

THE HIGH COURT

[2024] IEHC 14

[Record No. 2023/1042 JR]

BETWEEN

C.C (A MINOR) SUING BY HIS FATHER AND NEXT FRIEND D.C.

APPLICANT

AND

**MINSTER FOR EDUCATION, NATIONAL COUNCIL FOR SPECIAL EDUCATION,
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

**JUDGMENT of Ms Justice Marguerite Bolger delivered on the 16th day of January
2024**

1. This application relates to a child, C, born on 28 June 2006, who has a mild general learning disability and ASD. C has a place in a new special school that was due to open for the school year 2023-24 but that has been delayed to at least the first quarter of 2024 as construction and recruitment for staff is ongoing. In the meantime, C is entitled to apply for a home tuition grant from the Department of Education and Science. C's parents assert that he has been denied his constitutional and statutory rights to an appropriate education and seek a declaration that the State respondents have failed to discharge their duty to provide C with an adequate and appropriate education pursuant to Article 42 of the Constitution, ss. 6 and 7 of the Education Act 1998 and the Education for Persons with Special Education Needs Act 2004.

2. The State respondents rely on C's place in the new special school and on the home tuition scheme that has been made available to C, and all the children with places in the new special school, as a temporary, interim measure pending the opening of the school. They also rely on their offer to afford C an exemption from Rule 64(1) of the Rules for National Schools so that he can attend the new school for another year after he turns 18 in June 2024, subject to making the appropriate application through the school. The State maintains

that it has afforded the applicant his constitutional and statutory rights to an education and emphasise the statutory recognition of the limits afforded by resources in providing for an appropriate education. The State disputes that any declaration should be made as the applicant has a school place and that it would be futile as no substantive relief could be gained.

Mootness/futility

3. It did not seem that the State was pushing hard on the mootness point, but it is still necessary to address both mootness and futility. It is very clear that the applicant, whilst having a place in the new school, is not receiving any school-based education at present. His psychologist has recommended a place in a special school rather than a place in an ASD unit in a mainstream school. Whilst he is entitled to the benefit of a home tuition grant, there remains a real and serious issue as to whether his constitutional right to the provision of an education and his statutory rights to an appropriate education are being vindicated. If they are not, then consideration must be given to granting a declaration and the laudable but, to date, unsuccessful attempts by the State to get this school open does not render the grounds of such a declaration either moot or futile. The legal issue to be determined is whether the facts of this case come within or without a child's rights to an appropriate education. The applicant's case is neither moot nor futile.

Constitutional provisions

4. Article 42.4 provides as follows:-

"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."

Statutory provisions

5. Sections 6 (a) to (e) of the Education Act 1998 provide as follows:

"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;

(d) to promote opportunities for adults, in particular adults who as children did not avail of or benefit from education in schools, to avail of educational opportunities through adult and continuing education;

(e) to promote the right of parents to send their children to a school of the parents' choice having regard to the rights of patrons and the effective and efficient use of resources."

Section 7(1)(a) provides:

"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."

Section 7(2)(a) provides:

(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."

Section 7(4)(i) provides:

"(4) In carrying out his or her functions, the Minister—

F14[(a) shall have regard to—

(i) the resources available."

Background

6. C's father, in his grounding affidavit of 11 September 2023, explained how C's parents had made enquiries about a school place in Dublin for C early in 2022 when they were making plans to move to Ireland, but they were informed at that time that they had to have an address in Ireland in order to make an application. That did not happen until August 2022 when they moved to Ireland, by which time the allocation of school places for the school year 2022-23 was complete. C's parents made extensive efforts to locate a school place for C and applied to a number of schools, both special and mainstream, in their locality and beyond. They made telephone contact with the National Council for Special Education (NCSE) and were informed of the need for a report from an Irish-based psychologist, which they eventually procured privately in December 2022. The required diagnosis was made and the psychologist, Dr. James, recommended that C be enrolled in a special school immediately. Dr. James swore an affidavit on 11 October 2023 in which she confirmed her diagnosis and recommendations and observed that C was doing well at that time in receiving daily learning support which she recommended should continue but she said it was of utmost importance that C receive a place in a special school immediately *"in order to provide him with an environment where he can grow socially and academically and establish a routine"* (at para. 37).

7. Upon obtaining the required psychologist report, C's parents were put in touch with a SENO (Special Education Needs Organiser) and were advised about applying to a number of schools including mainstream schools with ASD units which C's parents did not consider to be appropriate to C's needs (in the light of the psychologist's findings and recommendations), but they applied for those places because they were suggested by the SENO and out of the sense of desperation (para. 8 of C's father's affidavit sworn on 17 November 2023). There seems to be some dispute between the parties about three schools which the NCSE's deponent says were identified to C's parents, but C's father averred that those schools were unsuitable as they were not special schools, even though they had applied to other non-special mainstream schools.

