**O'Donoghue v. Minister for Health [1993] IEHC 2; [1996] 2 IR 20 (27th May, 1993)**

**The High Court**

**O'Donoghue (a Minor) suing by his mother and next friend O'Donoghue v The Minister for Health, The Minister for Education, Ireland and the Attorney General**

**1992 No 75 JR**

**27 May 1993**

O'HANLON J:

SECTION 1: INTRODUCTION.

The Applicant in this application for Judicial Review is Paul O'Donoghue, who was born on the 2 November, 1984, and is now eight years of age. He sues by his mother and next friend, Marie O'Donoghue, with whom he lives at 39 Mahon Drive, Blackrock, in the City of Cork. He is the only child of her marriage, and she is separated from her husband. He is an Irish citizen.

The Applicant was born a normal and healthy child, but at the age of eight months he contracted a serious illness known as Reye's Syndrome, secondary to a viral infection manifested by throat and ear inflammation and gastro-enteritis. He was put on medication but his condition deteriorated rapidly and he was admitted to hospital. He was vomiting and had brain disturbance. He was in intensive care and was in danger of death for some time. After some days he was brought back to the general ward, but was helpless, unable to move his head or limbs, and apparently unaware of anything going on around him.

He was discharged from hospital on the 8 August, 1985, but as it was found impossible to feed him at home he was brought back to hospital and kept there until January, 1986.

An intensive course of physiotherapy was embarked upon, in which Mrs O'Donoghue took an active part. She said that she spent about eight hours per day with him in the hospital, playing with him, feeding him, helping with the physiotherapy, and discussing the exercises with the medical staff. She felt that a little improvement took place in his condition during that period. He started to look at things and notice them, and to respond to noises. She took him home at the week-ends.

By February, 1986, it was felt that the General Hospital could do no more for him and he was admitted to residential care in the Cope Foundation in Cork, which is administered by the Cork Polio and Aftercare Association and which is one of a small number of institutions in the country which can accept patients suffering from severe mental and physical handicap. Mrs O'Donoghue continued to spend a large part of the day with him, from 1 pm to 8.30 pm. From Monday to Friday he was taken by car from the Cope Foundation to Cork Regional Hospital for physiotherapy, and she brought him home at weekends. On one day per week the cost of transport between the Cope Foundation and the Cork Regional Hospital was met by the Southern Health Board; on all other days the cost had to be borne by Mrs O'Donoghue. In the hospital she fed him, played with him, and got him ready for bed. She learned from the nurses how to look after him.

From the 19 August, 1986, to 16 September, 1986, Paul had to be detained in the Cork Regional Hospital, suffering from a fractured femur. At the end of that period an outbreak of infection had taken place in the Cope Foundation, and for the time being he was taken by Mrs O'Donoghue to her parents' home, her marriage having broken up during the course of that year. By December, 1986, the Cope epidemic has cleared, and there was a residential place again available for Paul, but at this stage Mrs O'Donoghue felt she could look after him at home and was anxious to do so. She has continued to do so ever since, and in April, 1987, was provided by Cork Corporation with the local authority house at 39 Mahon Drive, Blackrock, where she still resides with Paul.

During the year 1986 Mrs O'Donoghue learned about the Peto Institute for Conductive Education in Budapest, and although the Institute is engaged principally in the treatment of persons suffering from motor disabilities and not for those suffering concurrently from mental handicap, she decided to bring Paul there for assessment and treatment. Their first visit took place in June, 1986, and because she felt he had benefitted greatly from the experience, further visits took place in January, 1987, August 1987, August 1988 and June 1989. All the cost has been paid for out of her own resources and out of money raised by her family, friends and neighbours by various means. In addition, she had special furniture made which was required for the purpose of continuing the Peto techniques in the home.

In the year 1987 Paul was referred for assessment to Cork Spastic Clinic and this took place for the first time on the 1 May, 1987. Thereafter he was able to attend for physiotherapy and occupational therapy once a fortnight for about one hour, in common with other children suffering from similar disabilities.

A further assessment took place in November, 1987, when he was diagnosed as suffering from severe mental handicap. As a result he was not offered pre-school facilities which were provided for children who though physically handicapped were not mentally disabled. Instead, he was given a place in a group receiving conductive education for a two-hour period, once a week. He also continued to receive physiotherapy and occupational therapy for about one hour, once a fortnight. The others in the group who were not under the same kind of mental disability as Paul were given pre-school facilities at the Spastic Clinic two or three times a week, later extended to five morning or five afternoon sessions per week, with free transport also being provided. From that time forward Mrs O'Donoghue felt that Paul was being discriminated against and was being left behind when educational facilities of various kinds were being provided for other children who were less seriously disabled.

An application was made towards the end of 1987 to have him admitted to the Cope Institute as a day-pupil, but the course was full, and although his name was put on a waiting list there was little hope of his being accepted for the foreseeable future, although this was not made clear to Mrs O'Donoghue at the time.

As no other facilities were available she continued with him at home, devoting 1 1/2 hours every morning to the Peto methods of instruction; she took him swimming once a week, and he was allowed attend a local Montessori school one afternoon a week, where a teacher, Mary Ahern, did some basic work with him involving shapes, colours, puzzles, and textures to help his sense of touch. Once again, Mrs O'Donoghue felt that he benefitted from all the time spent with him at these sessions.

In November, 1988, when he had reached the age of four, she asked the Spastic Clinic to re-assess him. She herself felt that progress had been made; that he was interested in what was going on around him. He showed a great interest in television; he liked people to talk to him, and he was now able to maintain eye contact. She felt he was ready to begin some more formal kind of education.

Once again he was found unsuitable for admission to the Spastic Clinic pre-school, which was a preliminary stage leading to admission to the School of the Divine Child, but that school was unable to accept the severely mentally disabled. She enquired again about admission to the Cope Foundation but was told that there were no vacancies. As a concession he was allowed to attend a Montessori School at Douglas, for one hour, twice a week. Mrs O'Donoghue had to look after transport to and fro, and also to remain on hand while he attended, in case some difficulties might arise. She felt that he benefitted from this experience also and enjoyed being with the other children, but his hours of attendance could not be extended. He continued to attend up to June 1989.

In July, 1989, Mrs O'Donoghue and one other concerned parent made arrangements for a Hungarian teacher, trained in the methods of the Peto Institute, to come to Ireland for one month to work with Paul and another child, and these sessions continued daily from 9 am to 4 pm. The two families had to bear all the cost of transport, salary and accommodation for the visiting teacher.

For the following school year, September 1989 to June 1990, Paul was attending for one hour on two days a week at a new Montessori School which had been set up in Glasheen. During this period of his life the only State aid provided in the fields of training or education were physiotherapy and occupational therapy sessions, one hour every two or three weeks at the Spastic Clinic, and one two-hour period weekly in group conductive education.

In the latter half of 1990, when Paul was approaching his sixth birthday, the Plaintiff and two other parents brought over a Hungarian teacher to set up classes in conductive education in Cork and the Conductive Education Group was formed. After months of hard work classes began in October 1990 at the SMA Centre, Wilton. A total of 23 children attended the course -- most of them were also in full-time education concurrently. All costs were shared by the parents, and no State aid was provided. The children were divided into different groups. Paul and four others went for five mornings a week from October 1990 to July 1991, and the cost of Paul's attendance was £1,120.

Mrs O'Donoghue felt a sense of grievance because some of the children attending the special Conductive Education Course with Paul in the morning, were also able to attend the Cork Spastic Clinic Pre-School in the afternoon and have transport provided for the purpose. She made further representations and he was, as a concession, allowed attend twice-weekly for 2 1/2 hours in the afternoon, but she had to provide her own transport, and this arrangement continued up to June, 1991.

During that year 1990/1991, Paul resumed his conductive education classes privately with a Hungarian teacher, three days a week for 2 1/2 hours, and once again Mrs O'Donoghuehad to provide transport and remain with him throughout the sessions. He also had the benefit of one hour per week music therapy as a private student. Furthermore, after much pressure on Mrs O'Donoghue's part, and having failed yet again to get Paul into the Cope Foundation, the Spastic Clinic allowed him to attend a 1 3/4 hr stimulation group on Mondays and Thursdays, and the pre-school course on Wednesdays for 2 1/2 hours in the afternoon, -- a total of six hours per week. In this situation, Paul having attained seven years of age in November, 1991, Mrs O'Donoghue considered that the educational facilities being provided for him were totally inadequate, particularly having regard to the fact that other mentally handicapped children, (classified as mild or moderately mentally handicapped) were receiving full-time education in the Cork Spastic Clinic, with free transport to and from school. As a result, these proceedings were instituted, claiming that the State was under a constitutional obligation to provide for free primary education for all children within the jurisdiction and had failed to honour this commitment in relation to Paul, and other children suffering from a similar degree of mental and physical disability.

Leave to apply for Judicial Review was granted by Order dated the 24 February, 1992. The application was made by Notice of Motion dated the 11 March, 1992, and a Statement of Grounds of Opposition dated the 26 May, 1992, was filed on behalf of the Respondents. It was therein recorded that the Department of Education had approved the appointment of an additional teacher for the Cope Foundation; that the Applicant (Paul O'Donoghue) would be provided with a place at the Foundatign on a full-time basis from not later than the beginning of the school year in September, 1992, and that provision had been made for day care facilities for him there in the meantime. A promise was also given of free transport so far as required.

The specific relief claimed in these proceedings on behalf of the Applicant is an Order of Mandamus to compel the first and second named Respondents to provide for free primary education for the Applicant; a declaration that in failing to provide for free primary education for the Applicant and in discriminating against him as compared with other children, the said Respondents have deprived him of constitutional rights under Articles 40 and 42 of the Constitution, with particular reference to the provisions of Article 40.1; Article 40.3.1; Article 40.3.2; Article 42.3.2 and Article 42.4. Damages arealso claimed, and a claim for interim relief was met by the offer of day-care and educational facilities at the Cope Foundation after the proceedings were commenced.

The Respondents' Grounds of Opposition may be stated in summary form at this stage. They contend --

1. That the Applicant, by reason of being profoundly mentally and physically disabled, is ineducable, and that all that can be done for him to make his life more tolerable is to attempt to train him in the basics of bodily function and movement.

2. That when the Constitution speaks of a guarantee of free primary education, what is referred to is the conventional type of primary education, scholastic in character, exemplified in the curriculum of the National Schools, and that such education cannot be of any benefit to the Applicant.

3. That such training as can be given to the Applicant, and as may be of any benefit to him in the quality of his life, is not properly describable as "education", and cannot be regarded as "primary education" within the meaning of that expression, as used in Article 42 of the Constitution.

4. That the Applicant, having been given a place in the Cope Foundation, has now achieved the essential relief sought to be achieved on his behalf in these proceedings and that further debate as to the merits of his claim would amount to no more than a moot on which the Court should not embark.

SECTION 2: THE WITNESS EVIDENCE.

Evidence was given as to the facilities which have been available in the Cork area for care, training and education of persons suffering from mild, moderate, severe or profound mental and/or physical disability during the period which has elapsed since the birth of the Applicant on the 2 November, 1984, down to the present time. The particulars are as follows:

1. The Cope Foundation (already referred to) is located at Montenotte and is a voluntary organisation funded by donations and fund-raising activities. It also receives funds from the State. It provides residential and day care services for handicapped children with mild, moderate, severe, and profound mental and physical handicap. It has had, at all relevant times, long waiting lists, and is full. It provided educational facilities on a day care basis for about 12 severely and profoundly mentally handicapped children, until the latter half of 1992, when one additional teacher was provided and it became possible to accept a further number of such pupils. The Applicant was on the waiting list for four years before being offered a place in the latter half of 1992. It was the only institution in the Cork area which could deal with children who suffered from both severe physical and mental handicap.

2. Cork Spastic Clinic. This again is operated by a voluntary organisation funded by donations and fund-raising, and also receiving funds from the State. It has two sections --

(1) The Clinic

(2) The School of the Devine Child.

The school provides teachers and education of mild and moderately handicapped from 3 to 18 years of age. It provides treatment and assessment -- the treatment including physiotherapy, occupational therapy, and speech therapy. It can provide educational facilities for the categories of mild and moderate mental and physical handicap. The children are assessed at age 3 to decide on their mental ability and whether they will be offered a place at the Pre-School. They are re-assessed at age 5 to decide if they will be offered a place in the School of the Divine Child or should attend an outside school.

3. LOTA. This is a school run by the Brothers of Charity, a private religious organisation, and funded by donations and State funds. It provides residential and day care facilities for children who are mentally handicapped but who do not suffer from physical handicap. By reason of his severe physical handicap the Applicant was unable to avail of the facilities offered at Lota.

Mrs O'Donoghue (much of whose evidence has already been summarised), refers in her grounding affidavit to these institutions and states that (as of the time of swearing that affidavit in early-1992), "I have been unable to get any further educational facilities from any of these institutions for (Paul) nor have I been directed to any other institution by the various State agencies contacted". She exhibits correspondence she has had with various State agencies and Ministers of Government in the matter. She refers to the undisputed fact that throughout the State free primary education is provided for children who do not suffer from mental or physical handicap, 5 1/4 hours per day, 5 days per week on average, with a normal education in a wide range of subjects, and with free transport provided to and from school where necessary.

In the course or her oral evidence she described the progress made by Paul year by year. After his initial illness his head was down on his chest and he was unable to lift it or move it around. It was only at age 4 that he began to develop head control and eye movement. She felt that he benefitted from attending the Montessori classes -- Tir na nOg and Glasheen. The children were very fond of him and stimulated him very much, and he enjoyed it. She also felt that he benefitted enormously from the time spent at the Peto Institute in Budapest, and from the help given by the Hungarian teacher who came to Cork.

As regards his present stage of development, she said he had very good head and upper body control, if holding onto a chair in front. He could turn around, and was beginning to get some use of his right. He was developing eye/hand co-ordination and trying to make things happen with his right hand. He laughs and smiles; enjoys life; has come alive. She produced some toys, as recommended by the Peto Institute, which, though expensive, were very stimulating for him -- a keyboard, a jack-in-the-box which he was able to handle himself. She described him as very determined and very pleased at his own achievement. His fists, which used be permanently clenched were now opened up.

He derived great enjoyment from a combination of tape machine and book, and sang with the music, paying great attention, looking at his mother and back again to what was in progress. She said he was always happy when things were happening. He enjoyed music therapy, and was now constantly vocalising and singing in time with her. She described his present attention span as very good; he loved swimming, games, joking, and responded well in a group. He was able to communicate with her about his needs when hungry or thirsty. She had succeeded in training him to cough to clear his chest and this had helped to eliminate chest infection from which he had previously suffered. He could respond to verbal messages, as when told to hold up his head. He was very good when there were children around, and sang in the dressing-room when he was brought swimming. She felt he had made great progress to date and would benefit very much if he could get further education to develop what she had been able to do for him by her own efforts. Two recent photographs of Paul which were put in evidence convey a strong impression of a child who was alert and happy at the time the photographs were taken. Professor James Hogg, PhD, Psych, a Professor in Dundee University and holder of the Chair of Profound Disability in Edinburgh University, gave evidence in support of the Applicant's claim. He is the co-author of a series of books relating to the education of persons suffering from severe and profound mental handicap, one of which -- "Profound Retardation and Multiple Impairment, Vol 2, Education and Therapy" -- was put in evidence.

