

**THE HIGH COURT  
JUDICIAL REVIEW**

[No. 971/03 JR]

**BETWEEN****LEWIS O'CAROLAN (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND ANNETTE O'CAROLAN)****APPLICANT****AND****THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND, THE ATTORNEY GENERAL, THE MINISTER FOR HEALTH AND CHILDREN  
AND THE NORTHERN HEALTH BOARD****RESPONDENTS****Judgment delivered the 15th day of June, 2005 by Mr. Justice John MacMenamin.**

1. Lewis O'Carolan, the plaintiff in these proceedings, is a 14-year-old boy suffering from severe autism with challenging behaviour. He lives with his parents, Colm and Annette, and his younger sister, Fern, aged 13 years. The family live at 44 Norfolk Road, Phisborough, Dublin 7, a terraced three-bedroomed two-storey house. In normal circumstances this would provide comfortable accommodation for the family; however due to Lewis' behaviour the house became severely damaged. In particular this damage has affected internal doors. There has been extensive damage to walls, floors, furniture and fittings. The family live in an environment of persistent worry, stress and trauma. This is because Lewis is frequently agitated, hitting out, kicking, screaming and causing damage. There is also the constant possibility of severe, self-inflicted injury by Lewis against which the family have to be constantly vigilant. Lewis' behaviour is not merely a source of stress to his parents but must also have some impact on his younger sister Fern. It is the view of every psychologist and educationalist who has assessed Lewis that he is in need of immediate intervention under the supervision and guidance of experienced professionals.

2. In order to explain how this highly unfortunate position has arisen it is necessary to deal with the background as perceived and narrated by his parents. In setting out this account I wish to make clear that this should be treated as background material and is not evidence which has been tested in court, nor can such historical material constitute findings of the court in the absence of presentation by way of evidence and submission.

3. Lewis was born in the Rotunda Hospital on 21st September, 1990. He was released home from hospital as normal and appeared healthy and alert. Shortly afterwards Mrs. O'Carolan recommenced her employment as a civil servant. Her husband Colm worked from home as a sculptor and looked after Lewis during the day time. For reasons that will appear below it is unnecessary to make any findings regarding the causes of Lewis' unfortunate condition. Suffice to say that after a specific incident of illness when he was three months of age Mr and Mrs O'Carolan believe that Lewis contracted a virus and thereafter, in their eyes, they noticed a considerable change in him. They state he was completely listless and not focusing. He was kept in intensive care in a Dublin hospital and thereafter was released home. In the O'Carolans' eyes Lewis never recovered his alertness and focus. They state that he was fussy and irritable. Despite reassurances from a number of sources Lewis did not recover. When he was four years of age he was brought to the O'Carolan's general practitioner who referred him for assessment at the Child and Family Centre in Castleknock. He was thereafter seen by a psychologist who referred him in turn to the Eastern Health Board to the Children's Clinic in a Dublin hospital. The source of Lewis' complaint and its true origins do not arise on these proceedings.

4. He was assessed on the 26th April, 1995. Thereafter Mr and Mrs O'Carolan say that they were informed that Lewis had "autistic traits" but no clear diagnosis was given to them. It was suggested that Lewis should attend an identified special school as a possible placement for him.

5. Mr and Mrs O'Carolan visited the school but state that they did not consider the service it provided would be adequate to Lewis' needs. It was not possible at that stage to suggest any alternative placements. Further assessments made in 1995 indicated in a clearer fashion that Lewis had a condition which was diagnosed in the autistic spectrum including Aspergers Syndrome. He was offered ten weeks speech and language therapy two days a week for two hours. For a while he was placed in a crèche. This ended in January 1996.

6. The O'Carolans sought a second opinion from another source when Lewis was five years old. Four months later they received an appointment and Lewis was seen by a team lead by psychologists and a senior speech and language therapist who concluded that Lewis was mild to moderately autistic. They stated that he was not suitable at their particular institution because it was not "autism specific" and redirected him back to the special school which, it will be recollected, was the institution which Mr and Mrs O'Carolan had previously inspected.

7. Lewis started attending this school at the age of six years in November 1996. While the early case notes describe him as being a pleasant and happy child the position apparently began to deteriorate after the first few months. Lewis began to return from school with increased tension and bad moods. These escalated over time. His parents would then take him out of school for several days during which time his mood improved and he became easier to cope with.

8. Lewis' parents were particularly concerned because they say he was spending up to four hours a day travelling on the bus journey to and from school. They say this proved traumatic for him. It caused him to bang the window of the bus out of frustration. Mr and Mrs O'Carolan state that the school informed them that a special device was being constructed to restrain Lewis as he was trying to get up from his seat and walk around the bus. Mr and Mrs O'Carolan say they asked to have this device in place before the bus arrived. Every morning, he was put on the bus outside his home in view of neighbours.

9. It is not the function of this court to make any findings upon this or any of the other incidents which occurred in Lewis' early life. It is sufficient to say that in the recollection of Mr and Mrs O'Carolan this experience was both embarrassing and humiliating.

10. It should also be borne in mind however that difficulties had apparently arisen on a relatively frequent basis in bringing Lewis to school. Apparently there had been a number of serious incidents on the school bus. These difficulties culminated in the school bus driver expressing hesitations as to whether it would be appropriate to carry Lewis in the bus and also concerns being expressed by a carer as to Lewis' own safety and that of his fellow pupils on these journeys.

11. Two particular issues troubled Mr and Mrs O'Carolan. The first of these was their concern that Lewis was, in their eyes, receiving inadequate attention in the school. They were concerned regarding his daily programme. This was particularly of importance with a child such as Lewis in that it is necessary to devise a detailed and specific programme ensuring that each portion of the day is regulated and designed in order to ensure that his educational attainments are properly cared for. The second concern related to

Lewis' drug regime. Mr and Mrs O'Carolan recollect that when he was approximately eight years of age they were called to a meeting with the school with a view to putting Lewis on neuroleptic drugs.

12. The school was apparently experiencing difficulties because of staff shortages. It may be that these shortages particularly impacted on Lewis. Two years later when he was about 10 years of age the O'Carolans made another request for an individual education plan for their son.

13. In addition to the two factors just enumerated, yet a third was added to the problems which Lewis, his parents and his carers encountered. Lewis particularly enjoyed swimming which was arranged under the aegis of the school. He also enjoyed other school activities. However, as Mr and Mrs O'Carolan recollect, they were informed by the school authorities that there were insufficient staff available to bring Lewis swimming in view of his challenging behaviour.

14. It appears that the staff in the school found dealing with Lewis profoundly difficult, both from the point of view of staffing resources, the protection of other children in the school and Lewis' own safety.

15. In November 2002 the school bus transport arrangement came to an end. The O'Carolans contend that this was because the escort refused to allow Lewis on the bus. While again it is unnecessary to make findings on this point this may well have been due to a number of situations which placed Lewis' own safety and that of other children at risk. An alternative arrangement was put in place approximately three months later. This new arrangement involved collecting Lewis at 10 o'clock in the morning and returning him at 1 o'clock.

16. Again the issue of medication arose as an issue in Lewis' predicament. The O'Carolans state that a drug named Respitodol was suggested which they found was an anti-psychotic drug prescribed only to children aged over 16 years. Lewis at this stage was only 12 years. Mr and Mrs O'Carolan point out Lewis is not and was never mentally ill. A combination of the perceived factors outlined above caused Mr and Mrs O'Carolan to decide to withdraw Lewis from school in February, 2003. They were deeply concerned as to his future, particularly so because of their concern that Lewis might ultimately be treated as a mentally ill person and be placed in one of the state institutions, such as Portrane. That this was a continuing fear was demonstrated by a sudden intervention by Mr. O'Carolan in the course of hearing evidence from another witness during the hearing before this court. They were determined not to allow their child to be pointed towards what they considered might be a life of medication and institutionalisation because of what they considered were inadequate social, psychological and educational services.

17. Since February, 2003 Mr and Mrs O'Carolan have retained Lewis at home. This has been possible because of their care, dedication and devotion. It was also possible because at least one of his parents was in a position to be at home during the larger part of the day.