8. On 12 June 2023 an application was made for the new special school which was accepted on 26 July 2023. The school has not yet opened, which C's father says leaves C without access to an education appropriate for his needs. Private home tuition has been arranged for C but his father says this is insufficient and "*a poor substitute for a place in a special school*".

9. C's parents clearly worked hard to secure an appropriate school place for C and sought and received assistance from the NCSE. The efforts of both parties eventually led to the offer of a place in the new special school in July 2023. All parties agree that this is an appropriate place for C and, indeed, his father acknowledged (at para. 5 of his affidavit sworn 9 October 2023) that a special school is a scarce resource. When C was given a place in a special school, he was also entitled to participate in the Department of Education's home tuition scheme pending the opening of the special school.

10. Given that the process of seeking a place in a special school did not commence until the application processes for the school year 2022-23 were closed and could not proceed until the appropriate expert report was available in December 2022, I do not consider the period of time from August 2022 to July 2023 to have been inordinate to the point of being an actionable breach of C's constitutional and/or statutory rights such as could give rise to the type of declaratory relief that is sought, particularly given the availability of the Department's home tuition scheme which I address further below. The real issue that C's parents have is the delay with the opening of the school, originally anticipated to occur in September 2023 and more recently delayed until the end of March 2024. The Department's deponent has set out in detail the efforts made to get the school open from when it was first announced in April 2023 to date, against the background of an exponential growth in the need for special classes and special schools throughout the country. She says 389 new special classes and 2 new special schools were established for the 2023-24 school year. She explained the delays caused by building works, lease issues and staff recruitment and avers (at para. 84 of her affidavit sworn on 14 November 2023) that she does not believe, having consulted with the relevant personnel, that there is anything more that can be done to expedite the opening date for the school and that everything humanly possible is being done to get the school ready for opening at the earliest possible point. Significantly, this has not been challenged by the applicant.

Home tuition scheme

11. The Department operates a home tuition grant scheme, the details of which are set out in circular 0024/2023. The scheme provides for a grant to pay for up to 20 hours per week of home tuition. The tutor(s) must be recruited by the parents and must be qualified in the sector in which tuition is being provided and must be registered with the Teaching Council, which requires vetting. The Department must approve the qualifications and identity of the tutor. Those requirements of qualification and registration are reasonable and ensure an appropriate standard of quality and safety in respect of a person who is to be paid from the State's resources to go into a child's home and provide them with education support.

12. One of the categories of eligible students, pursuant to the circular, are "*students with special educational needs seeking an educational placement in a recognised school*". At p. 2 of the circular, it is stated:-

"Accordingly, home tuition is provided as an interim measure only for children for whom a placement in a recognised school is not currently available and should not be regarded as an optional alternative to a school placement."

The Department has recognised C's entitlement to avail of a home tuition grant, at least since he was given a place in the new special school in July 2023.

13. The home tuition grant scheme itself has not been challenged. C's father has, on affidavit, welcomed the prospect of financial assistance to pay for C's current three tutors whom he and his wife have recruited and paid for since late 2022 without assistance from the NCSE. The NCSE averred to having received enquiries from C's father in February 2023 relating to home tuition but says that no application was received at that time. There is correspondence from the Department dated 22 August 2023 to the applicant's solicitor expressly referring to the home tuition grant scheme and providing email addresses for making an application for that grant, but no application was made at that time. The Department's deponent averred in their affidavit of 23 November 2023 that an application for the home grant scheme was processed by the NCSE on 2 November 2023 and sent to C's parents but that, as of the date of her affidavit, no application had been received.

14. C's father does not make a particular issue about the availability of a home tuition grant and does not seem to be interested in applying for it as two of C's three current tutors would not qualify and C's father says (at para. 13 of his affidavit of 17 November 2023) that they are reluctant to change C's home tutors who have built up a relationship with C over time. That is, of course, a matter for C's parents. However, I consider the availability of the

home tuition grant scheme to C, and indeed other children who have places in the yet to be opened special school, to be highly relevant in determining the State's compliance with its constitutional and statutory obligations to provide C with an appropriate education, the level of which may be determined by the resources available to the State and bearing in mind that the State's compliance with their obligations are to be determined and assessed by reference to the child's needs and not by parental preference (*O'Carolan (a minor) v. Minister for Education* [2005] IEHC 296).

15. In *Nagle v. Southwestern Health Board & ors* (2001 EJSC-HC 4608) Herbert J. found that "*little or nothing has or is being done by the Department of Education to vindicate the plaintiff's rights under Article 42.4 of the Constitution*" in circumstances where the plaintiff had been out of school for 18 months because of the school's refusal of his enrolment due to the lack of properly trained staff to administer medication if required. Home tuition had been provided a year into his school absence but the provision of that tuition did not satisfy the High Court that it could accept the assertion made by the Department's officials that all possible steps were being taken to provide the plaintiff with a suitable education. That was in circumstances where there was no school place for the child and the only discharge of the State's obligation to provide him with education was the provision of home tuition. I distinguish that situation from what is happening here where home tuition is being made available to C as a temporary arrangement pending the opening of the special school in which he has a place.