He gave as his opinion that the profoundly mentally retarded can be educated even though suffering from multiple disabilities. He said that the Warnock Report in the United Kingdom had shown that there was now a wealth of evidence supporting the belief that even the profoundly handicapped can benefit from education tailored to their personal needs. This was evident from his own research in the Hester Centre, established in Manchester in 1968 for research in mental handicap, and with which he had been associated from 1972 until 1991. This was the first Centre to conduct research into the education of those suffering from severe and profound mental disability.

Professor Hogg gave evidence about developments in this field in England and Wales, in Scotland, and in the USA, in all of which countries it had been made compulsory by law to provide education for the severely and profoundly mentally retarded.

In England and Wales most of such children were attending special schools with trained teachers. The ordinary primary school hours were observed -- 9.30 am to 3 or 3.30 pm, with a five-day week. He said the children were being educated and were benefitting. The same system prevailed in Scotland since the transfer of responsibility from Health to Education in or about the year 1974, and a National Curriculum was now being developed in that country. He felt a curriculum was important and affected the quality of the education. "Teachers need a focus rather than spontaneous interaction".

He said that education had to do with the whole child -- its competence as a human being. A strong emphasis had to be placed on early education for this particular group, otherwise they would come into the system very handicapped. A withering of use of functions could take place if not built on from the start. Help was given for children subject to such multiple handicap from two years of age in the countries referred to.

He expressed enormous admiration for what had been achieved in Paul's case to date, but said it was impossible for a parent to provide what should be provided in school. There was a need for specially-trained teachers. He saw Paul on the 29 June, 1992, and found him very socially-responsive, with good interaction and natural social encounter; a good sense of humour; he seemed to be relating to the world. He felt he had great potential for the future, was reaching out, had improved enormously in physical control. He found him very motivated, which he described as unusual. He said he was beautifully positioned to make significant advances; had good eye contact; can look from person to person, and was striving to express himself in ways he could not yet do.

But for the efforts which had hitherto been made on Paul's behalf, Professor Hogg considered that he would now be lying on his back with severe deformation and total lack of motivation. He refused to accept a distinction between education and training in such a case. "Training is regarded as a low-level activity, but the psychological and motor processes are quite complex. It is not a low-level psychological function. And in the field of communication, non-verbal communication can become very sophisticated."

Cross-examined, he said he would not ascribe a special mental age to Paul as there was a variation in different areas of development. He was severely physically disabled, but he expected he would acquire some independent mobility in the upper limbs and body. He said he could not and would not give a prediction regarding his long-term mental development, save to say that he was very ready to improve. He believed he would progress to the 18-month level but "that needn't be the end of the story". Some children made substantial progress. He believed that Paul would have benefitted several years ago from educational facilities.

In bringing about the change-over from Health to Education, he said that considerable international material had been available on the subject for many years, instancing the UK Change from Health to Education (1971), the Warnock Report (1978) and many documents and Acts of Parliament responding to these developments.

Asked about the Pilot Project which had been in progress in this country for some years past, Professor Hogg said: "The severe and profound don't constitute a problem. They have a requirement to basic education. A wide range of information exists as a guide-line." He did not consider it an appropriate situation to find that only 200 had been taken on after an eight-year period, with no education being provided for thousands of others who were in need.

Ann Carlin, a teacher with qualifications in teaching mild and moderate mentally-handicapped children, was attached to Cork Spastic Clinic when Paul attended there between 1989 and 1992. She said she had no training in dealing with profound mental handicap, and was "out of her depth", but she made progress by trial and error. She said that Paul improved over the period, in eye-tracking and other areas. He was vocalising sounds and showing more interest at the end. He enjoyed music stimulation and vocal involvement. She felt that every child was educable, and that Paul would have done better with a structured course and a more skilled teacher.

John Twomey, an Educational and Clinical Psychologist, was employed as Principal and Chief Psychologist at the Cope Foundation from 1970 to 1982, and was a contributor to the first World Congress on Education for the Severe and Profoundly Mentally Handicapped, held at Stirling in August 1978. He spoke on that occasion about a controlled experiment conducted at the Cope Foundation with the help of the Department of Education, in relation to the education of children suffering from severe (but not profound) mental handicap. The conclusion reached as a result of that experiment was that such children were clearly shown to be educable. Already, however, those conclusions had been overtaken by events, since England and Wales by the Education for All Handicapped Children Act, 1970, and the USA by Public Law in 1975 had made education compulsory even for those profoundly mentally retarded.

The purpose of education for these categories should be to try to bring out their potential and prepare them for life. They needed to be taught sensory or motor responses at a basis level. "They have minds, they are alive, they do have educational needs. They have almost total dependence on adults to initiate learning. They need to be able to form relationships with other people. Their educational needs are very special indeed -- basic sensory responses -- reaching, touching, listening, seeing. Most normal children learn basic skills, for example self-care, incidentally, but the handicapped need structured, formal learning, even for the act of reaching and grasping."

Mr Twomey said he did not make a differentiation between care and education -- "all are learning processes, for example, feeding, satisfying hunger, can be used as part of a teaching curriculum." He was a member of the Working Party which produced the "Blue Report" on the Education and Training of Severely and Profoundly Mentally Handicapped Children in Ireland, in the year 1983, but said that new methods had been devised since that time. Asked what meaning he gave to the word "primary" when linked with education, he said that it meant "first" or "basic" education for children.

In the case of children severely or profoundly mentally handicapped, he felt that they should be given education, perhaps from 4 to 18; he saw no reason why they would not benefit from the same number of hours as other children, and he would prefer to see them in a classroom.

He estimated that about 200 children were benefitting from the Pilot Scheme already established, but that this represented only 10% or less of all the children in the State suffering from such disability.

The purpose should be to give the child as much independence as he or she was capable of developing; trying to help them overcome their difficulties one by one; develop the child's imagination and scope for communication of their needs and the satisfaction of those needs. He felt this process was already taking place in Paul's case in the imaginative and inventive way he responded to his mother. Asked when basic education should start, he gave as his opinion that the sooner it started the better for the severely or profoundly handicapped child -- perhaps as early as six months. He said that if it started and stopped, he would expect regression and loss of any skills already acquired.

In Paul's case he had noted that his head control was now good; that he was acquiring movement of his right hand; that he was able to hold an object, with the intention of doing so; that he had some vocal communication with his mother and could respond in different tones; that he had three vowel sounds. He felt that Paul might be taught to feed himself. He was already communicating with his mother. He had had a good educational input, but with lack of continuity, and involving unfair demands on his mother.

In cross-examination he disputed the proposition that primary education meant what was given to the normal pupil. He said that in the same age range, one pupil was always more advanced than another. There should be some interaction and integration, to condition other children to treat Paul like a 7 year old socially. He was referred to the "Lilac Report" produced in 1990 which spoke of the introduction of education for the severely and profoundly handicapped on a gradual basis; that it should be monitored carefully, and should be on an experimental and research-orientated basis. The witness said this need not hold up the provision of education and was not intended to do so. After ten years, the so-called 'Pilot Scheme' was only providing for 200 out of a possible 2000 who were in need.

Dr Ciaran Donovan is a general practitioner in practice in Cork and had Paul as a patient from March, 1985. He had continued in regular contact with him since that time. He saw great changes taking place in Paul; at age 7 1/2 he was able to communicate better; he smiles and sings; his hearing is good; he seemed to be benefitting from all that had been done for him; he seemed more relaxed and flexible physically and his head control was better. He did not think he would have done as well at all without his mother's care and her efforts to provide him with conductive education and to bring a teacher to Cork for the purpose.

He considered that what had taken place was education in the broader sense. "You can educate such a child to do as much as he can do; to become aware of his surroundings; to enjoy life more; to develop the quality of his life -- not education in the formal sense."

Catherine O'Sullivan was Paul's music teacher from December, 1990, to May, 1991, and again from December, 1991. She holds a Diploma in Music and Dance Broadcasting based on the Koday method, from the University of Hartford, Connecticut, and followed up this course with further study in Hungary in 1987. The method is based on the principle that every child should have a right to music education, oral, physical and visual, based on the folk song material of the country where one works.

She said the music education method was very good for the handicapped, and she had taught in Connecticut to the multi-handicapped, and for a further year in Pennsylvania as therapist and music educator to a blind student. From 1990 she worked in the Cope Foundation with four groups of severe and profound mental handicap, and also in Lota with other similarly handicapped pupils.

The method involved graded rhythmic training, oral, listening, receiving. Twenty songs were presented in one year, starting with two-tone songs, moving on to 3/4/5. She produced the curricular used. The child was trained to understand the beat and rhythm. She found that Paul had the ability to "inner hear" music, with the tone in the correct place. Visually, he was able to follow High, Medium and Low, with ascending and descending hand actions.

When she started working with him in December 1990 he was sitting, looking upwards, with a blank expression. The programme combined music education for 10/15 minutes of intensive learning period; physical education; music and water relaxation, and musical therapy which could be used to enliven a withdrawn child (lively rhythm) or to calm the hyperactive.

In Paul's case she found he had the same tonal range as his mother. He could "pitch-match" what the witness sang, within five tones. He could now sequence three tones, singing a complete musical phrase. He could come in with the correct tone in the proper place, and would start a song he wanted her to sing again. When she played a tape, he came in spontaneously on the correct note and pitch.

She continued: "He has inner life and inner hearing. He is understanding the elements of music. I would like him to be able to sing a complete song. He is very alert to his environment, and enjoys some songs more than others. He likes an ascending melody. He derives tremendous enjoyment from music, and has a dynamic range -- can be very loud or very soft."

She said he had the musical ability of about a two-year-old, but she felt there was no limit to his ability -- "I believe he can go much further, has a musical memory, can communicate."

She described the development of eye/hand co-ordination by the use of music combined with toys or other objects associated with the particular song. This provided intensive stimulation and helped to develop his inner life. She described it as "like building a house -- one brick at a time."

Mary Aherne, a Montessori teacher, took Paul at age 3 for one afternoon a week, on a one-to-one basis. He had no physical control over his movements. He had partial control of his head, but it would then fall down. At times he became very interested, focussing on material, at other times he would turn away or let his head fall. She said she had seen him since and was delighted with the progress which had been made -- so much more head control; an alertness about his face; he smiled when they met; his eye contact was good. She felt he could be educated.

Celia Powell is also the mother of a child who is profoundly physically and mentally handicapped -- Aisling, now eight years of age. Her condition was diagnosed at age 3, but they knew she was mentally handicapped from age 5/6 months. The family moved to England (having previously lived in the Dublin area, where Aisling was admitted to St Michael's House at age 3 1/2), and lived in Oxford for about three years.

Education for the profoundly and severely mentally handicapped is compulsory in England from aged 5, and Aisling was admitted to the Mabel Pritchard School although still only four years old. Those in charge felt that the earlier such children could be taken the better, and they were willing to take children from aged 2 1/2 years. There was no difficulty in getting her a place, and she was also offered a place in a play-group. The programme of education involved attendance 9 am to 3 pm for a five-day week, as for all other children. There was a head-master, teachers, class-rooms, 4/5 rooms, and about five children in Aisling's class. Term reports were issued. There was a nursery nurse teacher, and a trained nurse for the school. Occupational therapy took place one weekly, and physiotherapy once weekly. A visual aid teacher attended to teach eye co-ordination skills.

Aisling, when living in Ireland, at age 4, had very poor head control and could not focus on objects. In England she developed the ability to sit for long periods; to focus; to float unaided in the pool; good head control, and the ability to take her own weight when being carried. Free transport by taxi to school was provided and also an escort. The facilities they enjoyed in Oxford were available generally in England.

Mrs Powell said that Aisling was in Oxford from age 4 to 7 and benefitted greatly. They returned to Ireland in 1991. In the absence of suitable services in Ireland, they brought a girl with them from Oxford who was trained in the Peto method. There was no place available for Aisling in St Michael's House on her return from England to Dublin. A place was found for her in Dunmore House (St John of God's) Glenageary, where two trained nurses look after each class. They felt that Aisling was regressing, and were so concerned for her that the family planned to return to live in Oxford on a permanent basis. Since their return there in the Summer of 1992 she was a lot happier -- while in Ireland she had lost the ability to vocalise and to sit for a long time. She liked the school environment in England, and could stand with the aid of a plinth, and reach out and touch things, whereas on leaving Ireland her hands were clenched all the time. She now wanted to sit, could take her own weight, had head control, could focus. She was not as sick; spent less time with the GP; was much more aware of people; could communicate when hungry and cried when unhappy. She tried to respond to greeting.

As regards the facilities available in Ireland, Mrs Powell gave as her opinion that they were doing the best they could with limited resources. The various institutions were providing nursing care but not education. "We can pin-point the time when she (Aisling) progressed -- it was when we went to Oxford."

John O'Gorman was President of the National Association for the Mentally Handicapped for 2 1/2 years up to April, 1992 and is qualified as a general and mental handicap nurse. The National Association is an umbrella organisation for 140 voluntary groups, and had two representatives on the Working Party which produced the Blue Report in 1983.

He estimated the number of profoundly or severely mentally handicapped in the age group 4-18 as between 1500 and 3000. The 1981 Census gave a figure in the region of 2000. The Pilot Programme for Education of persons in this category following upon the publication of the Blue Report in 1983 involved the setting up of a total of 19 schools each capable of taking 12 pupils. With regard to the large number, perhaps 1800, not catered for in this manner, many attended Developmental Education Centres financed by the Department of Health, and set up by voluntary organisations such as the Brothers of St John of God, and St Michael's House. Some of these institutions would have teachers employed; most would have a programme designed by a multi-disciplined team involving physiotherapists, psychologists, Montessori teachers and others.

With regard to educational needs, he said the view was now changing and it was now felt definitely that educational needs should be attended to by the Department of Education and that this would be for the benefit of the handicapped. About 200 were now in education with teachers provided by the Department of Education. Most of the remainder were attending Centres with no teacher.

He considered that a proper ratio would be one teacher to six pupils -- in the United Kingdom the ratio was two to five, and on a recent visit to Denmark he found that two qualified teachers and one assistant had responsibility for seven pupils. He said the Child Education Development Centre had been a compromise solution when first established but thinking had moved forward since then, and an educational deficiency was now seen clearly in a lot of these Centres. The object should be to develop the individual to his or her full potential, as was sought to be achieved in the Primary School.

Gerry Buttimer, Chief Executive Officer of Cope (Cork Polio and After-Care Association), said the Cope Foundation was the only place in Cork catering for those with profound mental and physical handicap. They had one "Blue" teacher (a reference to the Blue Report of 1983) as of July 1992. They could at that stage cater for 12 pupils at most, and had a flexible programme. Most of the children were resident in Cope. Part of the group were taken in the morning, and part in the afternoon -- some on a one-to-one basis. He estimated that there were a further 24 children in the Cork area living at home for whom they were unable to provide the necessary service, due to lack of resources, and these 24 were on the Cope waiting list. They had applied to the Department of Education in 1991 for more teachers but had had no response. In May/June, 1992, when the present case was listed for hearing sanction was given for one additional teacher for another 12 children, leaving a further 12 unprovided for. Back-up staff -- at least four child care assistants would also be needed.

Asked about the feasibility of imparting education to the group in question, he replied: "We would be convinced that they are capable of being educated -- I have been saying this for 20 years."

Cross-examined as to what was involved in primary education, he said it comprised the initial education, not the 3Rs, for those with severe or profound mental handicap; education in a very broad sense -- social, toilet, feeding, head control -- with the emphasis within that context.

Patricia Walsh, who holds the qualifications of MEd (Mass), MSc (TCD), Dip Clin Psych, is a Clinical Psychologist and Director of Research at St Michael's House. She has about 25 years experience in the field of mental handicap.