18. In February, 2003 after Lewis was taken out of school, the O'Carolans applied for a home education grant. Four months later they received sanction for home education to the extent of 10 hours a week. They considered that this was inadequate for a child of Lewis' age particularly in light of their concern that he had regressed. It is a measure of the concern the O'Carolans had for Lewis that having consulted with Kathryn Sinnott, the mother of Jamie Sinnott, they decided to move to West Cork and there lived for a number of months while Lewis attended a tutor named Nena Winter. It was in that context that the O'Carolans applied for the home education grant. During this period the O'Carolans paid rent in the sum of €150 per week and also paid education and tuition expenses of €25 per hour. Ultimately they ran out of money and were constrained to return to their home in Dublin.

19. By this time, whether rightly or wrongly, the O'Carolans had lost faith that an appropriate level of education and care could be found for Lewis in this jurisdiction.

20. In the month of August, 2003 the O'Carolans first consulted their solicitor Mr. McGeehin of McGeehin Toal and Company. Thereafter two courses of action were pursued, albeit somewhat related. The first of these involved a further assessment of Lewis by Ms. Catherine Milford, a paediatric occupational therapist who concluded that Lewis had significant behavioural difficulties. In her report Ms. Milford made a number of recommendations couched in forcible terms, the principal being that Lewis should attend "a school that had experience in dealing with children on the Autistic spectrum who have developed challenging behaviour". By letter dated 28th November, 2003 Mr. Toal, Solicitor, wrote to the Northern Area Health Board drawing its attention to these recommendations and requiring it to provide an appropriate facility. In summary that letter stated that in order to meet Lewis' requirements, he should attend a school that has experience in dealing with children on the autistic spectrum and should be handled by staff members with specialist training; that he should receive one-to-one supervision; that he should be placed in a small class to reduce stimuli; and that the school should have an occupational therapist to assess factors affecting his behaviour.

21. Though this proposal was put to the Department of Education and Science no satisfactory resolution arose from the correspondence which then took place. It was proposed that Lewis should return to the Special School. Mr and Mrs O'Carolan rejected this proposal outright. They considered that he was regressing. Their view was fortified by that of Ms. Milford who took the view that Lewis' return to that school would not be of assistance to him. Mr and Mrs O'Carolan's views were further reinforced by advice which was given to them by Mr. David J. Carey, an Educational Psychologist. The advice which the O'Carolans received, and the manner of its expression, was sometimes in unusually forceful terms.

22. In the meantime Mrs. O'Carolan made enquiries of two schools in the United Kingdom, one being Blaydon House School based in Staffordshire and the other being Arran Hall School based in Wales. Both schools she considered specialised in dealing with precisely the type of situation in which Lewis found himself. They both confirmed that Lewis was a suitable candidate for them and that they would have a place for him once he was assessed. Mr and Mrs O'Carolan were greatly impressed by the services which both schools offered. They preferred Blaydon House because of its location near to Birmingham Airport.

23. A further possible location in Britain was at Kisimul School in Swindon which again offered to accept Lewis. This came into consideration early in the year 2004. Mrs. O'Carolan states that she was very anxious to place Lewis in this school because his behaviour was continuing to deteriorate and that he required placement as soon as possible in an establishment equipped with what she considered was the knowledge and experience necessary to care for him. Yet a further option pursued by Mrs. O'Carolan was that of Linn Moor in Scotland which made an assessment of Lewis in December, 2004.

24. It should be said that the pursuit of these alternative educational establishments took place in the following context. First, there was ongoing correspondence between Mr. Toal and the state authorities. Second, it would appear that some considerable time elapsed prior to the school authorities and the health board being formally placed on notice that Lewis had been removed from the Special School. Third, as and from October 2003, the O'Carolans were receiving advice from educational professionals who were strongly opposed to any of the propositions for Lewis' education which were put forward by the Department of Education or the

Health Board. Fourth, the options which were considered by Mr and Mrs O'Carolan were all outside the jurisdiction and would involve Lewis being placed in such an institution for quite lengthy periods although of course with the potential for his return on holidays and also for provision for visits by the O'Carolan family.

25. In order to complete the picture it is necessary now to deal briefly with the history of the litigation between the parties.

26. On the 19th December, 2003 counsel for the applicant made an ex parte application to this court (Kearns J.) for leave to apply by way of an application for judicial review for the following reliefs:

1. An order of mandamus or alternatively a mandatory injunction requiring the first to the third named respondents to provide appropriate education to the applicant
2. An order of mandamus or alternatively a mandatory injunction requiring the first to the third named respondents to comply with s. 7(1)(a) of the Education Act, 1998 in respect of the applicant
3. An order of mandamus or alternatively a mandatory injunction requiring the respondents to take all necessary steps including the provision of appropriate medical and care services to the applicant so as to promote the welfare of the applicant and/or vindicate his constitutional rights
4. An order of mandamus or alternatively a mandatory injunction requiring the second to fifth named respondents to comply with s. 3 of the Childcare Act, 1991 and/or the Health Act, 1970 in respect of the applicant
5. Damages for negligence and/or breach of duty including statutory and/or constitutional duty on the part of the respondents and each of them including aggravated exemplary and punitive damages
6. A declaration that the constitutional and statutory rights of the applicant had been infringed
7. Interim and interlocutory relief including an order requiring the respondent to make arrangements for the accommodation of the applicant in Arran Hall School or another suitable facility as soon as practicable
8. Further and other relief
9. Costs

27. Instead, in amending the reliefs sought at paragraph 6 above, the court ordered that the applicant was to have leave to apply by way of application for judicial review for a declaration that the respondents had failed to take all necessary steps to provide all appropriate medical, educational and care services for the applicant so as to vindicate his constitutional rights and his rights pursuant to the Education Act, 1988 and the Childcare Act, 1991 on the grounds set forward by the applicant.

28. During the following months the matter appeared on a number of occasions in the High Court lists. Even by June, 2004 the process of filing affidavits had not been completed.

29. The case appeared in the lists on a number of occasions in July, 2004 at which point the applicant was seeking an early trial.

30. Thereafter from October, 2004 until December of that year it was not possible for the case to be listed for plenary or full hearing. During that period however further proposals and counter proposals were exchanged between the parties.

31. On 7th December, 2004 the case was listed for full hearing but adjourned for mention to Tuesday 14th December to enable the respondents to put interim proposals in writing and to enable these to be considered by the applicant's parents and their advisors. These proposals from the respondents were expressed by letter dated 10th December, 2004 to the solicitors acting on behalf of the applicant. A response was received thereto on 14th December, 2004.

32. Two factors seem, in particular, to have militated against the provision of an early court date. The first of these was the apparent desire of the applicant to bring on plenary proceedings for damages in addition to the reliefs being pursued by way of judicial review. Clearly this would involve a lengthy hearing measured in weeks rather than in days.

33. The second was the almost total polarisation which had by then occurred between the applicant's and respondents' respective advisors in the area of psychology and education.

34. The matter appeared in the court lists in January and February, 2005 at which point the case was reviewed in an endeavour to focus the court proceedings on the current needs of Lewis O'Carolan who by that time had been out of the education system for almost two years.

35. It will be noted that while home tuition was offered to the applicant as and from June 2004 albeit on a restricted basis, such offer has not at any stage being taken up.

36. There followed further filing of affidavits during February, 2005.

37. To deal with and consider further proposals and counter-proposals, it was determined on 3rd March, 2005 that an oral hearing would take place focussing on Lewis' future education. This was on the basis of what were to be two opposing proposals regarding Lewis' future education. These would be considered by the court having regard to his constitutional rights and best interests as a minor, and as a plaintiff who has not attained the age of 18 years.

#### **Offers made by State respondents**

38. While it is unnecessary to detail and recite each of the proposals made by the State respondents which are recited in the course of correspondence it will be helpful to advert specifically to two in number in order better to understand the issues before the court.