16. In *A.McD. v. Minister for Education & ors* [2013] IEHC 175, the applicant child had been expelled from their school in February 2012 and the only provision of education to her was home tuition which O'Malley J. found "*is not designed to replace the form of social education gained by learning how to get along with one's peers and other people.*" Again, that situation is distinguishable here as C is being offered home tuition purely pending the opening up of the new special school in which he has a place. O'Malley J. refused to grant the relief sought (albeit in what was an interlocutory application) as there was no element of bad faith or a conscious or deliberate flouting of rights and efforts were being made to find a school for the child. There is no suggestion of bad faith or any deliberate or conscious flouting of C's rights made in this application.

Discussion

17. The constitutional entitlement to the provision of free primary education is narrower than the broader statutory rights conferred by ss. 6 and 7 of the Education Act 1998 but those statutory rights are subject to the availability of resources, well summarised by s. 6(b) and s. 7(4)(a)(i) cited above. It has been long recognised that the nature of the education to which a child is entitled pursuant to the Education Act is an appropriate one, which may not equate to the education of choice of their parents (*O'Carolan*). I am satisfied that the limits placed on the State's discharge of their obligations by the available resources and what is practical, applies to the circumstances applicable to the delayed opening of the new special school in which C has been allocated a place, and where it is open to C's parents to apply for a home tuition grant as an interim measure pending the opening of the school.

18. The suitability of C's place in the new special school is acknowledged, the only issue is the delay in accessing it. The delay is not one that can last much longer. Whilst not wishing to minimise in any way the distress the delay has caused for C and his parents, it is a delay in completing a current project which is very different to, for example, a delay in getting a project up and running at all. In both *Nagle* and *A.McD.*, the children had no school place in spite of the Department's stated efforts to find one for them. Here, C has a place in the exact type of school that his psychologist has recommended and of a type that his father fairly admits is a scarce resource. Any detriment C may suffer as a result of the delay is ameliorated, at least in part, by the provision of home tuition which is commanded by his psychologist as well as the option to continue in the special school for a further year beyond his 18th birthday. The State claim an entitlement to cease education of the type that will be available to C when the new special school opens, upon a child reaching their 18th birthday. C's counsel claims that C is entitled to continue beyond his 18th birthday in spite of the rules that say he is not, but any such purported entitlement has yet to be established as part of a child's constitutional or statutory rights to an appropriate education. Insofar as things currently stand, I interpret this offer by the State respondents to allow C to remain in school for another year beyond his 18th birthday as a fair concession made in good faith and in an attempt to address the delay in affording C the benefit of a school place throughout his 18th year.

Conclusions

19. C has constitutional and statutory rights to an education, the latter being of somewhat broader scope than the former. He has the right to an appropriate education

subject to practical and resource issues, which cannot be invoked lightly to restrict what is an important fundamental right. The State has made provision for an appropriate education for C by providing him with a place in a new special school. Unfortunately, and in spite of huge efforts by the officials concerned, the opening of the school has been delayed by a number of months but is expected to open within the coming months. C has not been left without any education in the meantime as he is in receipt of home tuition which has been commended by his psychologist albeit it is acknowledged by all concerned not to be a suitable replacement for a place in a special school.

20. As a temporary measure and pending the opening up of his school, C is entitled to the benefit of the Department's home tuition grant scheme. His parents have not yet availed of it for their own reasons, but that does not alter the fact that C is entitled to a grant to cover tuition from a suitably qualified, Teaching Council-registered, vetted tutor, which are minimum requirements which are all reasonable and part of the State's commendable desire to ensure that the education services that it is paying for are provided by suitably qualified, professional and vetted teachers.

21. In those particular circumstances, I consider that C's constitutional and statutory rights have been vindicated and that the State is discharging its obligations to him. However, that does not mean there can be an unlimited delay permitted in ensuring C gets to attend the special school that will provide him with the environment which his psychologist has said he requires in order to grow socially and academically.

22. In all the circumstances of this case, as outlined above, I am satisfied that the delay in getting C into such a suitable school does not give rise to the declaratory relief that is sought. However, I will allow the applicant liberty to apply in the event that there is further delay significantly beyond the first quarter of 2024 such that may put his education and his academic and social development seriously at risk.

23. I will put the matter in before me at 10.30am on 5 March 2024 for the making of final orders.

Counsel for the applicant: Derek Shortall SC, Paul Gunning BL

Counsel for the respondents: Tony McGillicuddy SC, Claire O'Connor BL