When taking her course in Massachusetts, she found there was in operation a mandatory school system, initially for mild and moderate mental handicap, and later for the severe/profound as well, after the adoption of the Education of the Handicapped legislation in 1975. The States must adhere to that Federal Law if they are to receive Federal funding. In an action tried in New Hampshire in 1989 it was held that a child so handicapped was entitled to a full formal education, even below the normal age. At present no child may be excluded from full-time education regardless of the degree of handicap.

She made further study visits in recent years to Wisconsin, Connecticut and Massachusetts.

Children so handicapped, she stated, need more and better education, and benefitted from it in the short, medium and long term. The programme should start very early. Once the child's needs are made clear it should have access to the educational process work situation -- for example to the pre-school situation at three years of age, or earlier. Early intervention was important. "Never, in my experience, do they fail to benefit from education. Some may be temporarily withdrawn. Over a period of 18 months, positive advances are noted due to the educational process."

Dealing with the Pilot Schemes started up in the wake of the Blue Report published in 1983, she said that about 228 places were provided for severe or profound cases, with approximately 2000 others left unprovided for. In Day and Care Centres teachers were generally not provided, and there was no educational programme or curriculum.

In reply to cross-examination she said it was necessary to look at the whole child and its needs; not to classify a child as having a mental age of 18 months and so forth. "Function is the important word. The curriculum should be to enable him to acquire the skills he needs in daily life, and the child should be given the same esteem as any other person of his years. Try to balance what he requires with his ability."

Dympna Hyland, a teacher with the Cope Foundation in Cork, said that no course of training had yet been provided for teachers of severe or profound mentally handicapped children. Twelve children were being educated under the Pilot Scheme in operation in Cope -- four from 9.30 to 12 noon; two from 12 noon to 12.45, and six from 1.50 pm to 3.30 pm. She felt the children could keep going all day if all necessary facilities were provided.

Lota dealt with those who were mentally handicapped but not physically handicapped, and had standard hours and full classes. She felt that continuity was all important -- the child must be aware of what your are doing. There should be a teacher plus two or three back-up staff, and deal with children one at a time. During the conventional teachers' holiday period the teaching staff in the system gave the programme to the nursing staff, who were not trained to make use of it. Asked about the contrast between the programme for such pupils and the ordinary school programme, she said: "A child learning to hold his head up is like an other child trying to learn long division".

Catherine Synnott of Blackrock, Co Cork, is also a mother of a profoundly mentally handicapped child -- Jamie -- who, however, is in fairly good physical condition. He was born in 1977 and is now 15. He received no education from the State to age 7. He was seen in the USA and she was advised that early intervention was necessary. He was accepted in LOTA for two two-hour periods per week, for seven months in the year. Although he had no teacher, there were two staff in a nursery situation and he did very well, and spoke five times when four years old.

At age 5, she said there were no further services available to help in the education of Jamie. He could only stay at Lota as a residential patient, which she did not want. She said he was doing very well to age 5, but never spoke again. She had a recollection of one very clear word -- "NO". He was accepted in the Cope Foundation for one afternoon a week, in a group of 10 mentally handicapped children. The local parents whose children suffered from mental disability formed an Association to push for help for Lota, and to push for education and services. They succeeded in getting one Day-Centre for five days a week for 20 children -- 10 at a time. "We had to fund-raise for transport and did so -- raising about £15,000 per annum."

She said the help derived from these means was "not educational", it was "working towards education". Mrs Synnott has seven other children. She said that Jamie loved going to the Centres and LOTA. He was sitting at home for hours doing nothing. She wrote to Dublin and got the Blue Report. "We knew they could be educated. I couldn't do it. I confused him -- a teacher would have to be strict. We contacted the Department of Education and the Minister many times -- we were told that within five years all would be covered -- profound etc; this was around 1983."

Deputations were sent by the Association to the Department. Jamie continued to attend a Day Centre from age 7 to 14. He could move around. The nurses were very stressed, changing children and so forth. He was allowed do his own thing. Bad habits developed.

At age 11 he was offered a place from 9 am to 3.30 pm at Cork Spastic Clinic as an experiment. She said he did wonderfully. "He learned to eat; to put his arms out; to relax when being dressed; to co-operate. He developed much more eye contact." She could leave him with a bowl to fend for himself, and he helped with feeding. He became almost fully toilet trained and was dry most days. "It was a great help to me as a parent -- he could help put his shirt and clothes on. He was so happy and proud of himself. I could say "No", and he would understand and respond. He began to understand commands."

She said there was a lot of music in the experimental programme and he loved it. His balance improved and for a while he could walk up two steps unaided. The course lasted six months. After it ended he kept some of the benefits derived from it and lost others. He lost "shirt help" -- putting his arms in. He feeds with help. He became depressed and distressed. He had got rid of bad habits he developed at the Day Centre, so she did not send him back. She paid someone to take him for a walk every day. He spent two years doing nothing and had no education from 11 to 13. At 13 "in desperation" she got him a place in LOTA on condition that she provided her own transport, to bring him in each day. This was for two hours in the afternoon, five days a week.

Mrs Synnott said Jamie would benefit from more and that the teachers would love to have him for longer periods. No meals were provided at school, and the opportunity for training in this area did not arise. She said: "I would like him to go off in the morning, with transport provided, to a good centre with all necessary staff who could deal with such matters as communication skills, eating, toilet training. He could then come home in the afternoon to the family circle."

She had begun to teach him sign language with some success -- a salute for "Hello"; a circle on the hand representing a biscuit -- and he was beginning to use his body to let them know his wants. He danced to show happiness and stamped when he wanted something important. He took pride in his appearance and in the clothes he wore. He loved going to school and being praised.

She said there was a demand and need in the Cork area for education facilities for profoundly and severely mentally handicapped. She knew of over twenty sets of concerned parents, most of whom had no school facilities available to them. LOTA and Cope and her own group were all making representations.

This concluded the oral evidence called on behalf of the Plaintiff. The following is a summary of the evidence given by witnesses called on behalf of the Defendants.

Sean MacGleannain is Chief Inspector in the Department of Education, and also Chairman of the Education Committee of Rehabilitation International, a voluntary association of State and voluntary organisations.

He said that in this country Primary (or National) Education had continued unchanged since 1831. It represented basic elementary education to the generality of children, based on reasonable homogeneity of intellectual powers. Compulsory subjects were Irish, English, Mathematics, Social and Environmental Studies, Music, Physical Education.

The present arrangement was that children from age 4 may attend voluntarily; education from 6 to 15 was compulsory generally involving a move to secondary school at age 12.

Rule 27 of the Rules for National Schools dealt with Special Schools and allowed the Minister to introduce and provide alternative programmes. A start was made with blind and deaf pupils at the end of the 19 century. Considerable expansion had taken place since the end of World War II. Special schools and special staffs were provided. Intending pupils were assessed through their General Practitioner and the local Director of Community Care, and could be enrolled after a report was made to the Department.

In 1965 a Commission of Inquiry into Mental Handicap recommended the establishment of a net-work of schools for Mild and Moderate Mental Handicap and this recommendation was acted on -- Ireland being one of the first countries to bring moderate mental handicap into the system. Teachers were advised to work out their own curriculum locally.

England extended educational facilities to all categories of mental handicap, including severe and profound, by the Education Act, 1971, and a new look was taken at the problem in this country at that stage. A new Commission was set up, of which Mr MacGleannain was Chairman and produced the report commonly referred to as The Blue Book (1983). Represented on the Commission were the Departments of Health and Education; An Bord Altranais; the INTO; the Health Boards and the medical profession.

The Commission recommended that the severely and profoundly mentally and physically handicapped should get as much training and education in the broad sense as was possible, with a view to improving their quality of life and functions. The feeling was that education should be involved, not hived off, and that the needs of the group should be catered for by a multi-disciplined team. A Pilot Scheme was recommended and the following year the Minister for Education produced a four-year plan. A cadre of teachers was to be produced, and ten were provided in 1985, starting in January 1986 after an induction period. In 1987 10 more were allocated, and a total of 19 were eventually taken up. For a period the whole 19 were engaged. Some problems were experienced but by 1989 the Department and Management looked at the results and concluded that the scheme was working reasonably well.

A variety of practices were in operation -- some rotating the children during the day, others retaining the same children all day. The problem of funding was a major issue as about 20% of total Exchequer expenditure was already devoted to education. Cut-backs were imposed in the 1987/89 period and no additional teachers were provided for the scheme in 1988/89. In 1992 some relaxation took place, with the creation of a number of additional posts.

He said the Blue Report Scheme was held back not just by finance but also by divisions of opinion between different interests and the need for full co-operation and support of two separate Departments of State -- Health and Education. While the Department of Education would recognise additional teachers, their appointment would have to be supported by the provision of other services by the Department of Health.

The training involved was the normal three-year course for a Primary teacher followed by a probationary period of one year; then three years' work experience, followed by a one year special course in St Patrick's, Drumcondra.

Asked to define what was meant by Primary Education, he said it was a basic minimum education of general application -- the early education from 6 to 12, given to the generality of children. He said it would not cover the kind of learning and human development that takes place from birth to age 4.

This was learned and transmitted in the home. It was not necessary to provide for it in a school setting. The severely and profoundly mentally handicapped needed training in the most basic human responses to their environment. It was necessary to make such instruction very structured and very specific. It is not part of the training of an ordinary teacher or an ordinary class-room.

He was asked in cross-examination whether it was now the accepted view that such persons can benefit from education, and replied -- "In the broadest sense -- the enhancement of human development. It is not ordinary primary education." He said that persons so handicapped would never reach normal levels; he questioned their capacity to generalise, to remember, to concentrate. They would be slower than normal. They would never master the 3Rs.

He confirmed that physical education was compulsory in National Schools. It presupposed that the child had use of limbs and could obey orders, and take part in aerobics and other exercises to develop bodies. It was an important part of the course.

He said that the English Act 1971 was considered at the time of the Blue Report (12 years later), and the Commission felt that we had fallen behind. However, a long delay had taken place in implementing the English Act. At the present time, (as of July 1992), there were 16 Blue teachers, each with 12 pupils in their care -- a total of 192 pupils. The first appointment had been made in 1986; informal reviews of the scheme took place in 1986 and 1989, and in 1989 it was concluded that it would be beneficial and desirable to extend the scheme on a gradual basis. Prior to 1989 the scheme had contracted due to interdisciplinary problems. Expenditure on Primary Education as part of the over-all Education Budget had declined from 56.9% to 36% between 1966 and 1992. He agreed that one teacher and one therapist could not cope with 12 severely or profoundly handicapped children. About 24 profoundly handicapped children in the Cork area were awaiting educational facilities -- the total for the country would now be about 1600 of whom about 200 were being catered for under the Pilot Scheme. Severely and profoundly handicapped children had never been regarded as coming within the scope of Rule 27 of the Rules of the National Schools up to the time of the Blue Report.

Dr Andrew Joseph Stynes is Director of Community Care in Cork City and County. He gave evidence of benefits provided for the Applicant under the health care system in the form of home aids, a shell-chair, a bath chair, a prone stander, and a weather cape. The Applicant had also had the benefit at different times of hospital and medical care; training and education at Cope and the Spastic Clinic. The Southern Health Board was providing a nurse and three special care assistants in connection with the educational programme at Cope from September, 1992. He accepted the correctness of what was said in the Blue Report as to the need for a qualified teacher supported by medical and paramedical staff in providing for the needs of the severely and profoundly disabled.

Dr John V Halpenny, a Consultant Psychiatrist on Mental Handicap, was a member of the Blue Book Committee. He had not seen the Applicant but had read reports of psychologists who had seen Paul at different stages of his development. He felt the maximum mental age Paul could hope to attain would be three years. Development continued, however, up to about age 16, as does the ability to learn.

A child who was found to suffer from severe or profound mental handicap should be referred to mental handicap services as early as possible -- even before 6 months of age if possible. Such services were available and were ready and willing to provide for the child in residential and day care units, with an Early Service Programme to age 4/5. Nurses in Day Care Centres feel they are providing more than a baby-sitting service -- physiotherapy, speech, and occupational therapy. These are not called "education" but approached very closely to what had been described as education in Court. "The nursing staff feel they are 'educating' them".

Registered Nurses (Mental Handicap) had an educational content in their three-year training re-development, stimulation. They regard it as their main function -- to develop the child to its maximum potential in all respects. "Their job is to encourage the child to become independent".

Referring to the Blue Book, Dr Halpenny said a multidisciplined team was needed, and he would expect teachers to provide teaching skills.

They should try to develop the cognitive ability of the child. He felt that what was happening in the Day Care Centres approximated very closely to Professor Hogg's description of developments in the United Kingdom. "Our Registered Nurse (Mental Handicap) is very close to Professor Hogg's 'No 1 Lynch Pin'".

Dr Halpenny said that the ability to learn continued to develop up to age 16, but the actual learning process could continue on after that age. He concluded from the reports he had read that the Applicant had the capacity to learn. A good brain could exist within a very physically disabled body, and an annual review of such persons was necessary. He instanced the writer, Christopher Nolan, as an example of "education unlocking the potential".

He felt it had still not been proved scientifically that what is achieved by the intervention of teaching was something that would not otherwise be achieved.

Liam O Heigearta is Principal Inspector of Special Schools for the Department of Education. The Department had not been involved with the profoundly handicapped until the Pilot Scheme was set up after the Blue Report. The Departments of Health and Education then decided to accept this recommendation and appoint multidisciplined teams. Ten teaching posts were sanctioned in Spring, 1986, and a further ten in Autumn 1986. No teacher in the country was up to that time specifically trained, but a very efficient cadre existed eg, for mild and moderate handicap.

A multidisciplined team was needed involving teacher, nurse, childcare worker, physiotherapist, music therapist. All members of the team were contributing to education in its broadest sense. The Scheme had been evaluated and the Department favoured its continuation and expansion. He repeated what had been said already by Dr Halpenny, that there was no proof that a teacher does better than a nurse or care worker, but said the Department "was willing to make an act of faith".

He was aware that Cope had been pressing for two additional teachers for some time; that their existing class was full and that there was a waiting list. He was unaware that the Applicant was four years on the waiting list. There was still no specific course provided here for teachers wishing to qualify for teaching in the area of severe and profound mental handicap. He thought the course for special teachers (mild and moderate) could be adapted, with work experience in those areas.

Gabriel Harrison, a former National Teacher, with additional qualifications in psychology, had experience as Principal Teacher and as a Psychologist with the Eastern Health Board before becoming Inspector of Normal and Special Schools in Galway and the Midlands. Two of the Centres in his area of inspection deal with children who are profoundly mentally handicapped.

He said that if a Curriculum were to be provided for this group, it would be quite different in kind and degree from the ordinary Primary School Curriculum. "All the literature suggests that what you are doing is enhancing basic sensory responses, including fixation, visual tracking, reaching, grasping -- a very basic or early level of cognitive curriculum."

Most children have these capacities by age 2, by ordinary development. From age 2 to age 4 the child then acquires language and the use of symbols. At 4, the curriculum assumes he has all these skills, and proceeds to build on them. He felt a special curriculum could now be devised for the profoundly mentally handicapped, linked to the Piaget Theory, on which Professor Hogg also based his curriculum.

Such children could be educated alongside other children, but needed a one-to-one approach as each child was quite different from the other in their needs. They could acquire skills, but a question had to be asked about their ability to maintain or genera1ise them. Head movement and head control were very important, especially with regard to the visual field. To teach eating with a spoon the child has to be able to regard the spoon, then go through fifteen or twenty stages. They need someone who can do all this -- not necessarily a teacher, perhaps a psychologist working with teachers.