#### **The Cabra proposal**

39. By letters dated 10th December and 16th December, 2004 an offer was made consisting of placement for the applicant in suitable accommodation in a newly developed facility in Cabra. The Northern Area Health Board (the last named respondent) and the St. Michael's House Service agreed to working with the Department of Education and Science over the following months to

develop an appropriate educational service for the applicant and a number of other clients with similar needs within the Health Board's region. Pending the development of that service in the long term, the Health Board and St. Michael's House service agreed to provide the necessary health related support services on an interim basis to support the Department of Education and Science in providing an educational programme to the applicant. It was also proposed that some of the clinical support services could be delivered in the clinical facilities of St. Michael's House in Ballymun, the remainder of the services being delivered at Cabra. The health related support services were to be offered to the applicant on the basis of assessed need and subject to resources being available. These included behavioural therapy, psychological services, speech and language therapy, occupational therapy, social work out of home, respite supports and social and recreational services including swimming, music therapy and other activities appropriate to the applicant's needs. The Health Board's manager of disabilities was to be made available to liaise with the applicant's family in relation to the package of care to be provided. Furthermore the Department of Education and Science agreed to provide a tutor and a special needs assistant to deliver an appropriate and supervised educational programme for the applicant.

40. A service known as the Jonix Education Service assisted the Department by sourcing a person who was stated to be a suitable tutor to deliver the programme. The Department of Education and Science also agreed to provide the necessary resources for transporting the applicant with escort support to and from the Cabra complex. The transport arrangements while funded by the Department of Education and Science were to be delivered by St. Michael's House Service. The Department of Education and Science also arranged for Ms. Marie-Louise Hughes, an Educational Psychologist, to advise on the implementation of the interim arrangement for the applicant and, where necessary, to review the progress of the arrangement.

41. The National Educational Psychological Service (NEPS) Regional Director for the east coast area agreed to nominate an educational psychologist from that body to liaise with Ms. Hughes in supporting the applicant's interim educational placement. A nominated NEPS psychologist was to consult with the health and educational professionals regarding all of the supports that would be provided to the applicant. It was indicated that if this care plan was acceptable to the applicant's family, St. Michael's House and the Health Board's Manager of disability services would meet with the applicant's family to discuss the staging of the support package and to agree a consultation process thereafter. It was indicated that the clinical team in St. Michael's House would then carry out a comprehensive and multi disciplinary assessment of the applicant in order to develop the care plan to meet his needs. Following further correspondence from the applicant's solicitors the Chief State Solicitor as stated, wrote again on 16th December, 2004 providing further details in relation to the programme. It was indicated in that letter that the Department of Education and Science would sanction up to 20 hours of home tuition per week to be delivered by the identified tutor. It was also agreed that the issue of the content and nature of the programme which the applicant would follow would be based on recommendations from Ms. Hughes. Various other matters were addressed in that correspondence.

42. The applicants were not disposed to accept this offer and continued to press for a placement for the applicant in the United Kingdom. The Cabra Proposal was in a case superseded by the respondents final proposal namely the Woodlawn Proposal.

### **The Woodlawn Proposal**

43. There is currently before the court a further proposal from the respondents for the delivery of what is stated to be an integrated educational and health support service to the applicant at a community facility known as "Woodlawn", located at Blakes Cross, Lusk, Co. Dublin ("The Woodlawn Proposal"). The Woodlawn Proposal was prepared by the Health Service Executive (Northern Area) and by the Department of Education and Science with the assistance of experts in various disciplines. The proposal was reviewed and examined on behalf of the state respondents by Ms. Marie-Louise Hughes, Senior Educational Psychologist (Autistic Spectrum Disorders), who is the expert retained on behalf of the state respondents. Ms. Hughes was of the view that the Woodlawn Proposal was an appropriate one for the applicant's needs.

44. At the concluding date of the hearing on 21st April, 2005 I expressed the wish that the Woodlawn Proposal, which was put forward by way of undertaking on the part of the respondents, should be set out in further detail in order to ensure there was no lack of certainty and more specifically to deal with a number of criticisms which were made by the applicant's witnesses during the course of that hearing regarding aspects of the proposal.

45. On 30th April, 2005 the court received an affidavit sworn by Ms. Violet Harford, Director of Services for Persons with Disability, Health Service Executive, Northern Area (successor in title of the last named respondent). This affidavit exhibited the final crystallisation of the Woodlawn Proposal although, I am satisfied, it does not form a material deviation from the plan as put forward in the April hearing. For that reason I permitted the matter to be dealt with by way of affidavit and allowed the applicant liberty to file an affidavit in response thereto. It was neither necessary nor desirable to re-canvass issues which had already being dealt with over a three day hearing, clearly stressful to the parties, which had taken place on 19th to 21st April, 2005. No affidavit was either received or filed on behalf of the applicant in response to the affidavit of Ms. Harford within the time span allowed of one week. However a draft unsworn affidavit from Mr. David Braybrook was received on the 10th of June, 2005 which raised a number of issues regarding the Woodlawn Proposal.

46. First, it is of course fundamental to any scheme that there is involvement and co-operation from Mr and Mrs O'Carolan.

47. The following are the additional steps envisaged and set out in detail.

### **The Respondents Proposal**

#### **Woodlawn**

##### **1. Risk Assessment**

The risk assessment will be carried out by visits to the family home with the involvement of Lewis and his parents. The risk assessment process generally takes place over a period of three to four weeks and would be carried out by the following key personnel:

- ... Consultant Psychiatrist for Intellectual Disability
- ... Clinical Nurse Manager or Deputy Clinical Nurse Manager, Woodlawn Service
- ... Clinical Nurse Specialist, Community Support Team
- ... Other relevant team member as appropriate.

The risk assessment would involve pre arranged visits to the family home to carry out a medical and nursing assessment, assess and observe Lewis in the home environment and his interaction with his parents and his sister. It would involve discussion with his family regarding his likes and dislikes, general behaviour, identification of triggers for his challenging behaviours as well as identification of circumstances which lead to positive behaviours and also risk factors. The number of such visits is envisaged as likely to be between four and five. The first visit would involve all of the above staff but it is anticipated that each visit thereafter would involve two staff at any one time rather than the full team.

It is envisaged that the information gathered during the risk assessment will inform the multi disciplinary team of the measures to be taken in preparation for admission of Lewis to Woodlawn.

## **2. Installation of measures to meet identified risks**

The proposal states that, given the risk assessment has yet to be carried out, it is difficult to give a definite time frame for completion of measures to meet identified risks. However the Health Service Executive Northern Area has already commenced the process, engaging in the installation of a fence. The issue of locks on doors, windows, taps and other items is being examined. The Department of Education and Science states it has also commenced the process with regard to classroom and playground equipment. It is anticipated that the various works to be carried out would be done in tandem with the risk assessment and that the estimated time frame for completion would not be less than five to six weeks.

## **3. Introduction of Lewis to Woodlawn**

It is envisaged that the key personnel involved in the risk assessment of Lewis will also be the key personnel involved in the introduction of Lewis to Woodlawn. This will involve the consultant psychiatrist, clinical nurse manager and clinical nurse specialist together with a nurse and care assistant who will be specifically assigned to Lewis. Other staff will be introduced over time as appropriate.

In general the introduction of a client to Woodlawn takes place over a period of three to four weeks. The process generally commences with short visits to the faculty with the parents or guardians present, then short visits without parents/guardians leading to longer visits during the day, overnight stays and gradual admission. It is envisaged that medical and nursing assessment of the client in the context of care planning would continue over the introduction phase.

It is further considered that the introduction of Lewis to Woodlawn will be carried out in consultation with his parents. The timeframe involved will be dependent on how Lewis responds and settles within the facility but it is anticipated that it will not be less than three to four weeks. The introduction phase in particular it is envisaged, can be both difficult and problematic time for the "client" (in this case Lewis), family and staff alike. The Woodlawn authorities however draw attention to the fact that their staff have substantial experience in managing this process and would envisage working closely with the family during this time.

## **4. Placement of Lewis in Woodlawn and Multi Disciplinary Assessment**

On completion of the introduction phase it is envisaged that Lewis will be admitted to Woodlawn on a full time basis. This is estimated to be not less than three weeks after the first risk assessment visit. At this stage in the process it is envisaged that the functional assessment and therapy assessment will commence.

## **5. Functional Assessment**

The purpose of the functional assessment would be to help understand the reasons why Lewis engages in challenging behaviours and to guide the development of a behavioural plan. The methodology for the functional assessment will be agreed by the full multi disciplinary team. This functional assessment will include the following components:

1. Interview data from his parents and other care-providers
2. Behaviour data collected at Woodlawn and
3. Functional analysis

This is considered to be a systematic way of analysing the problem times for individuals with challenging behaviours.

