable to survive the scholastic process, even though possessed of the general intellectual ability to benefit from that education.

33. I am satisfied that regardless of whether one adopts the broader definition of primary education or the narrow one urged on the Court by Mr. McDonagh, and in this respect I am of the opinion that the weight of authority favours the broader definition, the tuition of the applicant in socialisation and integration in society must be regarded as included in the State's constitutional obligation to provide free primary education to the applicant.

34. The first named respondent says it has not breached the applicant's constitutional right to a free primary education because, in terminating home tuition in favour of inclusive education in the school setting, it made provision for the special educational needs of the applicant through supplying an S.E.N.O. and it gave a commitment in the letter of the 27th September, 2005, to provide whatever additional services or therapies as are necessary to meet the applicant's needs. The applicant, through his parents, rejected this proposal. It must be questioned whether that rejection is justified in circumstances where there has been a failure on the part of the applicant's parents to engage with the S.E.N.O. and to explore and implement the proposals made by the first named respondent.

35. Paragraph 10 of the affidavit of John P. Kelly, Acting Principal Officer in the Department of the first named respondent, sworn on 20th February, 2006, sets out in detail the efforts made by the S.E.N.O. to engage with the applicant's parents as follows:

*"10. As appears from the proceedings herein, details of this Applicant's case were referred to the relevant Special Educational Needs (SENO) organiser (sic) with a view to ensuring that an appropriate educational response was available to the Applicant in Scoil ... and to evaluate the ongoing requirement for home tuition support for the Applicant. In this regard the Department wrote to the parents on 27th September 2005, to notify them of the upcoming review and to notify them that the SENO would make contact with them to discuss their child's needs and the provision that is currently in place. I now beg to refer to a copy of the said letter, dated 27th September 2005, upon which marked with the letters 'JK1' I have signed my name prior to the swearing hereof. The Department also wrote to The Principal of Scoil ... on 27th September, 2005, to indicate their decision to involve the local SENO to discuss how the needs of the Applicant could be best met by the school. I now beg to refer to a copy of the said letter of 27th September, 2005, upon which marked with the letters 'JK2' I have signed my name prior to the swearing hereof. It was envisaged that this review would be completed before the end of 2005, however, the deadline for the review was then extended to February*

2006. I am advised by the NCSE [National Council for Special Education] that despite their endeavours to meet with the parents and the home tuition providers, Jonix Services since September 2005, such a meeting did not take place. Furthermore a questionnaire was sent to the Applicant's mother to assist the SENO in the home tuition review process and a response was never received by the NCSE. Consequently the NCSE could not ascertain how the home tuition funding was being utilised and therefore could not carry out a proper review of the Applicant's case. The SENO, however, based on information from the school concluded that the Applicant's educational needs are being met through IEP, Goals, Delivery and Monitoring and that in situations where successes don't occur help is sought from the ['B'] clinical team attached to the school."

36. In her affidavit, sworn on 30th March, 2006, the applicant's mother stated that the S.E.N.O. refused to give the applicant an appointment with her based on the institution of these proceedings in the following terms:

"6. At paragraph 10 of his report Mr. Kelly refers to contacts made by the Special Educational needs (sic) Organiser (SENO) by or on behalf of the First Named Respondent. I say that this paragraph contains a number of inaccuracies. I say that the SENO first made contact with us on the 15th December 2005 by means of a message left on our phone answering machine. The only timeslot available to us was the afternoon of the 19th December 2005 and as it was during Christmas week and we were extremely busy. However, I left a message for the SENO on the 3rd January 2006 and she contacted me the following day. I attempted to make an appointment with the SENO but she refused as she stated that, since we were taking a case against the Minister for Education and Science, it could prejudice the case. On the 24th January 2006 the SENO contacted me at work and forwarded the Home Tuition Questionnaire indicating that we could complete same immediately or when the case was over."

37. This was refuted by the first named respondent in para. 3 of the supplemental affidavit of John P. Kelly sworn on 20th November, 2007, where additional unsuccessful attempts to make contact with the applicant's parents were also outlined:

"3. I beg to refer to paragraph 6 of the Affidavit of [M. McD]. I say and believe and am so advised by the National Council for Special Education, on behalf of the appropriate Special Educational Needs Organiser (SENO), Ms. [McC], that she did not refuse to meet the minor Applicant's parents due to the commencement of litigation or, indeed at all. I say and believe and am so advised that she made contact with Mrs. [McD] to arrange a meeting in December 2005. Mrs. [McD] suggested that this meeting wait until after Christmas. The SENO complied with this request. The SENO was then informed that the family were on holidays in the New Year. The SENO left a number of messages on the parents' home phone and at Mrs. [McD's] workplace. The SENO never succeeded in making contact and her calls were never returned. The SENO again attempted to arrange a meeting with Mrs. [McD] in April 2006. She placed a number of phone calls to Mrs. [McD's] office, on Tuesday 18th April and Wednesday 19th April as the SENO had received conflicting information from different people in Mrs. [McD's] office. The SENO also sent two e-mails to Mrs. [McD's] office, one on each day. On Wednesday, 19th April the SENO received a reply from someone in Mrs. [McD's] Office to say that Mrs. [McD] was on holidays for the week and would not be at work. The SENO then phoned the [McD] household. At that stage she had left a number of messages for the Applicant's parents to express her interest in organising a meeting with them. The SENO explained that the purpose of the meeting would be to afford the parents an opportunity to respond to certain questions regarding home tuition which had, in fact, been responded to by all other similarly situated parents. I am also advised that she e-mailed a second copy of these questions to Mrs. [McD's] work e-mail. In light of the activity by Ms. [McC] outlined above, it is clear that the [McD] family would have been aware that she was trying to contact them. I have been informed that eventually Ms. [McC] concluded, in May 2006, that Mrs. [McD] did not want to make contact with her and that she was not going to attempt to further contact."

38. In her affidavit sworn on the 27th November, 2007, the applicant's mother makes the following criticisms of the proposed changes at paras. 8 and 9:

"8. I say that [S. McD] has been offered a 'referral' to a 'community based service' provided by professionals with little or no experience of children with autism, who do not operate in the school setting, despite the recommendation in the reports of Aisling Towey, David Carey and Marie-Louise Hughes.

9. I further say that requests for service would have to be initiated by the parents and not the school, leaving [S. McD's] teacher with no support whatsoever, when clearly [S. McD's] pragmatic speech is clearly a problem area, as identified in the reports of Marie-Louise Hughes, David Carey and Aisling Towey."

39. The evidence on affidavit establishes to my satisfaction, that, notwithstanding some misunderstandings in December 2005 and January 2006, the applicant's parents failed to respond to repeated attempts made thereafter by the S.E.N.O. to establish contact with a view to assessing and making appropriate provision for the applicant's educational needs. The evidence points to the applicant's parent's adamantly setting their faces against the change proposed by the first named respondent and to a determination to retain the status quo.

40. The expert evidence before this court on whether the withdrawal of the home tuition will impact upon the applicant's continuing development is contradictory. Experts retained by the applicant were of the opinion that in order for the applicant to actually enjoy his right to an inclusive education that the home tuition must continue. The following is contained in the report of Aisling Towey B.A., M.Psych. Sc., Clinical Psychologist of January 2006:

"The likely outcome if [S. McD's] home tuition is discontinued is that his skills in the areas of social interaction, communication and daily living will not continue to progress. This will mean that as [S. McD] gets older, and his scores on measures of these areas stagnate, that the gaps in these domains will widen, and his assessed level of Adaptive Behaviour/Learning Disability will reflect even more severe difficulties."

41. Dr. David Carey Psy.D, Educational Psychologist's conclusion dated the 11th July, 2007 is:

"Children with this pattern of skill deficit require sustained, specific intervention as part of schooling. The methods, goals, objective and targets of these interventions must be monitored on a regular basis. For children with autism it is not just a case of teaching social skills; these children must be taught over time to understand the social world and then apply the skills they have learned to it. This is not a simple process that can be completed successfully in school. It is a process which requires field work, that is, an opportunity to interact with the familiar and unfamiliar social world, to comprehend it by first having it interpreted to the child and then teaching particular skills. These skills must be taught and applied in multiple settings beyond the classroom. The issue of generalisation of skills is the bug-bear of educating

children on the autistic spectrum.

*I do not see how this can be accomplished within the school setting alone. This is particularly relevant when the school records clearly indicate that no sustained attention has been paid to this target in general and, in fact, it has been nearly entirely ignored in the available records."*

42. The first named respondent relied on the findings in the report of Marie-Louise Hughes, M.Sc., B.SSc. Grad. Cert. Ed., Educational Psychologist dated 20th November, 2006, to support its case that the provision of home tuition was not essential to the development of the applicant. In the section headed "Summary and Opinion" it is stated as follows:

*"The writer does not doubt that an intensive home-based programme can make a significant contribution to a child's development in the early years. However, starting a home programme is not a sound educational reason for continuing it. Rather, there is a need to rationalise and review the benefits, limitations and disadvantages of any particular course of action in respect of a child's education and well-being.*

*Following a review, a programme may remain unchanged, may be minimally adjusted or may be radically altered or discontinued, depending on changes in circumstances for the child. [S. McD's] home programme is premised on the belief that he requires it and that it is necessary to his continued progress. The writer's view is that this premise is mistaken.*