In cross-examination, Mr Harrison agreed that a profoundly handicapped child can benefit from education, and that such education had been made mandatory by law in the USA and the UK. Specialised structures and systems were needed for the purpose. A programme was needed for each child, specifying how he was to be taught and the conditions under which he was to be taught. He said there was no scientific evidence as yet to show that they obtain a benefit from education which lasts. The evidence was conflicting on this issue. Asked for his own opinion, he said: "I would favour expansion, and believe that they do -- I like to think they can".

Ruth Barrington, a Principal Officer in the Department of Health, said the Department accepted responsibility for the education and training of the mentally handicapped. It co-operated with the Department of Education concerning mild and moderate mental handicap. The profound and severe cases were dealt with by voluntary agencies -- mostly residential and day-care. Funds were made available by the Department and by the Health Boards. The voluntary agencies showed what could be done through education and care.

Statistics showed that about 15,000 of the population suffered from moderate, severe or profound mental handicap. The figure had risen by 25% from 1981 due to the ageing process. It was estimated that about 1600 children over-all were in the sever or profound category. The Department of Health's principal priority in this area was the provision of additional residential care for adults, and also for children, as about 2000 of the 15,000 total were not receiving any services at present.

She referred to the so-called "Lilac Report" produced by a Review Group in July 1990, entitled "Needs and Abilities -- a policy for the intellectually Disabled", which she described as "a major policy document for our Department". It had been adopted by the Government. It endorsed the need for education of handicapped children, and recommended that more places should be made available for children in all four categories, mild/moderate/severe/profound. In response to representations made by the Applicant's mother one nurse and three child care assistants were being made available for the Cope Foundation from September 1992.

She said the Applicant was now being offered the best education available. She accepted that there were no teachers employed in the Day Centres but referred to Halpenny's statement that nurses were effective as teachers.

Finally, in relation to the witness evidence in the case, it should be noted that Mr O Heigearta in his affidavit which accompanied the statement of Opposition, exhibits a series of Psychologists' Reports of assessments of Paul made at successive stages of his development --

Mary Desmond, date of test -- 13/3/1986 -- Paul then aged about 16 months;

Mrs Hilary Lane, date of test -- 3/11/1988 -- Paul aged 4;

Mary Desmond, date of test -- 22 Jan 1991 -- Paul aged 6 yrs 2 months.

All the reports give a picture of residual spastic quadriplegia and profound mental handicap.

SECTION 3: THE DOCUMENTARY EVIDENCE.

A large volume of documentary evidence was made available to the Court to supplement the evidence given orally and on affidavit by the witnesses. The written material included the following:-

1. Profound Retardation and Multiple Impairment. Authors, Professor James Hogg PhD and Judy Sebba PhD. (Hester Adrian Research Centre, University of Manchester, 1986).

2. Report of Commission of Inquiry on Mental Handicap (1965).

3. The Education and Training of Severely and Profoundly Mentally Handicapped Children in Ireland. Report of Working Party to the Minister for Education and Minister for Health and Social Welfare. ("The Blue Report" -- January 1983).

4. Report of Review Group on Mental Handicap Services. ("The Lilac Report" -- July 1990).

5. Curriculum for Primary Schools.

6. Curriculum Guidelines for Schools for Pupils with Moderate Mental Handicap.

7. Education for a Changing World. (Government Green Paper, 1992).

8. Declaration on Christian Education. (Vatican II -- Gravissimum Educationis, 28 Oct 1965), and Supplemental Declaration, 1981.

9. Universal Declaration of Human Rights. United Nations Convention on the Rights of the Child. General Assembly Resolution 3447 (XXX) of 9 December, 1975 -- "Declaration on the Rights of Disabled Persons". European Convention on Human Rights, First Protocol, 4 Nov 1950.

(1) Hogg & Sebba. Profound Retardation and Multiple Impairment.

The following passages from the work of Professor Hogg and Ms Sebba appear to be of particular relevance in the context of the present case:-

Historically, in special education, the essentials were selected from the elementary school curriculum, the demands for each subject were lowered, and teaching was arranged to involve shorter periods of concentration.

The emphasis has shifted from factual knowledge to social competence. More specifically to future needs, eg everyday living skills . . . The curriculum consists of a framework of goals within which skills, teaching methods and recording are specified.

The 1970 Education Act in England and Wales and similar legislation in Scotland transferred responsibility for the education of children with severe and profound learning difficulties from the health authorities to the education authorities. Since then, compulsory education for all children however profound and multiple their difficulties has been a legal requirement. Similarly, since Public Law 94-142 was introduced in the USA in 1975, educational programmes for all children have been mandatory. Hence there is official recognition of the philosophical position that every child has a right to an education . . . Stainback and Stainback's (1983) review of evidence regarding the educability of people with profound retardation strongly supports the effectiveness of teaching . . .

There is a paucity of research findings supporting or challenging the effectiveness of programming with this population. (One work) demonstrates that the lowest functioning people (Social Maturity Quotient of less than 10) do not benefit from intensive programming . . . This book shows that successful attempts have been made to teach specific skills to even those whose impairments are most profound. The objectives of education for all people would seem to be concerned with developing independence, increased opportunities and socialisation. The objectives of education for people with profound and multiple handicaps might be considered similarly . . . Cospen (1984) has argued that for pupils with severe and profound learning difficulties the formal school programme must include the teaching of skills which pupils in general education are assumed to acquire before or outside school . . . These skills might include basic communication, and self-help skills such as feeding, dressing etc . . .

The core curriculum becomes the basis understanding of the world including communication and daily living skills, whereas traditional 'academic' activities like reading, writing etc becomes the periphery.

(Vol 2 -- Education and Theraphy.

Chapter 2 -- Teaching and Therapeutic Methods).

(2) Commission of Inquiry on Mental Handicap (1965).

This long and comprehensive report dealt with all the problems of care and treatment of the mentally handicapped, and in relation to care during school-age made recommendations which are subsequently implemented concerning the education of the mildly and moderately handicapped, but did not make any recommendations at that stage for the provision of education facilities for those severely or profoundly mentally handicapped. Nevertheless, some of its findings and recommendations are of interest and of value when considering the claim made in the present proceedings.

They recorded that at that time there was no special legislation in regard to the education of the mentally handicapped, and they were dealt with under the general provisions in relation to education. (Chapter 4).

Special residential and non-residential schools which provide suitable education for the mentally handicapped are recognised by the Minister for Education as national schools and special arrangements in regard to staffing, time-table and curriculum apply to them. As in the case of the ordinary national schools, the Minister pays teachers' salaries and allowances and makes grants towards the costs of erecting and furnishing new schools, reconstructing existing schools and of transporting pupils to schools. In addition he bears the cost of providing special training for teachers of the mentally handicapped and makes grants towards the cost of providing teaching aids and materials . . .

There are at present 20 national schools for the mentally handicapped. The average number on the rolls totalled 1434 in 1964 -- 10 are part of residential centres and 10 are day schools.

In Chapter 5, dealing with the aims of care and treatment, the Commission stated --

For others (that is the more severely handicapped) the aim of care and treatment must be to enable them to develop their potentialities to the maximum and to utilise their limited ability to the best advantage, to reduce their dependency and to help them to lead lives as fully and happy as their disabilities will permit . . .

The mentally handicapped person has medical, domestic, social and educational needs like any normal person, but he may differ from the normal person in the extent to which these needs have to be met . . . In varying degree they may need nursing care, medical care, special education etc. All these special needs necessitate a wide range of services -- medical, psychological, educational, nursing and social -- all integrated in a scheme of continuous care and treatment . . . We are satisfied that, as far as possible, the normal needs of the mentally handicapped should be met in the same way as the normal needs of other sections of the community . . . To a person who is mentally handicapped, any addition to his already heavy burden is most undesirable and every effort must be made to provide him with relief where it is possible to do so.

Experience has shown that, as in the case of normal children, the formative years are most important in the life of the mentally handicapped and that proper care and treatment from an early age will greatly improve their prospect of reaching optimum level of development and of overcoming their disabilities to the greatest extent possible.

Dealing with care during school age (in Chapter 8), the Commission observed:

The pessimistic views of the educational potential of this group of children (ie the moderately mentally handicapped) which dominated theory and practice in the past are being abandoned in favour of an attitude of guarded optimism . . .

That the mentally handicapped child has, at best, only a very limited educational potential is something which cannot be disputed. No amount of schooling will enable him to overcome his disabilities completely. Because of his intellectual immaturity he is unable to benefit from the type of education provided for normal children or for children of less marked intellectual defect. At 6 . . . his mental age will be as low as 1 1/2 to 3; at 16 his mental age will be not more than 8 and may be as low as 4 . . .

The complexity and intensity of his learning difficulties undoubtedly set narrow limits to his educational advancement but they need not be regarded as insuperable. Even small improvements in physical well-being, in muscular co-ordination, in sensory acuity, in language and speech and in social competence can materially reduce his dependence on his family and on the community. To achieve these improvements a special form of education is essential and we recommend that it be provided for all moderately mentally handicapped children who are capable of benefitting from it . . . These children will generally have intelligence quotients from about 35 upwards.

In Paragraph 93 the Commission stated the fundamental objectives of such education as follows --

(1) the systematic development of behaviour patterns which are socially acceptable during and after school life

(2) training in sensory perception and discrimination

(3) physical development including muscular co-ordination

(4) language development and speech training.

The curriculum necessary for the achievement of these goals will include a variety of activities involving sensory experiences, games, dancing and other forms of physical movement, conversation, story-telling and drama, music etc. The basic skills of reading, writing and arithmetic occupy only a very limited place in the curriculum. His rate of learning is so slow that he can benefit from training well into adult life . . .

In this country since 1960 a number of day schools and residential centres for the moderately handicapped have been recognised by the Minister for Education as National Schools. We wish to record our approval of this development . . . The goal of training of the moderately handicapped is social and vocational competence in a sheltered environment. The basic educational skills are of fundamental importance in the curriculum for the mildly mentally handicapped. They occupy only a minor place in the curriculum of the moderately handicapped.

The Commission went on to remark, perhaps prophetically, in Chapter 11, Paragraph 141:-

Targets in the care of the mentally handicapped are constantly changing. What was regarded as adequate a decade ago is not so regarded today. What is regarded as adequate today may not be so regarded in another decade. In these circumstances, a continuous evaluation of the effectiveness of different forms of care and treatment is essential.

And in Chapter 13, dealing with future Organisation --

In the past the orientation of services was primarily medical but it is now recognised that only the combined efforts of physicians, psychologists, teachers and other workers can deal adequately with the complex problems presented by mental handicap.

. . . With the increased emphasis on the educational aspects of mental handicap the Minister for Education has tended to accept more and more responsibilities in regard to day and residential centres or parts of centres which provide education and can be regarded as special national schools.

Special national schools established prior to 1959 were intended for the mildly mentally handicapped only. More recently a number of day centres catering mainly for the moderately handicapped have been recognised as special national schools. We welcome this change. We accept the view that many of the moderately handicapped who were formerly described as ineducable, can benefit from a simplified form of education given by teachers specially trained for the purpose. We accordingly recommend that the education of both the mild and the majority of the moderately handicapped should continue to be regarded as a matter for the Minister of Education.

There are health and educational aspects involved in most grades of mental handicap and we recommend the continuance of the present system under which responsibilities in regard to the mentally handicapped are shared between the Ministers for Health and Education . . .

In general we recommend that the Minister for Health should accept responsibility for medical and nursing care and maintenance in residential centres and for nursery and care units and that the Minister for Education should accept responsibility for education -- in the wide sense of the term.

(3) The Blue Report, 1983

In compiling this Report, a Working Party had to consider whether the provision of education to the mild and moderately mentally handicapped, which had already taken place, should be extended further to provide education and training as well for the severely and profoundly mentally handicapped, and were to report back to the Minister for Education and the Minister for Health with their recommendations. The Working Party was established in 1980 and its Report is dated January 1983.

The Working Party was comprised of 22 members under the chairmanship of Sean MacGleannain, then Divisional Inspector of the Department of Education, and was representative of the two Departments and also of many other interested bodies such as the National Association for the Mentally Handicapped in Ireland, An Bord Altranais, the INTO, and the Regional Health Boards. There were 22 plenary meetings and members visited centres at home and abroad. Questionnaires were issued to all Care Units. The Working Party studied reports of research in Ireland and elsewhere, and in particular --

(a) The Report of the Commission on Mental Handicap, 1965;

(b) The Report of the Working Party for Services for the Mentally Handicapped, 1980;

(c) The Report of the Medical-Social Research Board;

(d) The Warnock Report -- United Kingdom Committee of Special Educational Needs, 1978;

(e) US Public Law 94-142 (The Education of all Handicapped Children).

The Report gives, at the outset, a summary of the recommendations which are to be found in the body of the Report, and this summary reads as follows:-

1. The World Health Organisation quadripartite classification of mental handicap (ie, mild, moderate, severe, profound) should be used in Ireland.

2. Counselling and support services should be further developed for parents and families of all handicapped children, especially for severely and profoundly mentally handicapped children.

3. All centres of severely and profoundly mentally handicapped children should have an education and training programme and specific times should be set aside for it. Also a designated space separate from the living quarters of the children.

4. Each child should have access to an education and training programme designed with his particular learning needs in mind and subject to review from time to time. A detailed progress record of each child's development should be maintained and should be transferred on move to another agency.

5. Care facilities as first priority for all still excluded from a suitable service in their own area.

6. Teachers, paid and supervised by the Department of Education should be made available to severely and profoundly handicapped children.

7. Any lower limit for eligibility for enrolment in schools for moderately mentally handicapped children should be removed and the decision about individual children left to the discretion of the Boards of Management in consultation with the Inspectorate of the Department of Education. Where the Board feels the curriculum in the school can be adapted to meet a child's needs it should be free to accept such children.

8. Where a school for moderately mentally handicapped agrees to enrol pupils assessed as severely or profoundly mentally handicapped, additional resources should be made available by the State to satisfy the additional special caring and learning needs of these pupils. A flexible approach should be adopted and the needs of each school examined on an individual basis . . .

9. The funding of special services other than teaching services in special schools should be examined by the appropriate authorities.

10. In large separate day care units . . . one teacher should be introduced for each 12 children . . . (attached to the nearest school for moderately mentally handicapped) reporting to the Principal of that school, but working as an interdisciplinary team in the care unit . . . Responsibility for capital expenditure, running costs and salaries other than teachers to continue with health agencies as at present.

11. Until such time as it is possible to provide designated teaching space in all residential centres, one teacher should be provided for every 12 severely and profoundly mentally handicapped children and a teacher should spend some time each day with each child . . . The authorities should consider the wisdom of providing for large numbers of non-ambulant profoundly mentally handicapped children in one central location in each area and integrated small numbers into more localised services.

12. Public money should be made available for the purchase of additional specialised equipment to provide greater stimulation of such children, eg, walking aids, hoists, electric wheel-chairs, etc.

13. In addition to one teacher per 12 children, each care unit should have minimum front-line staff of 15 for each group of 50 children.

14. The Department of Education should be responsible for the remuneration of teachers and they should be subject to the rules and regulations for national schools . . . (The Department of Health and the Health Boards for other costs and staff).

15. Centres should be redesignated Developmental Education Centres if providing formal education programme for a specified time each day to all children, in a space specially allocated for that purpose.

16. A comprehensive system of transport should be established for all handicapped children attending Developmental Education Centres on a day basis. (The Centres) should provide for out-of-school and leisure activities).