4. Standard functional analysis sessions will be carried out (play; demand; attention; and restricted access). Additional functional analysis sessions may be carried out if deemed necessary.

The functional analysis will be carried out over a period of four to eight weeks by the following personnel: educational psychologist from the National Educational Psychological Service; behavioural nurse psychotherapist drawn from St. Joseph's Intellectual Disability Service; and a senior clinical psychologist from St. Michael's House.

The other personnel assisting this process will be the independent expert retained by the Department of Education and Science and the Staff Nurse, Care Assistant and Special Needs Assistant specifically assigned to Lewis.

Functional analysis sessions will be carried out during the school day (9.30 am to 3 pm) and the functional analysis will begin after the first week of Lewis' arrival at Woodlawn. Based on the findings of the functional analysis, treatment sessions will be carried out. It is anticipated that the treatment sessions will last several weeks, however this will depend on the outcome with Lewis. It is considered that generalisation of skills will be a key component of the treatment sessions.

## **6. Therapy sessions**

Occupational, speech and language therapy and sensory assessments will also be carried out during this time by a senior occupational therapist from St. Michael's House and a senior speech and language therapist from the same institution.

Once the functional analysis and therapy assessments have been completed, the personal centred plan (PCP) and individual educational plan (IEP) for Lewis will be drawn up. The PCP and IEP will have a multi disciplinary focus in that Woodlawn staff will have responsibility for the PCP and the Department of Education and Science staff will have responsibility for the IEP.

## **7. Drawing up of Individual Education Plan**

An individual educational plan (IEP) is a written document outlining specific educational goals for a student with special needs. IEPs are working documents that are re-written annually and reviewed periodically, typically every six months. It is envisaged that the IEP will be prepared for Lewis by the teacher with the support of the educational psychologist and independent expert retained by the Department of Education and Science. The IEP will also require inputs from Lewis' parents and the multi disciplinary team.

For Lewis it is envisaged that the development of the IEP will begin after the completion of the functional analysis and commencement of treatment sessions. The development of the IEP will be as follows:

1. An assessment of Lewis' adaptive and academic skills
2. A formal meeting with the family and multi disciplinary team to draw up the IEP based on the findings of the assessment
3. The implementation of the IEP
4. The review of the IEP – as Lewis has been out of the educational system for a considerable time it is recommended by the Woodlawn authorities that a review assessment be completed three months after the implementation of the IEP.

## **8. Delivery of Individual Educational Plans and Therapeutic Supports**

Delivery of the Individual Educational plan will be carried out by the specialist teacher assigned by the Department of Education and Science with the support of the special needs assistant and where appropriate, support from the staff nurse, care assistant and teacher in Woodlawn.

The teacher who has now been identified is, the court has been informed, an experienced member of the Visiting Teacher Service working with the Department of Education and Science. This person is a qualified primary school teacher with a three year certificate of education and a bachelor of education (Honours) degree. She also has a Post Graduate Diploma in Special Education from St. Patrick's Drumcondra (one year); a Post Graduate Diploma in Visual Impairment from Birmingham University (two years – distance learning); a Masters in Education Qualification in Special Education and Visual Impairment from Birmingham University, and a Post Graduate Certificate in Autism from Birmingham University (one year – distance learning).

The teacher has been a special needs teacher since 1979. She was appointed to the Visiting Teacher Service in 1992 and has dealt with special needs children with moderate general learning disabilities and mild general learning disabilities which would also include children with autism and challenging behaviour. She has extensive experience in the area of special needs and was recruited into the Visiting Teacher Service to provide a generic service as opposed to any one type of special needs service.

The Senior Occupational Therapist and Speech and Language Therapist from St. Michael's House is to be responsible for the delivery of occupational therapy and speech and language therapy to Lewis.

## **9. Co-ordination of Service delivery**

The consultant psychiatrist for intellectual disability holds overall clinical responsibility for the delivery of care to Lewis in the Woodlawn Service. The clinical nurse manager is responsible for the day to day management of Woodlawn Service and she will be responsible for the co-ordination of the clinical and educational inputs including the scheduling and timetabling of the therapy supports and educational programme. Staff working with Lewis will receive appropriate support and training in their roles and regular review meetings will take place with input from all staff working with Lewis to facilitate the delivery of his integrated care package.

## **10. Inspection of Educational Provision**

The educational provision for Lewis in Woodlawn will be subject to inspection by the Department of Education Inspectorate. The Inspector assigned to this matter is a senior inspector working within the special education section of the inspectorate. The person has significant experience initially as a teacher in mainstream and special education settings, as a principal of a school for children with special educational needs and finally as an inspector of mainstream, primary and special schools.

## **11. Independent experts retained by the Department of Education & Science**

Ms. Marie Louise Hughes, consultant psychologist, will advise and make recommendations when required in relation to the implementation of the Woodlawn Educational & Care Programme for Lewis. Ms. Hughes has agreed to make herself available on a regular basis and is happy to work alongside all the relevant professionals involved with Lewis.

Senior Counsel who appeared on behalf of the applicant objected to the admission in evidence of the affidavits sworn by Ms. Violet Harford on 30th May, 2005 which exhibited the Woodlawn proposal. This objection was based on the contentions; (a) that the admission of this material was contrary to the rules of evidence; (b) that there was no mechanism for compelling enforceability of the offer; (c) that no indication was given as to resources being made available and (d) that the content of the offer was incompatible with the earlier evidence adduced at the plenary hearing.

48. In the course of a short hearing I rejected these submissions.

49. In the first place the affidavit and the offer arose from a specific direction of the court that the "Woodlawn offer" should be specifically set out in detail in order to avoid any misunderstanding. This matter was specifically dealt with on the third and final day of the oral hearing which took place on the 21st April, 2005 (see in particular p. 7 and 210 of the transcript). Second, the issue of enforceability is dealt with by the fact that the Woodlawn proposal has been given the force of an undertaking by the respondents which may be supervised by this court. Third, the issue of resources is not a matter which is within the purview of the Court. Fourth, there is nothing in the offer which is incompatible with the position taken by the respondents during the course of the oral hearing. Clearly the offer in question is different in nature from the Cabra Proposal referred to earlier. However it is clearly encompassed within the ambit of the Woodlawn proposal put before the court in the hearing commencing on the 19th April, 2005 and concluding on the 21st of that month.

## **The Applicants Proposal**

### **The Bangor Centre**

50. It is now necessary to examine and consider material which was placed before the court by affidavit by the applicants under the heading the "Bangor proposal"; again this was on consent of the parties and on foot of the procedural directions made herein.

51. By letter dated the 1st February, 2005 Mr. Richard J. Cubie, the head of operations of the Bangor Centre for Developmental Disabilities in North Wales described a visit which he, in the company of Dr. Sandy Toogood, had paid to the O'Carolans on the previous day. During the course of that visit Mr. Cubie and Dr. Toogood observed Lewis and also reviewed the comprehensive range of professional reports and submissions that Mr. and Mrs. O'Carolan had made available to them.

52. Mr. Cubie confirmed in that letter that Lewis met the criteria for a full multi disciplinary assessment at the Bangor Centre for Development Disabilities (BCDD). In view of the urgency of the case, the placement panel at BCDD had already considered their recommendations and would be prepared to offer a residential assessment placement for Lewis as soon as the practical arrangements for the assessment could be made.

53. It was envisaged that such a residential assessment would be limited to thirteen weeks in the first instance and would be subject to the Bangor Centre receiving written confirmation from the commissioning body (i.e. the Health Board) that they would underwrite the full costs of the assessment placement prior to the commencement of the assessment.

54. In the meantime it was recommended that the representatives for the family and the Health Board visit the Bangor facilities in the city of Bangor and in Ynys Mon in the County of Gwynedd in Wales to discuss the programmes that the children follow at the centre and the facilities, resources and opportunities that are available.

55. The Bangor Centre is apparently located on a number of sites within easy access of the campus of the University of Wales at Bangor. The residential faculties consist of one unregistered childrens' home and up to five childrens' homes (registered with the local authority), inspected and certificated by the Care Standards Inspectorate for Wales. There are to be day-facilities, one for nursery age and one for school age, all (it is stated in a brochure provided) to be located in Bangor City. The day facilities are registered with the Welsh National Assembly and inspected by the National Assembly School Inspection Service. The centre anticipates that it will ultimately cater for between 20 and 30 children in total.

