

DECISION

Appeal Number: 06-01912
Appeal By: Mrs E and Mr E
Against Decision Of: The London Borough of Barnet
Concerning: C
Hearing Date: 13 November 2006
Tribunal Panel: John Akers (Chair)
Derek Lucas
Jennifer Goodwin

Appeal

Mr & Mrs E appealed, pursuant to Section 326 of the Education Act 1996, against the contents of a Statement of Special Educational Needs dated 5 April 2006 ("the Statement") made by the London Borough of Barnet ("the LEA") for their son, C. They appealed against Part 2 (Description of Special Educational Needs), Part 3 (Description of Special Educational Provision) and Part 4 (Placement).

Attendance

Mr D I Silas (Solicitor with Messrs Douglas Silas Solicitors) represented Mr & Mrs E who both attended the hearing. Their witnesses were Ms B (Educational Psychologist) and Ms M (Educational Psychologist and Headteacher at F School).

The LEA were represented by Mr C Luck. Their witnesses were Ms W (Educational Psychologist) and Ms O (Headteacher at R Junior School).

Preliminary matters

- (a) Mr Luck made application for late written evidence to be admitted pursuant to Regulation 33 (2) of the Special Educational Needs and Tribunal Regulations 2001 (as amended) ("the Regulations"). We were told that the application related to a letter dated 15 September from J (Head of Therapies at Barnet NHS PCT). We were told by Mr Luck that he had forwarded the evidence to the Tribunal on 19 September 2006 and had sent a copy to Mr Silas. Unfortunately, Mr Silas had not received the evidence. He did not, however, contest its admission. We considered that the conditions set out in Regulation 33 (2) of the Regulations were in place and admitted the document.
- (b) Mr Silas made application for late written evidence to be admitted pursuant to Regulation 33 (2) of the Regulations. We were told that the evidence comprised two reports from Ms B (dated 13 September 2006), a report dated 4 October 2006 from Ms B, a report dated 20 September 2006 from Ms K (Paediatric Occupational Therapist) and a copy of C's IEP at F School for the Autumn term 2006. The application was not opposed by Mr Luck. We considered that the conditions set out in Regulation 33 (2) of the Regulations were in place and admitted the documents.

- (c) Mr Luck also made application for late written evidence to be admitted pursuant to Regulation 33 (3) of the Regulations. We were told that the evidence comprised written reports from Ms W and Ms O, following their visit to see C at F School on 30 October 2006. The reports had then gone before the LEA's "Complex Needs" panel on 3 November 2006 and had been sent to the Tribunal (with copy to Mr Silas) on 6 November 2006. Accordingly, the application did not comply with the conditions set out in Regulation 33 (2) of the Regulations. We considered the position with regard to Regulation 33 (3). We decided that the case was not wholly exceptional and that there was not a serious risk of prejudice to the interests of C in that both authors of the reports were in attendance and able to give oral evidence.

Facts

1. C is aged 9 years. He has a number of difficulties which are set out in detail in Part 2 of the Statement. These include:-
specific learning difficulties (affecting his acquisition of reading, spelling, writing and numeracy);
the cognitive deficit typical of a child with developmental dyslexia;
language and communication difficulties;
difficulties with fine and gross motor skills;
concentration and listening skills and
difficulties with social development and emotional needs.
2. At all times C has been educated outside the maintained sector. The Statement was made on 5 April 2006. The parents had made application (unsuccessfully) for Statutory Assessments in 2003 and 2004. The Statement was made following a further request for a Statutory Assessment on 9 February 2005. That request was, initially, again refused but, following an appeal to this Tribunal, the LEA agreed to carry out the Statutory Assessment in June 2005. In September 2005, C transferred to F School from H School. The transfer followed advice from the SENCO at H School, Dr L (Consultant Paediatrician) and Dr H (Chartered Clinical Psychologist). C remains at F School.
3. Prior to the hearing, Mr Silas had compiled and forwarded a working document setting out the parents' wishes with regard to the contents of Parts 2, 3 and 4 of the Statement. A copy of that document is annexed and marked "CE1". Following discussions between the parties, some agreements were reached. Mr Luck indicated that the LEA were prepared to agree:-
 - i) The deletion of the fifth bullet point to para 1 of Part 2 i.e. "He is in the fifth percentile for reading and fourth percentile for spelling".
 - ii) The eighth and ninth bullet points of para 1, Part 2 were agreed.
 - iii) The eleventh bullet point of para 1, Part 2 should read:- "C may have Dyscalculia. He is able to do basic addition and subtraction if he has the support of concrete materials"
 - iv) Para 3 to Objectives (Part 3) should read:- "Develop his fine and gross motor skills. Develop balance control and body awareness in order to advance his academic achievements and self-help skills. Develop his handwriting skills so that he writes in a clear and legible script. Make

appropriate use of alternative ways of expressing and recording his ideas.

4. Mr Silas objected to the format used in the preparation of the Statement with specific reference to the sections "To be provided by the School" and "To be provided by Barnet Local Authority". He submitted that it was for the LEA to make the provision set out in Part 3 of the Statement pursuant to Section 324 (5) of the Education Act 1996 and it was not possible for the LEA to delegate that responsibility. Mr Luck acknowledged the statutory responsibility of the LEA but believed that the headings were useful for both the School and LEA. He noted that Mr Silas had, himself, used the phrase "The School should also be able to provide the following" in the latter part of para 2 to Part 3 (Educational provision to meet needs and objects) of document "CE1".
5. As to C's language skills and the issue of speech and language therapy Mr Luck acknowledged that the parents had filed an expert's report from Ms D (Speech and Language Therapist). She had seen C on 16 August 2006. The contents of para 2, Part 2 of the Statement (setting out the position with regard to C's language skills and difficulties) and the contents of Part 3 (Educational provision to meet needs and objectives) para 2, language skills (setting out the provision required to address C's language difficulties) in document "CE1" were directly extracted from Ms D's report. Mr Luck confirmed that Ms J had not had access to Ms D's report when she wrote her letter dated 15 September 2006 (admitted by way of late written evidence). In that letter, Ms J made the following comments with regard to speech and language therapy:-

"SLT.