17. Formal induction training is needed for all teachers taking up such duties. (It) should also form part of the basic training of all teachers -- the methodology, theory and practice of teaching children with severe mental handicap.

18. Programmes of parent education should be associated with all Developmental Education Centres and parents and other members of the child's family should be involved fully in the education and training programmes. Where appropriate, teachers and other professionals should work with the families at home. Young people should be encouraged to take up this work.

19. The relevant authorities should formulate a definite policy on continuing education for adult severely and profoundly mentally handicapped.

20. Teachers and formal educational programmes for severely and profoundly mentally handicapped children should be introduced on a gradual basis. Such programme should be monitored carefully and their efficacy evaluated scientifically.

Chapter 3 of the Blue Report deals with the historical perspectives and the development of education for the severely and profoundly mentally handicapped and the following are some of the more interesting and important of the details given.

The provision of special education appropriate to the needs of mentally handicapped persons is of relatively recent origin -- commencing in the mid-19th century, but the real and dramatic growth having taken place only in the latter half of the 20th century. This had followed the development of techniques to identify the characteristics and needs of children with varying degrees of mental handicap, and the development of suitable programmes of education and training to satisfy those needs.

In England a start was made with the Elementary Education (Defective and Epileptic Children) Acts of 1899 and 1914, and the Education Act, 1921, which obliged local authorities to make provision for the education of defective children in special schools or classes, but these Acts did not apply to Ireland. Originally provision was only made for the mildly mentally handicapped. Person with a greater degree of mental handicap were regarded as ineducable.

It is only in more recent times that public awareness has grown of the benefit of educating children with more severe degrees of mental retardation. Programmes for the moderately mentally handicapped were introduced in the USA in 1914 (St Louis), 1929 (New York City), 1934 (St Paul's, Minnesota). In the early-1950s public school programmes were introduced for "the trainable mentally handicapped" -- ie, those with IQ below 50, previously regarded as ineducable.

The education of all handicapped children Act, 1975, (US Public Law 94-142) made the provision of free appropriate education for all children compulsory, no matter how severe or profound their handicap.

The corresponding Act passed in the UK in 1970 -- required that all mentally handicapped children, including the severely sub-normal, (ie, with IQ under 50), be provided with appropriate education. The concept of education was regarded as central treatment and no lower limit was set for the acceptance of children.

In Ireland the early development of services for mentally handicapped persons came from the religious orders, without legislation or State initiative, but with State agencies supporting the initiative of religious and non-statutory bodies. The role of education in the care of moderately mentally-handicapped children was officially accepted from 1953, with the Department of Education recognising special schools for this group. In 1961, St Patrick's College initiated the post-graduate course in Special Education.

In 1961 the Minister for Health set up the Commission of Inquiry on Mental Handicap, whose Report was issued in 1965, and has already been referred to.

The Commission recommended that special schools should be provided for the moderately mentally handicapped in the IQrange 35-50, although at that time serious doubts were still being expressed in the US and elsewhere about the educability of such children.

It was recommended that the education programme should focus on the following principal areas --

Personal Hygiene

Physical Education

The Development of a Simple Vocabulary

Self-Help

Social Training

Simple Domestic Tasks

Self-Reliance

-- with periods of free play and rest, and with guidance to be given to parents.

Having considered the implementation of the recommendations of that Commission, the compilers of the Blue Report in 1983 concluded that our schools for the moderately mentally handicapped had reached a degree of sophistication comparable with the best practices elsewhere.

They also concluded that the countries which share our philosophy on mental handicap have opted, in the main, to provide education and training for severely and profoundly mentally handicapped children through formal educational systems, and then proceeded to consider the question as to what extent that should be done in Ireland.

Chapter 5 of the Report deals with the Educational and Training Needs of Children with Severe and Profound Mental Handicap. Part of the text reads as follows:-

All children, whether handicapped or not, have these needs and each takes precedence over the others at certain periods of their lives. But in the case of severely and profoundly handicapped children these needs often have to be met concurrently, needing a considerable degree of overlap between and co-operation between, professions providing for the varying needs of the child.

In the past certain groups of handicapped children were excluded from access to education and training because of a very narrow definition of education and it was felt that certain children's disabilities were so great that they could not benefit from the curriculum in schools. More recently, however, the aims of education have been broadened considerably and there is a world-wide awareness that education can be of help in maximising human potential even for the most disabled people.

The Report then continues by citing the definition of education which is to be found in the Warnock Report:

The aims of education are the same, whatever the advantages or disadvantages of the child concerned. These aims are, first, to increase the child's knowledge of the world he lives in and his imaginative understanding, both of the possibilities of that world and of his own responsibilities in it; and, secondly, to give him as much independence and self-sufficiency as he is capable of, by teaching him those things he must know in order to find work and to manage and control his own life.

Children have manifestly different obstacles to overcome in their path towards this double goal and for some the obstacles are so enormous that the distance they travel will not be very great. But for these children any progress at all is significant. For the most severely handicapped education seeks to help them overcome their difficulties one by one.

It then considers the long-term programme for such children:

It is difficult to define long-term educational needs for children with severe or profound mental handicap. It is probably easier to list the areas of conventional education which have no relevance for them. As far as academic learning is concerned, few of them will ever achieve more than an ordinary child will have achieved by the age of 3, though many will reach as much higher stage cn a social level. Perhaps a summary of long-term aims might be that the children will be somewhat less dependent than is currently expected, lead more varied and stimulating lives, develop more as individuals, and increase their interaction with others.

The Report has this to say on the topic of the Right to Education --

Article 2 of the United Nations Declaration of Rights of Mentally Retarded Persons (December 1971) upheld the rights of all mentally handicapped of whatever degree to appropriate educational services . . . Art 42 of Bunreacht na hEireann would seem to uphold the right of all children to appropriate educational facilities. Ireland was one of the first countries to provide special educational services for moderately mentally handicapped children. It has now, however, fallen behind some other countries which have extended such services on a formalised and structured basis to children with severe and profound mental handicap.

The Working party is of the view that the care and treatment of severely and profoundly mentally handicapped children should be widened to include specific provision for education and training. An educational curriculum for such children would include elements such as those listed below (many of which are already being provided in existing services):

A. Basic Skills -- self-help, eg dressing, washing, feeding, toileting

gross and fine motor skills

sensory awareness

simple household tasks and daily living skills, eg, cookery.

B. Expressively Skills -- Communication skills, gestures, cues, simple language, sign language.

C. Leisure Skills -- Play with toys and with other children and adults

Participation in simple games, organised and free play

Horse-riding, swimming and other activities.

On the topic of Methodology the Working Party reached the following conclusions:

What is learned in an informal and incidental manner by ordinary children has so often to be made formal and structured for severe and profound mentally handicapped children. Research, home and abroad, suggests that where teaching methods are suitably adapted, severe and profoundly mentally handicapped children can make worth-while progress in the areas mentioned . . . (but) need teaching methods which are highly specific. Personnel need to be well-trained in methodologies . . . Specific times and physical space should be made available for training programmes -- each child to have access to an education and training programme designed with his particular learning needs in mind and subject to review from time to time and with a detailed progress report.

In Chapter 6 of the Report of the facilities then existing for providing for the educational and training needs of the severe and profound mentally handicapped were considered and some of the conclusions reached were as follows:

In the years following the publication of the Report of 1965 significant advances were made in material provision for severely and profoundly mentally handicapped children. In spite of these advances there are still too many for whom suitable services are not available on a regional basis and it can be almost impossible to obtain a suitable place in some areas. The lack of any available place can cause intolerable stress and hardship to parents and families.

It is difficult to gather precise information about the extent and quality of educational programmes available in centres for severely and profoundly mentally handicapped children. Most have a formal education programme for pre-school moderately mentally handicapped children. No national guide-lines are provided to be followed in the centres . . . There would appear to be a wide variation in the quantity and quality of educational programmes provided at the various centres . . . from some which provide a highly sophisticated service to those which have no specific learning programme . . . There is no established structure which ensures access for each severely and profoundly mentally handicapped child to an education and training programme appropriate to his needs . . .

The members of staff have responsibility for all aspects of care and training (and so cannot concentrate on education and training). Care needs take priority over education and training . . . In times of crisis, staff shortages and other emergencies there is pressure to reduce or eliminate altogether the education/training element . . . The lack of staff available specifically for education and training makes this element in the lives of the childen particularly vulnerable in times of crisis.

Many of the staff have limited orientation towards education and training eg, nurses are primarily nurses, not teachers.

There is unanimous agreement within the Working Party that education and training programmes should be made availabe for severely and profoundly mentally handicapped children.

Finally, in Chapter 7 of the Report, the Working Party made a number of important recommendations, with the following commentary:

It is unreasonable to expect staff trained in one discipline to adapt fully to skills appropriate to other disciplines. The skills of teaching have developed over the centuries to cater for all children other than the severely and profoundly mentally handicapped and there is no justification for excluding this population from access to the accummulated expertise of teaching. Teaching is a service for which the Minister for Education has ultimate responsibility. The Working Party is of the view that any teaching services provided for the severely and profoundly mentally handicapped should be the responsibility of that Minister also. Accordingly, we recommend that teachers, paid and supervised by the Department of Education be made available to the severely and profoundly mentally handicapped . . . They should work in close co-operation with personnel from other disciplines.

It was recommended that such teachers should spend not more than the normal five hours per day teaching, and that learning periods should be interspersed with leisure and rest periods; that there should be a greater degree of continuity of programmes (instead of long breaks during holiday periods) and a system of staggered holidays for such teachers was suggested. There was scope for admitting some severely or profoundly mentally handicapped children in schools for the moderately mentally handicapped. It was also recommended that one teacher for 12 children be provided; the teachers and formal education programmes to be introduced on a gradual basis and monitored carefully. It was felt that the learning experiences appropriate for the severely and profoundly mentally handicapped child would differ in degree rather than in kind from those appropriate for the moderately mentally handicapped.

(4) The Lilac Report (1990)

Next in time came the Report of a Review Group on Mental Handicap Services, July 1990, referred to in evidence as 'The Lilac Report". Its purpose was to identify the needs and disabilities of the Intellectually Disabled and to formulate policy guide-lines for the future. The Review Group was established in 1986 under the aegis of the Department of Health following discussions between that Department and representatives of some of the major organisations providing services for persons with intellectual disabilities. It re-examined the comprehensive study which had been carried out by the Commisison of Inquiry which had reported in 1965; the equally comprehensive work of the Working Party which produced the Blue Report in 1983, and a series of further studies which had been undertaken in the period which followed after the publication of the Blue Report.

While this Report is concerned with all categories of the intellectually disabled and their varying needs, it does make some significant statements on the topic of education for children who are severely or profoundly mentally handicapped. The title of the Report is "Needs and Abilities -- a Policy for the Intellectually Disabled". At page 21 the Report stresses the critical importance of early identification of such disability:

Specialist early intervention teams should be available in each region to develop the appropriate levels of expertise and experience in meeting the specialist needs of infants and young children with developmental delay.

One of the purposes of such early intervention and identification is --

(d) to offset the delay in the development of these children by systematic teaching and training programmes and by guiding the parents in how best to nurture the child's progress.

The Report then recommends that, as far as possible, developmentally delayed children should be facilitated at approximately three years to attend local pre-schools or playgroups for other children subject to the pre-school teachers and playgroup leaders following a programme recommended by the early intervention team.

Chapter 7 deals with "Children of School Age" and having praised the work hitherto done by the Child Education and Development Centres (CEDCs), continues as follows:

However, we would like to see close links between CEDCs and special and/or ordinary schools. This type of centre caters for children with a severe or profound degree of intellectual disability as well as for children with a moderate degree of intellectual disability who would not benefit from placement in a special class or school. These placements should be for limited periods prior to transfer to special classes or schools. Such children are entitled like any other child to education and development appropriate to their needs and capacity . . .

Consideration should also be given to associating the CEDCs with ordinary schools to facilitate the practical integration of CEDC pupils with their peer group.

One of the important conclusions of this Review Group is recorded at Page 35:

The results of a number of intensive programmes over the past decade have shown that there is scope for considerable improvement in the quality of life of persons with a severe or profound intellectual disability. Such programmes require a major input of personnel resources. Provision for this group of people simply by way of passive institutional care is no longer acceptable and a more optimistic view of their potential would be of substantial benefit . . .

An individual programme for each person is essential. Intensive personalized approaches to the needs of such people will also reduce problem behaviour. The educational curricula of students of all relevant professions should be reviewed to ensure that they are aware of and trained to deal with intellectuallydisabled persons within the community.

Having referred to the recommendation in the Blue Report that teachers should be allocated by the Department of Education to the CEDCs, the Review Group recommended that the Departments of Health and Education and the voluntary bodies providing services should discuss the future role of teachers within the CEDCs and the most appropriate methods of training, supervising and financing them.

(5) Primary School Curriculum (1971)

A new Curriculum for Primary Schools was produced in the year 1971 and is exhibited in the affidavit of Liam O hEigearta. Some of the Statements made and particulars given in this Curriculum appear to be relevant to the consideration of the issues which arise for determination in this case. The Curriculum refers at Vol 1, page 12 to the theme of "Primary Education -- Aims and Functions", as follows:-

An outline of the purpose of education should reflect the philosophy of a society. The scale of values in a society will inevitably determine its educational aims and priorities. We in Ireland have our scale of values.

Each human being is created in God's image. He has a life to lead and a soul to be saved. Education is therefore concerned not only with live but with the purpose of life. And, since all men are equal in the sight of God, each is entitled to an equal chance of obtaining optimum personal fulfilment.

Aims.

The aims of primary education may, therefore, briefly be stated as follows:-

1. To enable the child to live a full life as a child.

2. To equip him to avail himself of further education so that he may go on to live a full and useful life as an adult in society.

In order that the first of these aims may be achieved, two relevant factors must be taken into account.

(a) All children are complex human beings with physical, emotional, intellectual and spiritual needs and potentialities.

(b) Because each child is an individual he deserves to be valued for himself and to be provided with the kind and variety of opportunities towards stimulation and fulfilment which will enable him to develop his natural powers at his own rate to his fullest capacity.

A curriculum which is designed to achieve this aim must, there, endeavour to cater for the full and harmonious development of each child and must at the same time be sufficiently flexible to meet the needs of children of widely varying natural endowment and cultural background. The full development of the child cannot take place in isolation. If he is to know and value himself and form objective standards of judgment and behaviour, he must learn through experience to live and co-operate with other children and with adults and gradually to become familiar with the complex and evolutionary nature of the society of which is a part.

At page 15 dealing with "The Changing Role of the Primary School", the Curriculum stated:

Since 1951 Infant Teachers have based their work on the principles that individual differences should be recognised and catered for. Every child should be helped and encouraged to do his best, but no child should be forced beyond his capabilities.

Apart from the conventional subjects generally associated with school-work, the Curriculum has three long and important sections dealing with (1) Social and Environmental Studies, (2) Music and (3) Physical Education.

Social and Environmental Studies are stated to be primarily concerned with human activity, with the child's physical surroundings, and the natural phenomena with which he is familiar.

The Child has a natural urge to explore and investigate his own environment and thus it is good educational practice to direct and channel his curiosity so as to enable him to differentiate his experiences, to organise his knowledge and to form a satisfactory concept of his environment. . . . A primary aim of the curriculum will be to stimulate and foster in the child an interest in the world around him . . . The essential basis for much of the knowledge gained must be child's own observation, and therefore, a wide range of opportunities is provided for activity, exploration and discovery. This will lead to a sharpening of his powers of accurate perception, thinking and recording . . .