56. It will be seen from the phraseology employed in the previous paragraphs that the Bangor centre is in itself in a very early stage of development. In fact the information made available to the court was that, at present, there is only one other child similar to Lewis placed at the centre. This child is Welsh-speaking. The centre itself is located in a part of Wales where Welsh is the predominant language. It is also quite clearly at a substantial remove from Lewis' home. There is no doubt that one of the activities in which this centre engages, and will engage, is the care of autistic children who engage in challenging behaviour. While this proposal was put before the court by way of affidavit no oral evidence was led on this issue in the course of this hearing nor was it tested evidentially in the course of the hearing.

57. It transpired that this was not to be the main focus of the applicant's case. Instead, in the course of the three-day hearing, the thrust of the applicant's evidence was to seek to identify inadequacies in the proposal being put forward by the respondents and to contend that the proposal did not cater for Lewis' true educational needs and constitutional entitlements. The rendering peripheral of the Bangor Centre in the course of evidence was surprising having regard to the fact that arrangements had been made by the applicant to have the centre visited by Dr. Ian Grey, and by the respondents for Ms. Marie Louise Hughes to visit that centre in order to furnish them with an independent view of the provisions there, and a further opinion as to whether it would offer added benefits to Lewis O'Carolan over the proposal at Woodlawn.

58. Ms. Hughes in evidence pointed out that North Wales is predominately Welsh speaking. The Bangor Centre is bi-lingual. She reiterated that the pupil who currently attends the centre comes from a family whose first language is Welsh. All communication with this pupil is through the Welsh language. All written words for this pupil are in Welsh. It might be expected that any future pupils from the North Wales area would also be Welsh speaking. She envisaged that this situation would likely present additional problems for Lewis. Apart from the obvious confusion that a bi-lingual environment would cause to him, it would also reduce opportunities for incidental language learning through hearing the spoken word. The presence of one other (Welsh speaker) pupil would, she envisages, reduce the potential for learning language by 50%. If other Welsh speaking pupils were to enrol, these opportunities will be reduced further.

59. Ms. Hughes also stated that there was no input from speech and language therapy at the centre nor was there any input from occupational therapy. She also stated that at present there was no input from child and adolescent psychiatry at the Bangor centre and further that at this stage the teaching and care staff do not have adequate experience in working with students on the autistic spectrum.

60. She added that the Bangor centre does not offer long-term placement for students. It aims to provide a three year placement with planning for re-integration to local provision initiated in the first year. She stated that this would be difficult to facilitate in Lewis' case given the distance involved. She also pointed out that parental contact and input was considered an important element of intervention at the Bangor centre. This would be more difficult to facilitate in Lewis' case given the distance involved.

61. Given the fact that the Bangor proposal had been seriously pursued in affidavits filed prior to the hearing it was somewhat surprising that it was marginalised on the first day with little initial explanation. This despite the fact that Ms. Hughes had been caused to visit the centre on behalf of the respondents, and the applicants had caused one of their experts, Dr. Ian Grey (Senior

Clinical Psychologist specialising in challenging behaviour, from the Department of Psychology in Trinity College Dublin) to also visit the centre.

### **The evidence in the hearing**

62. At the hearing it was decided on consent that the respondents would first present their case as proponents of Woodlawn. Directions had been given that all material documentation regarding background history, expert testimony, affidavits and proposals and counter-proposals be filed and exchanged prior to the hearing.

63. First to testify was Ms. Marie-Louise Hughes, a Senior Educational Psychologist residing in Dungannon, Co. Tyrone. She is employed by the Southern Education and Library Board of Northern Ireland as Senior Specialist Educational Psychologist (Autistic Spectrum Disorder) and Manager of the Board's Autism Advisory and Intervention Service. She is a chartered psychologist. She holds the qualifications of Master of Science in Development and Educational Psychology from Queens University, Belfast and also is completing a Master of Science Degree in Autistic Spectrum Disorders at Queens University, Belfast. Ms. Hughes provided oral evidence in the case of Jamie Sinnott for the plaintiff.

64. Having outlined her assessment of Lewis, she described the Woodlawn Proposal. It is unnecessary to rehearse this material as the proposal has been set out in greater detail earlier in this judgment. Suffice to say that Ms. Hughes considered that the Woodlawn Proposal was that best suited to provide for Lewis' educational needs.

65. Turning then to Bangor she testified that at the time she carried out her visit there in March, 2005 there was one student only. In fact the centre had only ever had one student in the residential facility. It accommodates up to four students in total. The arrangement in the centre is that a student is placed in one residential area and attends school at that part of the facility in Bangor University some 15 minutes drive away. She stated that the centre has a similar function to that of Woodlawn but pointed out that it is not an autism specific placement. Bangor is in fact a centre dealing with young people with developmental disabilities and they have as their main focus the management of challenging behaviour irrespective of underlying diagnosis. Rather than emphasising any differential between Bangor and Woodlawn Ms. Hughes testified that what struck her particularly about the Bangor centre was the degree of similarity between the two services in terms of the approaches that they use. Ms. Hughes interviewed a teacher who was an expert in the method known as conductive education used for children with cerebral palsy. However this teacher was not autism trained although she had attended one or two conferences on that subject. She had no specific training in TEACCH (TEACCH is an abbreviation for the Treatment and Education for Children with Autism and Communication Handicaps. PECS is an abbreviation for Picture Exchange Communication System. Both are two recognised methods of treating children with autism).

66. While she considered the Bangor centre was only at its developmental stage and had not had the opportunity to employ experienced key staff, she particularly emphasised that what had been proposed was that Lewis would be offered a 13-week assessment placement. There was no guarantee that an actual placement would be on offer thereafter. Ms. Hughes also pointed out that Bangor has an upper age limit of 16 years and that Lewis will attain that age in September, 2006. Thereafter, as a matter of inevitability there will be a break in continuity in Lewis' treatment. By way of contrast, were Lewis to be placed in Woodlawn, the teaching proper would commence and he would remain there subject to multi disciplinary reviews up to at least his 18th birthday or perhaps into his young adulthood. He would then be in a position to pursue his entitlements to continuing education within the Irish education system and under the care of the Health Service Executive.

67. Dr. David McNamara also testified on behalf of the respondent. He is a Consultant Child and Adolescent Psychiatrist. He practices specifically in the field of autism in the area of Dublin and the east coast. He was retained to carry out an independent assessment of Lewis and the Woodlawn Proposal. It will be recollected that the fourth-named respondent's predecessor in title deals with the northern area of Dublin including Lewis' place of residence. Dr. McNamara worked for the South Western Area Health Board as it was then known. In co-operation with his colleague, Dr. Michael Fleming, a psychologist, an assessment was carried out on Lewis on 2nd February, 2005. Dr. McNamara's conclusion was that there was no doubt but that Lewis was suffering from autism. Lewis fell somewhere between the severe to moderate range of intellectual disability. He testified that this is not unusual in conjunction with autism. He stated that the challenging behaviour is often a part of autism. It is not a separate diagnosis.

68. In summary Dr. McNamara concluded that Lewis faced what he described as a triad of difficulties, that is autism, intellectual disability and challenging behaviour. Dr. McNamara stated that Lewis was a child "who was not receiving what he was constitutionally entitled to which was an education". He considered that the position where Lewis resided at home with his parents was a very difficult one. In essence he considered it necessary that at present Lewis should be placed in a structured environment which would address his educational needs based on an individual educational plan and also a personal care plan which would address all of the aspects which one might expect a child with autism to need in terms of occupational therapy, speech and language therapy, behavioural assessment and management.

69. He also recommended some form of home support and/or respite for the family. His recommendation was that Lewis should engage in an educational programme utilising a one-to-one ratio and group teaching, delivered at an intensity appropriate to Lewis' specific needs, for more than five hours a day. The second requirement was a structured educational plan, delivered by a teacher conversant with current autistic specific interventions. Dr. McNamara recommended that a structured and child-centered curriculum be followed with Lewis appropriate to his strengths aimed at enhancing his quality of life to facilitate participation in community life. He also recommended that effective teaching strategies for children on the autistic spectrum such as ABA (Applied Behavioural Analysis), PECS and TEACCH underpin Lewis' curriculum. The classroom should be one with minimal distractions. There should be devised a comprehensive behavioural assessment followed by a multi element intervention plan. In view of Lewis' level of aggression it will be important that this plan encompasses de-escalation and physical intervention strategies appropriate to individuals with autistic spectrum disorder. There should also be provided occupational therapy assessment with specific focus on sensory intervention. Speech and language therapy assessment should also be provided with a view to advising on strategies to enhance communication skills.