*The writer disagrees with the reported opinion of Ms. Towey that [S. McD's] progress will deteriorate if his programme ceases at this stage. On the contrary, a positive consequence for [S. McD] is that anxiety or annoyance associated with his intensive home programme will dissipate.*

*It is important to note that a diagnosis of ASD does not suggest an educational requirement for intensity as measured by one-on-one tutoring. Research issues on the issues of intensity are divided and controversial."*

43. In the final section of the report entitled "Requisite Provision", she concludes:

*"[S. McD's] requisite provision at this stage does not include an intensive after school ABA home programme as this is likely to place unreasonable demands on him. Mr. and Mrs. [McD] are able to provide a more appropriate range of learning opportunities and social experiences for [S. McD] after his formal school day and to assist him in the completion of homework assignments."*

44. The Speech and Language Assessment Report of Angela Denholm, Senior Speech and Language Therapist, H.S.E., "B" Services dated 22nd January, 2007, is also of relevance to the first named respondent's contention. Her conclusion reads as follows:

*"[S. McD] has settled well into his new class and is beginning to initiate more with his peers. [S. McD] continues to present with deficits in social interaction and this is in keeping with his diagnosis of Autism. [S. McD] may benefit from following a social skills programme to develop his skills in this area. Such a programme could be developed and monitored by a Speech and Language Therapist but would be best carried out in school and delivered by teaching staff to ensure generalisation of skills."*

45. These extracts illustrate the conflict of expert opinion. As this evidence was affidavit evidence solely, the Court is left in the impossible position of having to choose between contradictory expert evidence on affidavit. In essence, the first named respondent says it has made adequate provision for the special educational needs of the applicant and the applicant says that the provision is not good enough. It is for the applicant to prove to the satisfaction of this Court that this is the case.

46. It is apparent that the State's decision to discontinue the home tuition scheme for children in full-time educational placement amounted to a policy decision. It was based on the belief of the first named respondent, following a review undertaken by her Department that "school-based education provision is the most appropriate intervention for all children, including those with special educational needs". Such an approach is wholly consistent with s. 2 of the Act of 2004. The first named respondent is entitled to change its policy but it must have regard to the particular circumstances and educational needs of an individual, such as the applicant in so doing. The first named respondent appointed a S.E.N.O., a person charged with ensuring the needs of the applicant were considered and that appropriate services would be provided in the school setting to meet the needs of the applicant. As discussed above, this arrangement was met by a refusal by the applicant, through his parents, to avail of the new arrangements to provide for his special educational needs, in place of the home tuition grant. In so doing, the applicant's parents have placed themselves in the position of condemning support services that they have refused to avail of even on an experimental basis. In adopting this posture, they cannot establish to the satisfaction of this court that the measures proposed by the first named respondent would fail to meet the educational needs of the applicant.

47. All this combines to satisfy me that the applicant has failed to discharge the onus that rests on him of proving that the withdrawal of the home tuition grant amounts to a breach by the first named respondent of her constitutional obligations to the applicant under Article 42.4 of the Constitution.

48. The next issue which falls to be determined is whether s. 7 of the Act of 1998 imposes actionable duties on the first named respondent. The purpose of the Act of 1998 is described in its Preamble as "An Act to make provision in the interests of the common good for the education of every person in the State, including any person with a disability or who has other special educational needs..." Section 2 of the Act of 1998 defines the term "functions" as including "powers and duties". Where, as in ss. 7(1) and 7(2) of the Act of 1998, a function is conferred on the first named respondent, having regard to the definition of "function" in the Act, the function may involve a power or a duty or indeed both. Manifestly, where the first named respondent is tasked to do something that function will always confer a power to do it. The difficult question is to determine, when the carrying out of a function imposes a legally binding duty to a person or class of persons with a consequent legal liability to those persons in respect of a failure to perform the function.

49. A starting point in the analysis is to bear in mind that s. 6(1) of the 1998 Act states unequivocally that one of the objects of the Act is to give practical effect to the constitutional rights of children, including children who have a disability or who have other special educational needs, as they relate to children. This is obviously of direct relevance where primary education is involved.

50. Where a legally binding duty can be identified under Article 42.4 of the Constitution and where a corresponding function exists under s. 7, it necessarily follows that the discharge of that function will unavoidably carry with it a legally binding duty which could

not be of lesser legal force or effect than the constitutional duty. Construing the concept of “function” in s. 7 of the Act of 1998 in a manner consistent with the Constitution inevitably leads to that conclusion.