In relation to the place of music in the Curriculum it is stated:

From earliest times music has had an important place in the education and civilisation of man. No other artistic activity can combine the same physical and mental pleasure that springs from active participation in music-making, can simultaneously engage the powers of so many individuals, can so fully create a sense of unity and disciplined co-operation. Music should, therefore, be a pleasant and living element of school life; it should be a vital means of self-expression, a preparation for social life and a basis for future musical appreciation and creation . . . Songs should be mainly joyous and rhythmic in the Junior classes . . .

The Aims and Approach of Physical Education are --

"to promote the organic well-being of the child, to develop a suitable range of motor skills, to help him to adapt himself to his immediate environment and to cultivate desirable social attitudes. It also makes a valuable contribution towards the aesthetic, emotional and moral development of the child. Physical Education, then, should have an important place in the balanced school curriculum. To deny a pupil the opportunity of expressing himself in movement and general physical activity is to neglect an essential aspect of the growth of his personality and character . . . "The best preparation for being a happy and useful man or woman is to live fully as a child". (Plowden Report) . . . The modern approach allows each child to develop, working at his own particular rate, according to his own ability and aptitude.

(6) Curriculum Guidelines for Schools for Pupils with Moderate Mental Handicap

Following upon the recommendations made by the Commission of Inquiry on Mental Handicap in the 1965 Report already referred to, special schools were provided for the moderately mentally handicapped in the IQ range 35-50, and the progress made in relation to the category was the subject of special commendation in the Blue Report published in 1983.

A further important step was taken for the welfare of the group of children with the publication in 1987 of comprehensive Curriculum Guidelines for such schools, provided by the Department of Education, and bearing the title, "Towards Independence". The guidelines had been formulated and discussed at seminars for some years prior to that date.

The book is not a curriculum in the strict sense, but is intended to provide "points of departure for developing teaching strategies and items of content to meet the needs of individuals or groups of children in the school". The content of the work is necessarily on a completely different plane to the content of the ordinary Curriculum for Primary Schools already referred to.

Different sections deal with the following topic --

Personal and Social Development: Mobility, in class-rooms, school, neighbourhood etc.

Dress, basic skills, care, purchase of clothing etc.

Food and Drink

Hygiene

Health and Safety.

Training to walk independently, or to use a wheel-chair. Locomotion, ie, ability to move from one place to another. Orientation -- Knowing where one is, where one wishes to go, and the route to be followed.

Function -- The purpose of one's going.

An objective is laid down for each section, eg, to get the pupil moving around the class-room independently and without supervision; how to play safely and avoid dangers, and so forth.

Under the heading, "Aims and Approaches", the Guidelines records the manner in which progress has been made in dealing with the problems of the intellectually disabled since the publication of the 1965 Report.

The Commission envisaged that children admitted to schools for moderately handicapped would generally be within the IQ range 35-50, but it is now common practice to admit some below 35. The Commission also though of special education for 7-16 years, but now some children are admitted to special schools at age 4, and the majority stay on to 18 (p 5).

Existing educational provision for the moderately handicapped is based on the principles that they have a right to education and that they can benefit from it. The notions that the moderately handicapped can learn at all and certainly that they can benefit from the kind of all learning experience offered by schools, are ones that did not gain widespread acceptance until relatively recently.

The first large-scale provision made for them tended to emphasise 'care' and 'training' and were generally provided by personnel who had skills in nursing rather than teaching. Gradually evidence emerged that the behaviour of the moderately handicapped could be changed in more significant ways than was implied in the terms 'care' and 'training' and this led to demands on their behalf for more comprehensive intervention implied in the term 'education'.

Since educational services began to be provided on a large scale for them, the experience of those living and working with the moderately handicapped, and numerous scientific studies, have demonstrated that they are capable of learning over a wide range of human behaviour . . .

As well as the beneficial effects they have on motor and physical development, programmes of physical education are said to improve the self-confidence and motivation of the moderately handicapped and have positive effects on their intellectual and social behaviour.

There is evidence both from research and from the experience of those who work with them, that the moderately handicapped can learn to care for themselves in the areas of feeding, dressing, personal hygiene, locomotion and personal safety. It has also been demonstrated that they can learn such important social behaviours as the ability to live, work, and indulge in leisure pursuits with others.

Stephens (1971) suggests that 'realistic academic aims for the moderately retarded have as their goals the acquisition of those skills usually realised by persons and function at the pre-operational level'. Generally, according to Stephens, the moderately retarded will not progress beyond the reading readiness stage . . . Where a marked deficit is apparent in another area, particularly in social skills, the development of this area would generally take priority over reading . . . There is a continum of skills and behaviours that all human beings can, to a greater or lesser degree, master. The task is to develop a teaching technology that will help the moderately handicapped to acquire them, each to the limit of his own ability. (Chapter 3).

It is stated that "the over-all aim of educating the moderately handicapped is to promote their physical, intellectual, emotional, social, moral and aesthetic development in the direction of independent or semi-independent living". A number of general principles are forumlated:

While there is still a lot to be learned about the moderately handicapped which would be relevant to their education, it would seem that the present state of knowledge would justify the following assumptions as being helpful for educational programming for them:

(1) Moderately handicapped children have the same basic human needs as other children.

(2) They go through the same stages of development and in the same order, but at a slower rate than normal children.

(3) The levels they can reach in the various areas of functioning is not yet known, and therefore should be left open-ended.

(4) They do not benefit to the same degree from the learning opportunities offered by the home and the environment generally and have to be taught behaviours that other children acquire incidentally or through maturation . . .

At Paragraph 53 it is recorded that "there is a growing conviction among teachers that growth and development will not take place among the moderately handicapped unless it is actively planned and fostered . . . Their development cannot be left to chance . . . It must be programmed for in a detailed and specific way. Once curriculum guidelines have been provided . . . the schools are still left with the task of working out their own curriculum to suit their conditions". The section of the Curriculum Guidelines dealing with 'Communication and Expressive Skills' gives a good example of the content of the teaching programme for the moderately retarded and of the methods currently in use to encourage the learning process in the child. Oral language and Movement are dealt with as follows:

Oral Language

All children, however limited their ability, have some capacity for communication and expression . . . For those children who are failing to achieve a minimum mastery in expressive language, suitable learning objectives in other aspects of communication can be specified. In their case, emphasis can be placed on the development of receptive language and non-verbal communication . . . Many moderately handicapped children develop a sense of rhythm at a very early age and appear to enjoy music . . . Physical education is an age and appear to enjoy music . . . For the moderately handicapped it is seen as a central area of the curriculum.

Movement

The ability to move and the necessity for movement are among the most fundamental human characteristics. Throughout life the human being makes sense of his environment through movement, making use of one, some or all of his five senses. It involves not solely the use of arms or legs but also involves all other parts of the body. Movement experience is vital to the physical, cognitive, and emotional development of the child. It provides a context within which the child can learn.

It is now almost universally recognised that even for children with severe physical handicaps it is important that they be moved and that they be given opportunities to explore their environment from differing perspectives . . . Thus, their own bodies becoming learning aids for the children, they learn to understand a concept through their bodies.

The over-all aims of the movement programme will include the following --

-- that the child will develop physically to the maximum of his potent1al

-- that he will relate to his body

-- that he will be confident of what he can do with his whole body and its parts

-- that he will develop an accurate body image, through physical contact with the ground, through building up an awareness of objects in the environment and through bodily contact with other children and with the teacher

-- that he will use movement to express himself non-verbally . . . that he will make appropriate movements to express joy, sorrow, anger, pity, and fear . . . that he will enjoy all the movement activities.

The Curriculum Guidelines then outline in minute detail the exercises that can be undertaken for all physical movements even of the most elementary kind.

(7) Education for a Changing World -- Green Paper: Ireland 1992

The manner in which the Irish educational system as a whole should develop for the future is considered in the Government Green Paper issued in 1992. An extract from the Foreword of the then Minister for Education, Mr Seamus Brennan, dated June 1992, reads as follows:

No education system can be frozen in time. If it is to continue to deliver quality, it must constantly adapt to changing educational needs and to changes in the world it serves. At key times there is a need to take a fundamental look at the education system, and redirect it to reflect new needs as they emerge. Such a moment is now.

Throughout the developed world at present . . . there is a widespread consensus on the need for a radical reappraisal of traditional approaches to education policies, to take account of the complexities of modern living and the extension of education to all, and for a longer period of life. Ireland cannot stand apart from these developments . . .

In the Introduction which follows, it is stated:

The circumstances in which the Irish education system must adapt to the decade ahead should include --

The need to develop students for life as well as for work, in a social and economic environment that is rapidly changing.

The need to ensure that the handicap of social and economic disadvantage be alleviated rather than aggravated by the educational system.

The need to respond to increasing levels of expectation from education.

At page 4 the topic of shortcomings in the way of Change is addressed:

When we look at the present Irish education system is in relation to these challenges, shortcomings immediately present themselves:

-- Many disadvantaged children fail to enjoy the full benefits of education.

-- A significant minority of children encounter basic literacy and numeracy problems, which handicap them in the education system and more importantly, for life.

At page 5 the question of Responding to Change is dealt with:

In the light of the emerging needs and the shortcomings of the present system in relation to them, the Green Paper reflects six key aims;

1. To establish greater equity in education -- particularly for those who are disadvantaged socially, economically, physically or mentally.

2. To broaden Irish education -- so as to equip students more effectively for life.

Aim 1. To establish greater equity in education . . .

Equality of Opportunity

The overall national strategy for education is: To provide the opportunity for all to develop their educational potential to the full.

It is proposed that this aim be adopted as a main priority in allocating resources in education.

Barriers to Equity

Problems in the way of achieving this goal include: . . . The special needs of children with disabilities.

Moving towards Equity

Giving clear priority to disadvantaged students.

A higher than proportionate allocation of resources would be targeted at the problems of disadvantaged students. For instance, any extra teaching resources that become available would as a priority be devoted to increasing staffing in schools in disadvantaged areas. These schools would continue to get priority in the allocation of special and other teachers and in resources for in-career training of teachers.

Identifying Problems Early

The focus of remedial action would continue to be on identifying students with learning problems as early as possible, then responding with remedial intervention and a highly flexible approach to the curriculum.

Catering for Children with Disabilities

As with social and economic disadvantage, it would be policy to devote a higher than proportionate share or resources to the special needs of children with disabilities.

Dealing with the problem of effectively involves a recognition that there is a wide variety of different needs, and that the needs of individual children will change from time to time. Consistent with this, the approach would be committed to having as many children as appropriate in ordinary schools, backed up by a range of facilities, including special schools, which children could draw on as necessary . . .

Aim 2(11): The Need to Broaden Irish Education -- so as to equip students more effectively for life.

There is a need for the education to develop in the student:

An ability to manage oneself and to make the most use of personal resources . . .

An ability to relate effectively to other people . . .

(12) The Ways to Broaden.

Developing "the Health-Promoting School"

There would be increased emphasis on educating students, from primary upwards, on matters relating to health and fitness in the broadest sense. This is relevant both to better school performance and to preparation for life. Specific elements that would be addressed include:

-- A physical education programme, beginning at the early stages of primary education, that would promote the physical well-being of students in a non-competitive way. This would be linked to education on hygiene and nutrition.

-- A systematic health-screening programme, linked to support and advice for families of young people in need.

The Green Paper refers at page 33 to the Constitution, Article42.1, "The inalienable right and duty of parents to provide according to their means, for the religious and moral, intellectual, physical and social education of their children" and continues, "An underlying educational aim is to assist or enable each individual to promote his or her development and personality and to achieve a sense of self-worth".

The subject of children with special educational needs is dealt with at some length. One extract reads as follows (p 60):

The main thrust of this section is concerned with a minority of these children with special needs who, because of mental handicap, impaired vision, impaired hearing, physical disability, emotional difficulties or other disability, require more intensive help . . . In recent times a strong movement has developed throughout Europe favouring integration into mainstream schools of as many as possible of these children . . . Increasingly, these children and their parents are reluctant to accept the separation from their peers which a special school system entails. A Resolution was adopted by the EC Council of Ministers of Education in May, 1990, under the Irish Presidency, that integration, should be acellerated in all appropriate cases.

It is noted that the level of special school provision in Ireland (at 1.2% of all enrolments) is low in comparison with other countries of the European Community.

The aims of the Primary Curriculum are outlined in the Green Paper and include the following:-

To enable students to:

-- communicate with clarity through speech, reading and writing in their first language

-- acquire an appreciation of the arts and participate in and enjoy creative activity.

-- acquire a knowledge of their bodies and a sense of responsibility for their own health and to develop their physical ability through creative activities and sport.

Under the heading 'Physical Education' it is stated:

A new momentum in Physical Education, linked to diet and hygiene, will be an important element in a programme to enhance the health and physical well-being of children. The emphasis will be on health-related fitness and the development of an interest in physical activity as an essential component of an active and healthy lifestyle. It will seek to involve parents and communities in promoting and developing the health and fitness of children. The approach will be based on: A daily period of 30 minutes devoted to these activities; a balanced physical education programme based on motor skills and aerobic fitness; the availability of specialist teachers of physical education to provide guidance to primary teachers; research re special needs of Irish children.

Finally, in dealing at page 129 with the role of schools in promoting health and well-being, it is stated that, "The personal and social development of students must be a central concern of the school".

(8) Vatican II -- Declaration on Christian Education.

(Gravissimum Educationis, 28 October, 1965).

The entitlement of all persons to education regardless of any incapacity from which they may suffer, was stressed as a principle of Christianity in the Vatican II Declaration on Christian Education issued in 1965. Some of the relevant passages read as follows:

The Sacred Synod hereby promulgates some fundamental principles concerning Christian education, especially in regard to schools.

All men of whatever race, condition or age, in virtue of their dignity as human persons, have an inalienable right to education . . . This education should be suitable to the particular destiny of the individuals, adapted to their ability, sex and national cultural traditions . . . True education is directed towards the formation of the human person in view of his final end and the good of that society to which he belongs and in the duties of which he will as an adult have to share.

The task of imparting education belongs primarily to the family but it requires the help of soceity as a whole . . . When the efforts of parents and other organizations are inadequate, it (civil society) should itself undertake the duty of education, with due consideration however for the wishes of the parents.

Among the various organs of education the school is of outstanding importance. It is the duty of the State to ensure that all its citizens have access to an adequate education and are prepared for the proper exercise of their civic rights and duties. The State itself, therefore, should safeguard the rights of the children to an adequate education in schools.

A later statement from the Holy See, published in 1981, welcomed the initiative of the United Nations in proclaiming that year "The International Year of Disabled Persons", and set out basic principles which applied in dealing with the disabled:

1. The first principle, which is one that must be stated clearly and firmly, is that the disabled person . . . whatever the severity of the disability . . . is a fully human subject with the corresponding innate, sacred and inviolable rights. This statement is based upon the firm recognition of the fact that a human person possesses a unique dignity and an independent value, from the moment of conception and in every stage of development, whatever his or her physical condition. This principle, which stems from the upright conscience of humanity, must be made the inviolable basis of legislation and society.

2. Since the person suffering from handicaps is a subject with full rights, he or she must be helped to take his or her place in society in all aspects and at all levels, as far as is compatible with his or her capabilities. The recognition of these rights and the duty of human solidarity are a commitment and a task to be carried out and they will create psychological, social, family, educational and legislative conditions and structures that will favour the proper acceptance and complex development of the disabled individual.