70. Dr. McNamara testified that Lewis' combination of factors were shown in more than 5% but less than 10% of autistic children. He stated that he had met many children of Lewis' age with his level of ability who had more challenging behaviour in relation to those who cared for them.

71. Dr. McNamara recommended that the court should play a role in monitoring to ensure that the proposals and undertakings which had been put in place should be maintained.

72. Mr. David Braybrook, a specialist educational consultant in the United Kingdom, testified on behalf of the applicants. He holds a Masters Degree in the Education of Children with Special Educational Needs (Southampton University) 1981. He qualified as a teacher in 1965 and as a teacher of the deaf (from Manchester University) in 1966. He has experience as a teacher, specialist teacher trainer



and academic. He has worked as a specialist member of a number of tribunals in the United Kingdom dealing with the care and protection of children. He is a registered inspector of the British Office for Standards and Education and the part-time chief education officer of a charitable foundation known as the Ewing Foundation. He has advised on a number of occasions in relation to the care and education of autistic children. Having observed Lewis (albeit briefly) he considered that he has a severe and profound level of disability. His range of behaviours disturb and severely disrupt others and result in considerable damage to his environment. Music has considerable influence for him. It calms him and he appears to respond to a wide range. He stated that Lewis was mainly cared for by his father. His parents identified an initial reluctance on his part to interact with women. He consistently sought to empty anything that was in a bottle or container. He experiences speech as noise and will often cover his ears. Although earlier in his life he made use of spoken language he now only uses occasional words in isolation as part of a vocal repertoire of shouting, calling out and screaming.

73. Mr. Braybrook considered that there were many positive features to Woodlawn. He considered it lively, homely and friendly. It was also informal in nature. However he raised a number of specific criticisms which in his view ruled out Woodlawn. These were:

1. The layout fixtures and fittings were insufficiently robust to withstand Lewis' attention. In this connection Mr. Braybrook referred to the breaking of nearly all the furniture doors and plumbing in Lewis' home.
2. The internal doors to staff bases, the kitchen bathrooms and individual bedrooms are not locked. He considered that this may give rise to difficulties in containment and the risk of damage to the fabric and contents of the facility.
3. The level of noise, social interaction and co-operative demands in Woodlawn would, in Mr. Braybrook's view, be beyond Lewis' current functioning.
4. The proposed teaching space is likely to be an adapted small bedroom; the security arrangements in this room would be inadequate in view of the fact that Lewis is in Mr. Braybrook's phrase "a runner", that is, he would seek to leave the building.
5. Such alterations as might be made were not under the control of the manager of Woodlawn. There was insufficient detail regarding time scale of works and the time within which risk assessment work would be carried out.

74. Regarding educational arrangements Mr. Braybrook stated that much depended on the recruiting of a suitably qualified teacher who could deliver a specialist "autistic specific" programme. He stated that the identification and retention of such a specialist was the key to the success of the proposal. Such a teacher would not only perform a lead role in work with Lewis but would also be instrumental in training staff and outside agencies in all aspects of his education, management and care. This specialist teacher would need access to professional supervision and appraisal and there would need to be in place systems to ensure appropriate levels of support and accountability. While it had been suggested that St. Michael's House might provide some of these functions via the head teacher of one of the special schools, as yet this arrangement did not seem secure. He also stated that there was no arrangement at Woodlawn for departmental inspection of the educational provision.

75. Mr. Braybrook's conclusions were that placing Lewis at Woodlawn, would, in his view, place the existing successful provision there in jeopardy as a direct consequence of Lewis' challenging behaviour. He was concerned too about the physical structure, as already described earlier, the different group mix of the students at Woodlawn regarding age, ability and behavioural presentation, and the number of people in the institution.

#### **Areas of common ground agreed by Ms. Hughes and Mr. Braybrook**

76. Following the first day of oral hearing Ms. Hughes and Mr. Braybrook met in order to establish whether there were areas of common ground. These were identified as follows;

1. It was agreed at an earlier meeting in the day (19th April, 2005) that the context of the two establishments (Woodlawn and Bangor) were different. It was agreed that Woodlawn was best described as adopting an educational/therapeutic approach. Ms. Hughes described Bangor as having an ABA specialist interventionist approach.
2. It was agreed that Lewis has severe autism representative of about 5% but less than 10% of the spectrum. He is not profoundly autistic.
3. As descriptors of learning difficulties are not consistent between Ireland and the United Kingdom it was agreed that an appropriate descriptor for Lewis' learning difficulties would be moderate to severe.
4. It was agreed that his needs are complex as a consequence of his severe autism, his moderate to severe learning difficulties and his challenging behaviour.
5. It was agreed that Lewis requires input from a range of therapies but particularly from a speech and language therapist and an occupational therapist. This aspect will need to be an integral part of his programme and ideally delivered on-site.
6. It was agreed that the lead educational analyst in the Woodlawn Proposal would have to be the specialist teacher supported by the special needs assistant, the teacher, the Woodlawn staff and the other agencies.
7. It was agreed that there would need to be clinical supervision and monitoring of the therapy work. Similarly, there would need to be secure systems in place to ensure effective educational oversight and monitoring.
8. It was agreed that if Lewis was placed in Woodlawn, the physical environment would need to be adapted and the current use of accommodation reviewed.
9. It was agreed that in Woodlawn, some areas would need to be locked e.g. the kitchen, to ensure safety.
10. It was agreed that a balance would need to be struck in doing this between his needs and requirements and those of the other occupants, and that their views and needs would have to be respected and taken into account.
11. It was agreed that his transition back into provision would need to be managed with great care and sensitivity.
12. It was agreed that his education would need to be delivered within an autistic-specific approach.

13. It was agreed that he would receive a very high level of supervision and support at Woodlawn. Initially this will be a minimum of 2:1 staff ratio but on occasions a 3:1 staff ratio may be more appropriate.

77. This document was signed by both Mr. Braybrook and Ms. Hughes. It might be thought that the identification of such areas of common ground might have led to an agreed resolution of all the issues. Unfortunately however this did not prove to be the case.

78. Essentially Mr. Braybrook's objections, maintained in cross-examination, were as to the lack of specificity in the teaching arrangements, inappropriateness of Woodlawn as a physical location and a lack of clarity in terms of the co-ordination and management of the model to be pursued for Lewis' location.

79. Indeed Mr. Braybrook maintained a position which some might consider surprising, that is, in the absence of the specific arrangements which he identified, Lewis would in fact be better at home with his parents than attending Woodlawn.

80. Dr. David Carey, an Educational Psychologist, furnished an educational evaluation in relation to Lewis and visited Woodlawn. It was his professional judgment based on reading the material supplied by Woodlawn and inspecting the facility and having discussions that Woodlawn was not in a position to address the recommendations. In course of direct examination he expressed his views thus on day three of the hearing (p. 133):

"I think at the minimum level of appropriateness or constructivity what is needed right now is a clearly defined structure, a fully assembled team of relevant professionals, all with relevant and recent experience. There will be a need for thorough and effective training of all the staff at Woodlawn. There must be a very comprehensive multi-disciplinary assessment of Lewis which would directly lead to the creation of individualised education plans or programme, an IEP. I think at minimum level, once those structures have been created and they are working, it might be appropriate to look at Woodlawn as a possible facility but the problem is, there is not a clearly defined structure, there is not a clearly defined lead person just yet. Assessment has not been completed and there does not seem to be a very clear notion of who will complete such an assessment, when it will be completed, what the time frame completion is at Woodlawn. So in the absence of those kinds of supports and structures I would question the appropriateness even at the most minimum level of this placement."