51. There are two judgments of this Court where there is an acknowledgment of a statutory duty on the part of the first named respondent under s. 7 of the Act of 1998 namely, *Cronin v. Minister for Education* (Unreported, High Court, Laffoy J., 6th July, 2004) and *Nagle (A Minor) v. South Western Area Health Board and the Minister for Education* (Unreported, High Court, Herbert J., 30th October, 2001). These were judgments in applications for mandatory interlocutory orders. The question of whether the first named respondent owed a duty under s. 7 of the Act of 1998 was considered only in the context the balance of convenience and whether there was a fair question to be tried. Thus, there was no determination following a full hearing on whether s. 7 of the Act of 1998 imposed a legally binding duty.

52. In *O’Carolan (A Minor) v. The Minister for Education and Science & Others* [2005] I.E.H.C. 296, this Court (MacMenamin J.) found that the placement of the autistic applicant child in an institution nominated by the Minister was appropriate for his education despite the view of the parents that he should be placed in a different institution. The Court, in its consideration of s. 7 (1) (a) of the Act of 1998, stated as follows:

*“It will be seen that Section 7(1)(a) provides for ‘a function’ of the Minister. It does not impose a duty. However even if such a duty were imposed I find as a matter of fact and law that the proposal to place the applicant in Woodlawn and to provide the services referred to in evidence will, if observed, comply with any statutory duty imposed on the Minister under that section.”*

53. The facts of that case are to be distinguished from these proceedings. The Court, in *O’Carolan*, had to assess whether a particular placement offered by the respondent Minister was appropriate for the applicant’s needs. The question of whether the Minister owed a statutory duty which was actionable by the person to whom the duty was owed was not a issue which it was necessary for the Court to determine, in the light of the conclusion reached on the primary issue in the case, namely was the institution chosen by the Minister appropriate to meet the needs of the applicant in that case. Hence the foregoing statement of MacMenamin J. may be regarded as *obiter*.

54. A correct construction of ss. 6 and 7 of the Act of 1998 might also, in respect of primary education, indicate additional duties on the part of the first named respondent beyond those required by the Constitution, although in this case that does not arise because, as said earlier, the tuition of the applicant in socialisation skills is comfortably included in any concept of primary education as provided for in Article 42.4 of the Constitution.

55. The additional tuition and/or services which the applicant requires are clearly included in the lists of “support services” set out in s. 2 of the Act of 1998 and therefore, *prima facie*, properly the subject matter of a statutory duty under s. 7(1) or s. 7(2) of the Act of 1998.

56. Section 6 of the Act of 1998 states that the first named respondent “shall” have regard to the list of objects set out in the section. The use of the word “shall” indicates that it is mandatory for the first named respondent to have regard to the objects as outlined. Section 7(1) of the Act of 1998 also contains the word “shall”. It provides that a number of exercises “shall” be a “function” of the Minister under the Act. Section 7(2) goes on to specify that it shall be a function of the Minister to provide “support services” to students who have a disability, amongst others. The use of the word “shall” in these contexts, and particularly in the context of the function under s. 7(2) of providing support services tends to suggest an obligation to provide a service to cater for the specific educational needs of a particular person. Given that this provision may be exclusive to that person, the use of the expression “shall” in this regard is persuasive that it was intended by the Oireachtas that a failure to discharge the duty to provide would be actionable at the suit of the person denied the service in question.

57. In my view, in this case, the constitutional obligation of the first named respondent under Article 42.4 corresponds in all material respects with the first respondent’s statutory functions under s. 7(1) or s. 7(2) of the Act of 1998, and having held earlier that the first named respondent had a constitutional duty to the applicant to provide for the tuition he needs to achieve an appropriate level of socialization skills, in my opinion, it cannot be said that the function of the first named respondent of providing for that tuition under s. 7 of the Act of 1998 involves a lesser degree of legal obligation than the duty imposed on the first named respondent under Article 42.4 of the Constitution, particularly when s. 6(1) of the Act of 1998 expressly states that giving practical effect to the constitutional rights of children with disabilities or special educational needs is an object of the Act. I am satisfied that there is a binding statutory duty actionable at the suit of the applicant, to provide him with the appropriate tuition and training in socialisation skills. In essence, the first named respondent is required by the Constitution and by the Act of 1998 to ensure that this appropriate tuition and training of the applicant is provided to the applicant.

58. As outlined above, the State attempted to address the special educational needs of the applicant and to provide appropriate support services to him on the termination of the home tuition grant, in an effort to comply with its constitutional and statutory duties. The applicant, through his parents, did not participate in the first named respondent’s assessment of his special educational needs and refused to consider or participate in any alternative arrangements to home tuition. I am not satisfied that the applicant has demonstrated deficiencies in the proposed services, as there has been no engagement with these arrangements. Therefore, the applicant has failed to prove a breach of a statutory duty on the part of the first named respondent.

59. In these circumstances, I have come to the conclusion that I must refuse the relief claimed in these proceedings.