3. The quality of a society and a civilization are measured by the respect shown to the weakest of its members.

4. The fundamental approach to the problems connected with the sharing by the disabled in the life of society must be inspired by the principle of integration, normalization and personalization. The principle of integration opposes the tendence to isolate, to segregate and neglect the disabled, but it also goes further than an attitude of mere tolerance. It includes a commitment to make the disabled person a subject in the fullest sense, in accordance with his or her capacities, in the spheres of family life, the school, employment and more generally in the social, political and religious communities.

Normalization signifies and involves an effort to ensure the complete rehabilitation of the disabled person using all means and techniques now available and in cases where this proves impossible, the achievement of a living and working environment that resembles a normal one as much as possible.

Personalization in the various forms of treatment, as also in the educational and social means employed to eliminate handicaps, it is always the dignity, welfare and total development of the handicapped person in all his or her dimensions, and physical, moral and spiritual faculties, that must be primarily considered, protected and promoted. This principle also signifies and involves the elimination of collectivized and anonymous institutions to which the disabled are sometimes relegated.

The United Nations Declaration enumerates rights which have as their objective the most complete possible integration into society. Such rights have very wide repercussions on the whole of the services which exist at present or which must be developed, among which might be mentioned the organization of an adequate educational system, responsible professional training, counselling services and appropriate work.

(9) Universal Declaration of Human Rights

The Preamble to the Universal Declaration of Human Rights recites that "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and Article 1 asserts that "All human beings are born free and equal in dignity". The entitlement to education as a fundamental right is dealt with in Article 26 as follows:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education should be compulsory.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect of human rights and fundamental freedoms . . .

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

The Universal Declaration was followed by a subsequent United Nations Convention on the Rights of the Child, some of the relevant provisions of which read as follows:

Article 2 -- States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without any discrimination of any kind irrespective of the child's . . . disability . . . or other status.

Article 23 --

1. States Parties recognize that a mentally or (otherwise) disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child . . . of assistance for which application is made and which is appropriate to the child's conditions and to the circumstances of the parents . . . caring for the child.

3. This shall be provided free of charge, wherever possible . . . and shall be designed to ensure that the disabled child has access to and receives education, training, health care services . . . in a manner conducive to the child's achieving the fullest possible social integration and individual development . . .

States Parties shall promote in the spirit of international co-operation the exchange of appropriate information re treatment of disabled children, including methods of education . . .

Article 28.

States Parties recognize the right of the child to education and shall in particular:

(a) Make primary education compulsory and available free to all . . .

Article 29.

Education of the child shall be directed to:

(a) The development of the child's personality, talents, and mental and physical abilities to the fullest potential.

Finally, reference should be made to the General Assembly Resolution 3447 (XXX) of 9 December, 1975, which contains a "Declaration on the Rights of Disabled Persons" and called for national and international action to ensure its implementation. Some of its provisions read as follows:

Disabled persons --

3. Have the inherent right to respect for their human dignity . . . Whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost, the right to enjoy a decent life, as normal and as full as possible.

. . .

5. Are entitled to the measures designed to enable them to become as self-reliant as possible.

6. Have the right to education, medical treatment etc, which will enable them to develop their capabilities and skills to the maximum and will hasten the process of social intergration and reintegration.

The First Protocol to the European Convention on Human Rights, dated 4 November, 1950, declares in art 2 -- "No person shall be denied the right to education".

SECTION 4: THE LAW.

A number of previous decisions of the Courts in this jurisdiction and in the United States were referred to in the course of legal argument and must be considered at this stage.

In the case of Gladys Ryan v Attorney General, [[1965] IR 294](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ie/cases/IESC/1965/1.html),the provisions of Article 42 of Bunreacht na hEireann dealing with the subject of education were examined by the High Court and the Supreme Court.

Mrs Ryan resisted the decision of Dublin Corporation to introduce fluoride into the drinking water provided for the use of persons living in the Dublin City area, one of her grounds for objection being the manner in which it interfered with the right she claimed to provide as she thought fit for the health and welfare of her children. She claimed that this formed part of the process of education in respect of which the primary role of the parent is safeguarded by the provisions of Article 42 of the Constitution.

This contention was not accepted in the High Court or in the Supreme Court. It was held by Kenny J in the High Court that the word "education" in Article 42.1 is not used in its former wide sense which included "rearing and nurturing". He went on to hold that the education referred to in Article 42.1, having regard to the words of Section 2 of that Article ("Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State") must be of a scholastic nature. Accordingly, fluoridation did not interfere with rights given to family and parents by Article 42.

He said:

It seems to me that the terms of the Article show that the word "education" was not used in this wide sense in the Constitution. Sec 1 of the Article recognises the "right and duty of parents to provide according to their means for the religious and moral, intellectual, physical and social education of their children", but in Sec 2 it is provided that the parents are free to provide this education in their homes or in schools established or recognized by the state. The education referred to in Sec 1 must, therefore, be one that can be provided in schools and must, therefore, be one of a scholastic nature."

While upholding the decision of Mr Justice Kenny that the Plaintiff had failed to establish her cause of action, the Supreme Court adopted a definition of the word "education" as used in the Constitution which appears to be wider in scope than that referred to by the High Court Judge.

Chief Justice O Dalaigh, delivering the Judgment of the Court had this to say (at p 350 of the Report):

Mr MacBride contends that the provision of suitable food and drink for a child is physical education . . .

In the Court's view, this is nurture, not education. Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral. To teach a child to minimise the dangers of dental caries by adequate brushing of his teeth is physical education, for it induces him to use his own resources. To give him water of a nature calculated to minimise the danger of dental caries is in no way to educate him physically or otherwise, for it does not develop his resources. This ground of appeal also fails.

Article 42 of the Constitution again arose for consideration by the High Court and Supreme Court in Crowley v Ireland, the Minister for Education & Ors, [(1980]) IR 102, a claim for breach of constitutional rights based on failure to provide education in the local school during a closure brought about by a teacher's strike.

McMahon J, giving Judgment for the Plaintiff in the High Court, held that Article 42.3.4 of the Constitution, which directed the State expressly to provide for free primary education, conferred by implication on those for whose benefit the direction was made, a corresponding right to receive such education. He went on to hold that the children had been deprived of their constitutional rights and were entitled to damages.

On appeal, it was held by the Supreme Court:

1. That the provisions of Article 42.4 of the Constitution conferred on the Plaintiffs a right to receive free primary education.

2. That the relevant obligation of the State under that section was to "provide for" such education, and not to supply it.

3. That the absence of free primary education in an area for a considerable period of time furnishes prima facie evidence that the state is not performing its duty to provide for free primary education in that area.

4. That the total evidence established that the State had not failed to provide for free primary education for the benefit of the Plaintiffs.

Chief Justice O'Higgins said (at p 121):

Article 42.4 of the Constitution lays down that "the State shall provide for free primary education". These words impose an obligation on the State which is of general application to all citizens.

The case of Landers v Attorney General, (1975) 109 ILTR 1, concerned the professional singing career of a child of school-going age, and was decided by the present Chief Justice, then sitting as a Judge of the High Court. Article 42 of the Constitution again arose for consideration and the relevant part of the Judgment reads as follows:

Kenny J, in Ryan v Attorney General, [[1965] IR 294](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ie/cases/IESC/1965/1.html) to which I have already referred, at p 310 of theReport, defined education in Article 42 of the Constitution as being one that can be provided in schools and must therefore be one of a scholastic nature. This definition in his Judgment comes at the end of a careful and full analysis of the terms of the Article and of the meaning of the word "education", which I would, if it stands unaffected by a decision of the Supreme Court, find both an extremely persuasive and entirely acceptable authority. It was suggested to me on behalf of the Plaintiff that the references at p 350 in the Report in the Judgment of the former Chief Justice O Dalaigh to teaching and training of a child so as to make the best possible use of his potential talents was in some way to be taken as departing from or partly overruling the definition of Mr Justice Kenny. I do not construe this part of the Judgment of the Supreme Court in Ryan v The Attorney General in that way, nor do I find it in any way inconsistent with the express definition contained in the Judgment of Mr Justice Kenny. I therefore conclude that the proper definition of education, as provided for in Article 42 of the Constitution does not, whatever else it includes, include the public singing career of a child between the age of 7 and 10 years."

The obligation of the state to provide for the education of the mentally and physically disabled has not been considered previously by the Courts in this jurisdiction but has been the subject of a number of cases brought in the United States in reliance on the constitutional guarantees derived from the Federal Constitution.

In Pennsylvania Association for Retarded Children v Commonwealth of Pennsylvania, 334 Supp 1257, decided in 1971, the Defendants submitted to Orders restraining them from applying the Pennsylvania Public School Code of 1949 so as to exclude any mentally retarded children from free public programme of education and training.

The report records the following findings of fact made in the case:

Paragraph 4: Expert testimony in this action indicates that all mentally retarded persons are capable of benefitting from a programme of education and training; that most are capable of achieving self-sufficiency and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person can benefit from it; and whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a programme of education and training.

Next in order of time came the decision in Mills v Board of Education of District of Columbia, 348 Supp 866, decided in 1972. A class action was brought on behalf of seven children of school age, and reliance was placed on what had been stated by the US Supreme Court in Brown v Board of Education, 347 US 483 (1954) at p 493:

Today, education is perhaps the most important function of state and local governments . . . It is the very foundation of good citizenship . . . a principal instrument in helping the child to adjust normally to his environment. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms . . .

It was held that the Defendants in Mills v Board of Education of Dist of Columbia 348 F Supp 866 had breached the Plaintiffs' constitutional rights by "denying the Plaintiffs and their class not just an equal publicly supported education, but all publicly supported education, while providing such education to others".

The Court said:

The Defendants are required by the Constitution of the United States, the District of Columbia Code and their own regulations, to provide a publicly supported education for these "exceptional" children . . . Their failure cannot be supported by the claim that there are insufficient funds. It was held by the Supreme Court in Goldberg v Kelly, 397 US 254, (1969) that constitutional rights must be afforded citizens despite the greater expense involved.

In Honig v Doe and Smith 484 US 305 decided by the US Supreme Court in 1988, an action was brought on behalf of two students who, although suffering from serious emotional disturbance, had been admitted to "free appropriate public education" as required under the US Education of the Handicapped Act, but had subsequently been excluded from school for violent and disruptive behaviour. The action was largely concerned with the procedure which had to be followed in such circumstances, there being no dispute as to their basic entitlement to such "free appropriate public education".

Justice Brennan, delivering the Judgment of the Court on the main issues said:

The Congress Act, Education of the handicapped Act 1975, sought to assure that all handicapped children have available to them . . . a free appropriate education which emphasises special education and related services designed to meet their unique needs and to assure that the rights of handicapped children and their parents or guardians are protected.

There is ample evidence that such legislative assurances were sorely needed -- 21 years after the Supreme Court in Brown v Board of Education, (1954) 347 US 483, declared education to be "perhaps the most important function of state and local governments". In 1975 more than half of all disabled children were still not receiving appropriate educational services. Exclusionary practices had, by 1975, brought challenges in 29 States by Court proceedings.

The Act requires all States seeking to qualify for Federal funds to develop policies assuring all disabled children "the right to free appropriate public education" and file with the Secretary of Education formal plans mapping out the programs, procedures and timetables under which they will effectuate their policies. Such plans must assure that "to the maximum extent appropriate" States will "mainstream" disabled children, ie, will educate them with children who are not disabled and segregate only when "the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily".

The primary vehicle for implementing these congressional goals is the "individualized educational programme" which the Act mandates for each disabled child . . . (It) sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance and describes the specially designed instruction and services that will enable the child to meet these objectives. The programme must be reviewed and where necessary revised, at least once a year. The Act repeatedly emphasised the need for parental participation in the development of the programme and any subsequent assessment of its effectiveness.

A number of differing views were expressed by the members of the Supreme Court who delivered Judgments in the case on the issue as to whether the case should be regarded as moot, and therefore not justiciable, but as the circumstances of that case were so different from those which have to be considered in the present case, I do not think it necessary to refer to what was said about this issue.

SECTION 5: CONCLUSIONS.

I can now state my conclusions on the various issues which arise for consideration in this case. I do so by replying to the following questions:-

1. Is the Applicant capable of being educated? The first contention of the Respondents in response to the claim brought on behalf of the Applicant is the assertion that, however deeply one may feel for his plight, and that of his mother who has to look after him, he must be regarded as ineducable.

Mr Justice Kenny, in Ryan v The Attorney General [[1965] IR 294](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ie/cases/IESC/1965/1.html) considered that the word "education" when used in Article 42 of the Constitution was not wide enough to include the concept of "rearing and nurturing". Because it was to be education of a kind which could be provided by parents in their homes, or alternatively in schools established or recognized by the State, he considered that it must be one that could be defined as being "of a scholastic nature".

If, in using that expression, he had in mind what has been traditionally referred to in this country as "book-learning", then one would have to agree that it is virtually certain that education in this narrow sense will never be of any benefit to the Plaintiff because of his mental and intellectual disabilities.

Mr Justice Kenny's real purpose, however, was to say that "education" was not wide enough in this context to include "rearing and nurturing" and Chief Justice O'Dalaigh in delivering the judgment of the Supreme Court in the same case, and in agreeing with that decision of Mr Justice Kenny, enlarged upon the definition of "education" as given in the judgment of the High Court. For the purposes of the present case I consider that the longer definition is more useful:

Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral. To teach a chid to minimise the dangers of dental caries by adequate brushing of his teeth is physical education, for it induces him to use his own resources.

What the Chief Justice there stated is in harmony with the dramatic advances which have been made since that judgment was delivered in seeking to alleviate the lot of the mentally handicapped through education, initially focussing on the mild and moderate cases of mental handicap, and in more recent times including all children, however serious their handicap, in the educational system.

The whole momentum, as evidenced in the Declarations emanating from the Vatican, from the United Nations, and in the Protocol to the European Convention on Human Rights, has been towards the provision for every individual of such education as will enable him or her -- in the words of the Chief Justice -- "to make the best possible use of his (or her) inherent and potential capacities, physical, mental and moral" -- however limited those capacities may be.

Counsel for the Respondents, in closing their case, urged me to hold that it still remained uncertain whether the efforts put in to the education of the severely and profoundly mentally handicapped were of any real and lasting benefit to these children, and whether any advances made were not lost again as soon as the stimulus of the teacher was withdrawn.

I am led to believe, however, by the evidence of Professor Hogg, of the Plaintiff's mother and of the other mothers of handicapped children who were witnesses in the case and other evidence in the case, that this contention by the Respondents is not well-founded. I am supported in this conclusion by the further evidence that for many years past it has been compulsory to provide educational facilities for this category of handicapped children in many countries, for example in the United States, in England, Scotland, Wales, and Denmark, and it seems inconceivable that this enormous commitment of resources would have been undertaken without convincing evidence that it was worth-while to do so.

Finally, I have regard to the fact that a huge amount of research was carried out by the Commission of Inquiry on Mental Handicap which reported in 1965; by the Working Party which compiled the Blue Report, dated January 1983, and by the Review Group on Mental Handicap Services, which reported in July, 1990.

While the 1965 Report proceeded on the basis that education should be provided for the mild and moderate cases of mental handicap, but stopped short of making a similar recommendation in relation to those suffering from severe or profound mental handicap, the latter category were the special concern of the Working Party which spent three years on its researches before completing its report in 1983. Its recommendations were unequivocal -- "All centres of severely and profoundly mentally handicapped children should have a education and training programme and specific times should be set aside for it . . ." "Teachers paid and supervised by the Department of Education should be made available to severely and profoundly handicapped children." The Review Group which reported in 1990 lent its support to the earlier findings.