81. Finally the court heard evidence from Mr and Mrs O'Carolan. Mrs. O'Carolan summarised the present position thus:

"At the moment Lewis is dying on his feet for intervention. I have heard proposals, for years I have been hearing proposals regarding his care, but there was never anything concrete. It was always proposal after proposal, what could be done, what might be done. And it was only in the latter years that we realised how much he was deteriorating. That he wasn't getting appropriate education for his need. We queried a lot that question. And we were also met with obstacles. Lewis has been caught up in bureaucracy and there is an army of people being pitted against him just to get one child one appropriate service and its heartbreaking. And he is been caught up in all this and I feel its totally unnecessary ...

82. Mrs. O'Carolan added

"he's just sinking, he's slipping away from us. He is becoming more entrenched in the world of autism and its just heartbreaking to watch.

We were never adverse to the services here, it wasn't even in regard to Woodlawn, its not Woodlawn per se. We would need be happy with any facility that has the model of education that has been demonstrated to work with children with autism. And by work I mean appropriate ways to reduce his challenging behaviours, to communicate his needs, access his community and be independent and have an independent life."

83. She added ...

"We were accused of looking for the best for Lewis, the Rolls Royce of services. We were never looking for the best for Lewis, we were just looking for a programme of education, a standard programme of education, that was acceptable by international best practice, which isn't the best, its just standard and its appropriate for autistic children."

84. When asked about the appropriateness of the Woodlawn proposal as it was then expressed, "warts and all" she said:

"no-because sending Lewis to a service that isn't appropriate could do him more harm than good. Its not about just putting him in somewhere. We haven't endured what we have for the last two years just to put him anywhere and when I say that again I stress that we are not looking for the best we're just looking for what is appropriate."

85. For this reason therefore Mrs. O'Carolan expressed the view that in her eyes, unless the Woodlawn proposal was appropriate, adequate, and in accordance with international practice it would be preferable for him to remain at home.

86. When asked how she would feel about Woodlawn in the event of the proposal becoming more concrete she stated

"well it depends on what "the concrete is". It really – thats crucial".

87. What Mrs. O'Carolan had in mind was the programme should include ABA and TEACCH and that there should be a suitably qualified teacher who can lead the programme.

### **Consideration of Evidence**

88. Prior to dealing with the legal issues which arise it is as well to set out a number of features to this case as they arose from consideration of the evidence.

1. It will be seen that by agreement the respondents led evidence first. This was on the basis of the Woodlawn proposal which has recently being amplified. This was by agreement between the parties.

2. No evidence was adduced during the course of the hearing regarding the Bangor Centre. However at the conclusion of the hearing, Senior Counsel for the applicant stated that he wished to reserve his position on this issue and that in the interests of brevity the main focus of the applicants had been as to whether the Woodlawn proposal met Lewis' needs. Counsel did however seek to reserve his position in the event that the court made the declaration which he sought to the

effect that the respondents had failed adequately to provide for Lewis' educational needs.

3. It is hardly necessary to state that this hearing focused entirely on Lewis' present position and his future. No part of this judgment, nor any part of the evidence, should be taken as a reflection or finding on any person or institution who was not represented here. Insofar as any reference was made to such person or institution no part of this judgment should be seen as making any finding thereon.

4. The facts of this case are unusual, but not unique. It should not be seen as a "test case". What is at stake here are the best interests of Lewis O'Carolan, who is the sole plaintiff herein.

5. The proposal which has been put forward by the respondents as stated to be in the form of an undertaking was in the utmost good faith. This speaks for itself and carries with it the understanding the courts may supervise and remain informed as to any relevant issue regarding the performance of the undertaking.

6. The finding made by this court is in the light of the undertaking furnished. Had the present undertaking regarding Woodlawn not been made in the manner it was, the approach adopted by the court could very well have been different.

The court recognises that considerable effort was put into the preparation, formulation and framing of this proposal by each of the respondents and their advisors.

7. Insofar as there is any conflict between both sets of witnesses I prefer the evidence of the witness for the respondents. I say this, not because of any lack of expertise on the part of either set of witnesses, but because the evidence of the witnesses for the respondents is more directly focused upon the issues, both statutory and constitutional which this court must decide in accordance with authority. Such issues are distinct from those which might fall to be considered in a mental health tribunal in another jurisdiction.

8. One clear conclusion is that the role of the specialist teacher is of fundamental importance to the success of the project. Such a teacher must have a clearly defined role in each aspect of the programme's development and implementation. So too must Ms. Hughes who, by using her expertise, must ensure that an appropriate assessment is carried out and that the education programme is truly specific in its curriculum and adapted to the individual needs of Lewis.

Most fundamentally, the programme devised must be an education programme and not simply a care programme.

9. Any further question as to the precise method of assessment and the detail of Lewis' education and care lies outside the boundaries of the power of the court. To exercise such a jurisdiction would offend the constitutional separation of powers. It would lead the courts into the taking of decisions in areas where they have no special qualification or experience. Also, to exercise such a jurisdiction would trench upon the powers of the legislature and the executive.

10. Mr. Braybrook and Dr. Carey gave their testimony at a time when the Woodlawn proposal was less refined than at present. And while Dr. Grey did not actually testify it will be noted that he carried out a comparative audit of the behavioural supports for residential clients with challenging behaviour.

11. The views put to witnesses who testified on behalf of the respondents therefore were based on Dr. Grey's conclusions met the Woodlawn service was not in a position to provide a service effectively to treat Lewis' challenging behaviours. It was suggested that comprehensive behavioural assessments are not currently conducted there to develop written multi-element behaviour support plans. Furthermore, it was suggested that many of the clinical practice guidelines for the effective remediation of challenging behaviours are not in place. Such practices, it was contended, cannot be implemented overnight and it would take anywhere between six months and one year for such supports to become established within the service. It was stated that this was too long a period of time for Lewis to wait.

It was suggested therefore by the applicant's counsel that Lewis be sent to the Bangor Centre for developmental disabilities in North Wales for a pre-defined period of assessment and intervention.

12. But this proposal does not address the urgent need to recommence Lewis' educational needs in a satisfactory and continuous so as to protect his interest in the long term.

### **Consideration of the Issues**

89. The applicant in effect seeks a number of reliefs both statutory and constitutional.

90. The applicant alleges that the Minister for Education and Science has breached a duty under s. 7(1)(a) of the Education Act, 1998. This section provides that it is a function of the Minister under that 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 educational needs, supports service and a level and quality of education appropriate to meeting the needs and abilities of that person ...".

91. 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.

92. Moreover it will be noted that s. 7(1)(a) of the Act of 1998 must be read in the light of subs. (4) of that section which provides that in carrying out his or her functions under the Act "the Minister,

(a) shall have regard to –

(i) the resources available,

(ii) the provision for education and training made by other agencies with funds provided by the Oireachtas."

93. Second, the applicant relies on the Education for Persons with Special Educational Needs Act, 2004. This provides at s. 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 the courts 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."

94. No part of the applicants' evidence was specifically directed towards this statutory provision.

95. It is necessary then to turn to the relevant provisions under the Constitution.

96. Under Article 42.4 it is provided

"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."

97. The applicant contends that the content of the right to free primary education recognised in Article 42.4 is as set out by O'Hanlon J. in the case of *O'Donoghue v. The Minister for Health* [1996] 2 I.R. 20 at p. 65-66 where that judge explained there is a constitutional obligation on the state which

"involves giving each child such advice, instruction and teaching as will enable 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".

98. The kernel of this case is whether or not the state has breached its duty as set out under Article 42 and identified by O'Hanlon J. in the case of *O'Donoghue*.

99. This question is primarily one of fact. As has been indicated earlier the court has found as a matter of fact and law that the undertakings given, in the context of the areas of common ground, are sufficient to discharge any legal obligations of the state provided such arrangements as expressed in the course of this judgment remain in place and that each of the concrete arrangements as identified is observed.

100. One portion of the applicant's submission on the facts was puzzling. It might seem to suggest that the fact that the respondents do not rely on the original educational arrangements which had been put in place for Lewis in some way fortifies their argument that the Woodlawn Proposal is deficient. I consider that this point is ill founded.

101. The very reason that the respondents have made the offer of a placement at Woodlawn is, as I understand it, because the applicant was *dissatisfied* with the facilities at the Special School but this does not entail there was a failure of legal or constitutional duty.

102. It has been clearly indicated that the applicant intends bringing plenary proceedings regarding the provision of Lewis' earlier education. For this reason no finding is made regarding the adequacy or otherwise of the applicant's previous education. The question of whether the facilities at Woodlawn are adequate is one which must be dealt with on its own merits.