In the light of all these decisions and findings on a world-wide basis I am unable to accept the contention that the Plaintiff or other children suffering from profound or severe mental handicap are to be regarded as "ineducable". Professor Hogg, one of the leading international authorities on this subject, has seen the Plaintiff and was impressed by the progress he has already made and was very positive in his evidence that further progress could be made, given the help of appropriate teaching facilities.

A Pilot Scheme was established to give effect to the recommendations in the Blue Report, and has involved the engagement of 19 teachers and the provision of education for some 200 pupils in the category of severe or profound mental handicap. It has never been suggested that this was a waste of resources, and the evidence suggested to me that it was largely the budgetary constraints of the last ten years which prevented a further expansion in that scheme taking place.

I find against the Defendants in relation to the first contention that the Plaintiff must be regarded as "ineducable".

2. Assuming the Applicant is "educable", should such education as can be provided for the Applicant at the present stage of his development, be regarded as "primary education", within the meaning of that phrase as used in Article 42 of the Constitution?

The relevant provisions of the 1937 Constitution read as follows:

Article 42.

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. Parents should be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3.2 The State shall . . . as guardian of the common good, require in view of actual conditions that the child receive a certain minimum education, moral, intellectual and social.

3.4 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.

A corresponding, but much shorter, provision was contained in the Constitution of the Irish Free State, as follows:

Article 10.

All citizens of the Irish Free State (Saorstate Eireann) have the right to free elementary education.

For a full consideration of the manner in which the words and phrases used in these constitutional provisions have been interpreted by the courts in decided case, see "Education in the Irish Law and Constitution" by Professor WN Osborough in the Irish Jurist, 1978, p 145.

Some dictionary definitions of the terms used in Article 42 read as follows:-

Education: Bringing up or training, as of a child; instruction; strengthening of the powers of body or mind; culture.

Educate: To bring up and instruct; to teach; to train.

Primary: First; original; of the first order; first-formed; chief; elementary; fundamental; belonging to the first stages of education, elementary.

(Chambers Twentieth Century Dictionary, 1981).

At first sight, the word "primary" as used in Article 42.1 (The State acknowledges that the primary and natural educator of the child is the Family . . .) and as used in Article 42.4 (The State shall provide for free primary education . . .) would appear to be synonymous, but the Irish text of the Constitution leads to a different conclusion. The adjective given as equivalent to 'primary' in Article 42.1 is "priomhdha", meaning 'principal' or 'foremost' while 'primary education' in Article 42.4 is rendered in the Irish text as 'bun-oideachas'.

Fr Dineen's Dictionary gives the following meanings for the Irish terms which arise for consideration:-

Bun-: (As prefix) Principal, basal, foot-.

Oideachas: Advice, instruction, teaching (rec in this sense)

Priomhdha: Primitive, Chief, Primary.

I conclude, having regard to what has gone before, that there is a constitutional obligation imposed on the State by the provisions of Article 42.4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be. Or, to borrow the language of the United Nations Convention and Resolution of the General Assembly -- "such education as will be conducive to the child's achieving the fullest possible social intergration and individual development; such education as will enable the child to develop his or her capabilities and skills to the maximum and will hasten the process of social integration and reintegration".

This process will work differently for each child, according to the child's own natural gifts, or lack thereof. In the case of the child who is deaf, dumb, blind, or otherwise physically or mentally handicapped, a completely different programme of education has to be adopted and a completely different rate of progress has to be taken for granted, than would be regarded as appropriate for a child suffering from no such handicap.

The State has hitherto responded generously to its obligations in relation to virtually all of these categories of handicapped children, as has been recognised in the Reports already referred to, but has clearly lagged behind many other developed countries in what has been undertaken on behalf of the small but most seriously handicapped group of all -- the category to which the Plaintiff in the present proceedings belongs.

Admittedly, it is only in the last few decades that research into the problems of the severely and profoundly physically and mentally handicapped has led to positive findings that education in a formal setting, involving schools and teachers, educational equipment of many kinds, and integration as far as possible in the conventional school environment, can be of real benefit to children thus handicapped. But once that has been established -- and my conclusion is that it has been established on a world-wide basis for many years past, then it appears to me that it gives rise to a constitutional obligation on the part of the State to respond to such findings by providing for free primary education for this group of children in as full and positive a manner as it has done for all other children in the community.

It appears to me to be not unlike the position envisaged by the Supreme Court in giving judgment in Gladys Ryan v Attorney General, [[1965] IR 294](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ie/cases/IESC/1965/1.html) when the Court concurred in the finding of fact made by Mr Justice Kenny in the High Court, that it had not been demonstrated by the evidence adduced in the case that the introduction of minimal quantities of fluoride into the drinking water of the population presented any danger to health. The judgment of Chief Justice O'Dalaigh went on to say, however, that if further advances in scientific knowledge in the future should support a contrary conclusion, a claim of the same nature as that put forward by Mrs Ryan would not be foreclosed: [1965] IR p 343.

In relation to the present claim, had it been brought forward even as recently as 1965, when the Commission of inquiry on Mental Handicap was presenting its Report, a conclusion in line with the findings of that Commission might well have been reached, to the effect that education would do nothing to alleviate the plight of the more severely or profoundly mentally handicapped. Events have moved rapidly since that time, however, and on a world-wide scale, so that the weight of informed opinion has supported the contrary view for many years past.

Further in relation to the contention now made that such education as can be provided for this group of the mentally handicapped does not fall within the scope of "primary education" as that term is used in the Constitution, it appears to me that that argument is undermined by what has already taken place in relation to education for the mild and moderately handicapped.

In response to the recommendations made in the 1965 Report of the Commission of Inquiry on Mental Handicap, special schools were established which were integrated into, and recognised as part of the ordinary National School system.

A special curriculum had to be drawn up, very different in content from that applicable in other National Schools, and this was first made available and discussed at seminars in 1981. It is very largely concerned, not with what might be described as academic subjects of the conventional kind, but with personal and social development, under such headings as Mobility, Dress, Food and Drink, Hygiene, Health and Safety, Locomotion, Orientation, Function.

The ordinary National School Curriculum has always had a significant 'non-academic' content under the headings of Physical Education, Health and Fitness, Music and Singing, Social and Environmental Education and such-like. All that occurs in the special schools for the handicapped is that the emphasis of the educational process is laid on this limited group of subjects, to the exclusion of subjects which would make too great a demand on the intellectual powers of the mentally handicapped.

When one compares the Curriculum for Schools for the Severely and Profoundly Handicapped which is outlined in Professor Hogg's work on Profound Retardation and Multiple Impairment, with the Curriculum "Towards Independence", drawn up by the Department of Education for schools for pupils with moderate mental handicap, it appears to me that both are dealing with the same problem and differing only in degree -- the task of schools and teachers provided for the severely or profoundly mentally handicapped being that much more difficult than that which arises when seeking to educate pupils with mild or moderate mental handicap. The actual content of the curriculum put forward as appropriate for schools in each category is largely the same, and is directed towards the promotion of the child's physical, intellectual, emotional, social, moral and aesthetic development to the maximum extent that it is possible to do so having regard to the degree of handicap from which the child is suffering.

I believe that is has now come to be accepted that trained teachers and the school environment can make a major contribution to this process which cannot -- with the best will in the world -- be provided as effectively or as successfully by parents and family in the home. This seems to me to get over whatever difficulty might otherwise arise in reconciling the present claim with the view expressed by Mr Justice Kenny in Ryan v Attorney General [[1965] IR 294](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ie/cases/IESC/1965/1.html) that "education" as used in Article 42of the Constitution was intended to mean "education of a kind which could be provided by parents in their homes, or alternatively in schools established or recognized by the State", and therefore "of a scholastic nature".

I therefore come to the conclusion that the education to which the Plaintiff in the present case lays claim, in reliance on rights derived from the provisions of Article 42 of the Constitution can be correctly described as "primary education" within the meaning of that phrase as used in Article 42.3.4.

3. Does the present claim amount to a moot?

As already stated at the outset, the Respondents contend that all legitimate claims of the Applicant, whatever they may be, have now been met, by granting him a place in the Cope Foundation as and from the beginning of the school year in September, 1992 -- this being one of the schools established under the Pilot Scheme for the education of the severely and profoundly mentally handicapped. On this basis it is claimed that the Court is being asked to embark upon a moot and that there is ample authority for the proposition that it should refuse to do so.

This general principle is well-recognised. It was referred to most recently by Chief Justice Finlay in McDaid v Sheehy, [1991] ILRM 250, at p 256, as follows:

In Murphy v Roche, [1987] IR 106, at p 110, I, (with Henchy and Griffin JJ concurring) said

There can be no doubt that this Court has decided on a number of occasions that it must decline, either in constitutional issues or in other issues of law, to decide any question which is in the form of a moot, and the decision of which is not necessary for the determination of the rights of the parties before it . . .

The Chief Justice later went on to say:

These principles however, must, of course, be subject in any individual case to the overriding consideration of doing justice between the parties.

In the present case I am of opinion that the questions which arise for determination do not arise in the form of a moot, and I base this opinion on a number of different grounds. In the first place, the Applicant claims to have specific rights under the Constitution which are of great importance to him in his special circumstances, and his entitlement to such rights has been strenuously contested by the Respondents at all stages down to the present day. In the course of the present judgment I have found that, in my opinion, the Applicant has made out his case and that the Respondents have at all times been in error in contesting it.

I am of opinion that it is not sufficient for the Respondents to grant as a matter of grace and concession, educational benefits which the Applicant is entitled to claim as of right. Were this to foreclose any further action by the Applicant in pursuance of his claim, he would be left in a position where the benefits thus conferred could be withdrawn or varied at any time at the discretion of the Respondents, leaving the Applicant in the position of having to start afresh in seeking to establish his legal entitlement in the matter.

I think it is important for all parties to have a determination at this stage of their respective rights and duties. The Second Vatican Council expressed the principle rather pithily, albeit in a non-legal context --

The demands of justice must first of all be satisfied; that which is already due in justice is not to be offered as a gift of charity . . . (Apostolicam actuositatem, 8).

Secondly, I am far from convinced that, nothwithstanding the very noble and dedicated work which is being carried out by those engaged in the Pilot Scheme at the Cope Foundation, and elsewhere, it can be regarded as meeting the specific obligation imposed on the State by Article 42.4 of the Constitution to provide for free primary education in the case of the Applicant.

The evidence in the present case was sufficient to convince me that the provision of free primary education for children who are severely or profoundly handicapped mentally and/or physically, requires a much greater deployment of resources that was thought appropriate even as recently as 1983 when the Blue Report was completed.

To ask a single teacher to undertake the primary education of 12 severely or profoundly handicapped children, in my opinion, far exceeds the work-load deemed appropriate for a teacher in the ordinary primary school where the pupils do not suffer from mental or physical handicap. Mr O'Gorman, former President of the National Association for the Mentally Handicapped, gave evidence that the teacher-pupil ratio in the United Kingdom was two to five, and in Denmark he found that two qualified teachers and one assistant had responsibility for seven pupils.

Mr Buttimer, CEO of COPE, said that when the Pilot Scheme was implemented and 12 severely or profoundly handicapped children were accepted for education in the Cope Foundation, they found it necessary to divide the group in two, taking part of the group in the morning and part in the afternoon, with some being taken on a one-to-one basis. A single teacher had to undertake the work with the entire group. Dympna Hyland, a teacher with the Cope Foundation said 4 of the 12 children were being educated from 9.30 to 12 noon; two from 12 noon to 12.45 and six from 1.50 pm to 3.30 pm. She felt the children could keep going all day if all necessary facilities were provided. The basis on which the Applicant was ultimately offered a place in the Cope Foundation was in reliance on the appointment of one additional teacher to undertake responsibility for a further 12 pupils. This contrasts sharply with the practice in other countries where education for this category has been made compulsory. In Great Britain, according to Professor Hogg, the school day and the school week is the same for the severely and profoundly handicapped as for all other primary school children and he expressed his conviction that they were capable of benefitting from such an arrangement, with suitable rest periods and flexibility in tuition programmes. Mrs Powell's daughter, Aisling, was able to attend her school in Oxford for a five-day week from 9 am to 3 pm with no adverse effects.

The evidence given in the case also gives rise to a strong conviction that primary education for this category, if it is to meet their special needs, requires a new approach in respect of:-

(a) Age of Commencement: Early intervention and assessment being of vital importance if conditions of mental and physical handicap are not to become intractable.

(b) Duration of Primary Education: As this category will, in all probability, never proceed further, and are unlikely to proceed far up the ladder of primary education itself, the process should, ideally, continue as long as the ability for further development is discernible. Professor Hogg suggests that age 18 may not be unrealistic in this context.

(c) Continuity of Education: The lengthy holiday breaks which take place in the life of the ordinary primary school appear likely to cause serious loss of ground which may never be recovered, in the case of children with severe or profound handicap. Accordingly, to deal adequately with their needs appears to require that the teaching process should, so far as practicable, be continuous throughout the entire year.

These factors lead me to believe that the Respondents are misled in their belief that the arrangements already made to provide a place for the Applicant in the Cope Foundation are sufficient of themselves to satisfy any claim that may arise in his favour under the provisions of the Constitution to have free primary education provided for his benefit.

Thirdly, I am satisfied from the evidence in the case that the Respondents have failed for some years past to carry out a duty imposed on them by the Constitution to provide for free primary education for his benefit, and for this breach of his constitutional rights that they are liable in damages for any loss and damage thereby caused to the Applicant.

I think that a very modest claim has been put forward for recoupment of some of the expenses incurred in the effort to make good this default on the part of the Respondents. A total of £7,645.71 is claimed in respect of journeys to Budapest to obtain help and guidance from the Peto Institute; the hiring of a teacher to come to Cork from Hungary to continue the course of conductive education initiated in Budapest; various other courses of education in Montessori schools, and by private tuition, and expenses in connection therewith.

As I have decided that I should award this sum by way of damages in favour of the Applicant for breach of his constitutional rights this consequence also removes the present claim from the category of a moot were there no other grounds for doing so.

I therefore conclude by giving judgment in favour of the Applicant as follows --

1. I make an Order declaring that the Respondents, in failing to provide for free primary education for the Applicant and in discriminating against him as compared with other children, have deprived him of constitutional rights arising under Article 42 of the Constitution, with particular reference to Article 42.3.2 and Article 42.3.4 thereof. I do not find it necessary to deal with the further claims made inreliance on Articles 40 of the Constitution.

2. I award a sum of £7,645.71 by way of damages in favour of the Applicant.

In a case like the present one it should normally be sufficient to grant declaratory relief in the expectation that the institutions of the State would respond by taking whatever action was appropriate to vindicate the constitutional rights of the successful Applicant. I therefore propose to make no further Order at the present time, save in relation to the costs of the proceedings, but I reserve liberty to the Applicant to apply to the Court again in the future, should it become necessary to do so, for further relief by way of Mandamus, or otherwise as may come within the scope of the present proceedings. A general liberty to apply will also be given to all parties to the proceedings.

I conclude by paying tribute to the parties and their legal representatives for the extreme care, skill and thoroughness with which the case was prepared and researched on both sides. I regret that a long delay has elapsed between the conclusion of the hearing and the delivery of the judgment, (ten months in this case), but this is an inevitable consequence of a situation where the number of judges appointed to the High Court is not sufficient to enable the ordinary work of the Court to continue while judges who have to prepare reserved judgments are allowed time off to complete their work. I hope that this problem, which has now become a serious one, can be addressed, otherwise justice delayed will continue to be justice denied.

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