103. However it is clear that there are areas of concern on the applicant's part. These include

1. Whether the critical physical adaptations to the buildings have or will be carried out;
2. Whether there are adequate and suitably qualified teaching personnel in place including a TEACCH teacher.

104. Steps have been taken by the respondent to address each of these issues.

105. While these steps and the totality of the offer may not be sufficient to satisfy all the concerns of the applicants I find they are as a matter of fact sufficient to discharge the constitutional duties of the respondents.

106. While views to the contrary are sometimes expressed, the clearly enunciated principle, which this court is bound to follow, is that in this category of case courts can be a forum only for the identification of rights and duties under statute or the Constitution. The prescription and pursuit of what may be seen as "best practice" in this area of education must, in this State, remain a matter for the executive and the legislature if such an issue cannot be identified as a legal or constitutional duty.

107. In making the finding that the Woodlawn arrangement is adequate to satisfy the respondents statutory and constitutional duties, it also is clear that such finding specifically must have regard to a number of issues of principle.

108. The first issue of principle is whether the state is obliged to provide a severely disabled child with the particular type of education and care that his parents choose, or whether the obligation upon the state is simply to provide a standard of care and education that is adequate from an objective perspective.

109. No authority has been cited to the effect that parents are entitled to choose the exact type of care and education which their child receives. Indeed the most relevant authority, *O'Shiel v. The Minister for Education* [1999] 2 I.R. 321, is to the contrary effect. This authority demonstrates that the test as to whether there is a right to adequate care and education is to be objectively decided.

110. In that case Laffoy J. held that the State was not constitutionally obliged to fund any proposal for primary education emanating from parents and could legitimately adopt reasonable criteria for identifying schools that would qualify for public funding. She stated at p. 347-348 that:

"Even though the State must have regard to the constitutional guarantee of parental freedom of choice in framing (the scheme for the disbursement of public funding in the support of primary education), nonetheless it is proper for the State and, indeed, I would say incumbent on the State, to incorporate in the scheme measures to ensure that need and

viability are properly assessed and that there is accountability.”

Laffoy J. added:

“Fulfilment of the State’s constitutional obligation under Article 42.4 must take account of the parental freedom of choice guaranteed by Article 42, but it must be arrangements which have a rational foundation and prescribe proper criteria for eligibility which accord with the purpose of Article 42 and the provisions of the Constitution generally”.

111. I do not consider that any of the Canadian authorities cited by the applicant’s counsel are of assistance as authorities in this jurisdiction where quite different constitutional considerations arise. Indeed one such authority, *Auton v. British Columbia* 220 D.L.R. 411 (2002) a decision of the British Columbia Supreme Court, was overturned on appeal in an unreported decision of 19th November, 2004. The precedential value of that authority, based on the equality clause in the Canadian Charter of Rights and Freedom, was in any case not significant.

112. The remaining two authorities, *Eisler v. Ontario* 239 D.L.R. 911 (2004), and *Kaufman v. Leo Baeck School* 244 D.L.R. 411 (2004) involve mandatory orders being granted in respect of rights held non justiciable in this jurisdiction in *Sinnott v. Minister for Education* [2001] 2 I.R. 545.

113. While it is clear that the preference of the applicant’s parents may be that Lewis should be placed in Bangor, the evidence discloses that a constitutionally appropriate provision has been put in place and is available for the applicant in this jurisdiction subject to their maintenance in being.

114. While having “due regard” to the applicant’s parents views, there is a reasonable and rational basis, elaborated upon in the evidence by Ms. Hughes and Dr. McNamara, which demonstrate that the applicant may be placed in Ireland, and in particular at Woodlawn, rather than abroad.

115. The court is satisfied that the issue is not, therefore, whether Woodlawn is better than Bangor or whether it is the best but whether it is appropriate.

116. The constitutional duty which devolves on this court is to deal with the constitutional rights and duties as defined in the Constitution itself and by precedent. The primary question for consideration is not individual preference but constitutional and statutory duty as established in evidence.

117. Moreover, there is involved here a second issue of principle binding upon the court. This relates to the nature and extent of the duty imposed upon the State under Article 42.4 of the Constitution.

118. This issue was considered in some detail by the Supreme Court in *Sinnott v. Minister for Education* [2001] 2 I.R. 545 particularly by Hardiman J. In rejecting the contention that Article 42.4 imposed an unqualified duty on the State that judge stated at p. 694-695 as follows

“ ... the duty to provide for free primary education is a complex one, involving enormous annual expense, and requiring for its implementation the taking and constant reviewing of decisions on policy both by the legislature and by the executive. The content of the education provided for, the standard to which that content is to be taught, the mode of teaching, the age at which it is to commence and end, and many other matters must be decided upon and provided for.”

119. Having dealt with the Constitutional provisions under Article 17.2 for appropriation of revenue he went on to state:

“It is true that neither of these organs (i.e. legislature and executive) of government are in a position to disregard a constitutional duty and that the courts of powers and duties in the unlikely event of such disregard. But excepting that extreme situation, the duty imposed by Article 42 is a duty to be discharged in the manner endorsed by the legislature and the executive who must necessarily have a wide measure of discretion having regard to available resources and having regard to the public considerations of which they must be the judges”.

120. Having stated that, in particular, the expenditure of public monies as exemplified in this Article and other provisions emphasise that the duty imposed by Article 42 must be discharged in a manner approved by the legislature on the recommendation of the executive, Hardiman J. added

“It is true that neither of these organs of government are in a position to disregard a constitutional duty and that the courts have powers and duties in the unlikely event of such regard. But, excepting that extreme situation, the duty imposed by Article 42 is a duty to be discharged in the manner endorsed by the legislature and executive who must necessarily have a wide measure of discretion having regard to available resources and having regard to the public considerations of which they must be the judges” (at p. 699).

121. In view of the findings of fact which have been made it is unnecessary for this court to consider in any detail the authority of *T.D. v. Minister for Education* [2001] 4 I.R. 259. That case concerned the limits on the powers of the court to make mandatory orders against the State on issues of policy.

122. Again it is appropriate to quote Hardiman J. on the limitations of the power imposed upon this court in consideration of issues of this type:

123. He stated at p. 358

“If the courts were to depart from this imperative requirement (as to the respective roles of legislature and judiciary) in one case, moved perhaps by a great wave of sympathy of a particular plaintiff, they would naturally and even logically be asked to do so in many other cases, by persons whose plight was no less affecting. Such a course would represent the arrogation by the courts to themselves of powers which the Constitution vests elsewhere”.

124. On the basis of the findings made herein, and subject to the undertakings that have been outlined earlier regarding their maintenance in being, I consider that the facility now on offer in Woodlawn is objectively adequate and in compliance with the constitutional duties of the respondents.

125. On that basis therefore I consider that both the declaration and any mandatory relief sought by the applicant should be refused.

126. There remain two other matters.

127. The first of these is the degree of polarisation between the respective professional witness retained in this matter. In this context I would wish it to be noted that the court rejects any reflection which may be cast on Ms. Hughes in the course of the applicant's written submissions. In my view she is an objective, reliable and independent minded witness who has come to court in order to assist in accordance with her professional obligations. It must be in the best interest of Lewis that the professional advisors should seek to work together in order to further Lewis' interests.

128. Finally the courts recognises the exceptional hardship and strain involved in raising a severely disabled child and wishes to acknowledge the extraordinary devotion and commitment shown by the applicant's parents in seeking appropriate services for their child. Any person who reads the evidence of Mr and Mrs O'Carolan will recognise this.

129. Their concern went as far as retaining Lewis at home for a period of two years at what must have been an enormous emotional cost to themselves. Surely the considerations and perceptions which gave rise to the unfortunate circumstances of this case should not now be used as a ground for refusal to participate in the current proposal which appears to the court to be based in accordance with the statutory and constitutional duties of the respondents. While it may not accord with all the wishes that Mr and Mrs O'Carolan had it nonetheless represents a significant step forward as part of a process to be maintained and supervised by the courts.

130. And surely now the time has come to place past perceptions to one side and to avail of an offer made which recognises Lewis' legal and constitutional right to education and which will allow him to move to realise his full potential as a human being.