The independent SLT(C. Dehnhardt)..Document 25, does not recommend SLT.

Barnet SLT (R. Maharaj)...Document 26, draws these conclusions :

Age appropriate receptive language.

Mild difficulties with word finding skills and expressive grammar.

Recommendations : Classroom programme devised by SLT.

SLT review termly.

Advice and strategies to key staff".

Mr Luck confirmed that the contributions from C Dehnhardt and R Maharaj both dated from 2004 and that the LEA was not in a position to produce recent expert evidence to comment on the advice from Ms D and that, accordingly, he was not in a position to contest her expert views. He did, however, say that the provision could be delivered at R Junior School.

6. We were faced with a similar situation with regard to C's motor skills and occupational therapy. The report had been filed by Ms K (Paediatric Occupational Therapist) by way of late written evidence. The summary of C's motor skills difficulties set out in para 3 of Part 2 of document "CE1" and the provision needed to address his motor skills difficulties set out in para 3 of Part 3 (Educational provision to meet needs and objectives) of document "CE1" were directly extracted from that report. Mr Luck confirmed that Ms J had not had access to Ms D's report when she wrote her letter dated 15 September 2006 (admitted by way of late written evidence). In that letter, Ms J made the following comments with regard to occupational therapy:

OT

Barnet OT (N.Koopman).... Document 28.

“Slight” difficulties with body awareness skills.

Specific visual perceptual difficulties.

Self confidence / esteem at risk.

Recommendations : 1:1 adult support

Advice given for handwriting skills.

To engage in physical activity e.g. Swimming.

IPOP for physical activities.

Some specific activities to be done regularly.

Use of keyboard at school.

No further OT input.

Bearing in mind that the report had been filed by way of late written evidence, we invited Mr Luck to consider an application for adjournment. He indicated that he did not wish to make such an application. Mr Luck again stated that the LEA did not have any recent expert evidence to comment upon Ms K’s advice and he was not in a position to contradict it. He did, however, say that the provision could be delivered at R Junior School.

7. With regard to the issue of placement, the LEA’s view was that R Junior School was an appropriate placement. The following points were made in support of this view:-
- (a) R Junior School was a much respected, high performing mainstream school. Throughout his life, C had been placed by his parents in independent provision. At no stage had provision within a maintained, mainstream school been tried. Mr Luck said that the present placement by the parents at F School had, to a large extent, been prompted by the recommendation of a SENCO at C’s previous independent school, namely, H School. Mr Luck referred to the statutory framework for education of children within a mainstream setting. He acknowledged that F School could make appropriate provision for C’s Special Educational Needs but argued that it would not be an efficient use of public resources.
 - (b) We heard detailed oral evidence from Ms W. She agreed that C was highly distractible. Following her visit to F School on 30 October 2006, she had been able to assess C in three different schools. She confirmed that, at F school, C does seem very happy and she was certainly not arguing that F School could not meet his needs appropriately. It was her professional view that C’s educational needs could be met at R School with an enhanced level of support to 32 ½ hours. This would comprise 25 ½ LSA support, 2 hours from a specialist teacher and 5 hours lunchtime support. She indicated that C would take part in a specific literacy programme, namely, “Wave 3”. This would provide intervention three times per day in twelve minute segments. She said there had been an evaluation of “Wave 3” within Barnet. This had shown impressive average and individual gains. The “Wave 3” programme was a national programme, modified to meet local needs. It concentrated on phonological skills and was carried out in a group. In her view, it was an entirely appropriate programme for C. The programme would be delivered by a trained LSA. The “Wave 3” programme entailed extraction to a small area.

- (c) We also heard detailed oral evidence from Ms O. It was her view that R Junior School could make appropriate provision for C's Special Educational Needs in accordance with the wording of Part 3 of the Statement originally supplied by the LEA. She acknowledged that her SENCO was relatively new but she did have access to an SEN teacher who had experience of some 30 years (but no specific qualifications with regard to specific learning difficulties). There was one Teaching Assistant who has the OCR certificate of SpLD. She also said that they would be able to access the LEA's advisory service and to "purchase" specialist teachers. She indicated that her school would be able to make the provision set out C's current IEP (at F School) albeit provision would not be made by specialists. She had noted Ms B's comments that C would not have been able to "access the superb lesson" (seen by Ms B) at R School. She pointed out that C had not been present and if he had been in the class the class teacher would have appropriately differentiated the material.
8. In support of Mr & Mrs E's view, that the appropriate placement was at F School, the following points were made:-
- (a) The level of support at R Junior School would be insufficient. The environment available at F School was entirely different. Mr Silas submitted that the mainstream approach had been tried (albeit within the independent sector) and it had been unsuccessful despite the small classes available. The "Wave 3" approach now suggested by the LEA had insufficient empirical research. He also noted that the direct integrated approach at F School (where the therapists were very much integrated into the provision) would not be available at R School. C now needed a holistic environment with small classes, high staff to pupil ratios and integrated therapy provided by F School.
- (b) We received detailed evidence (both written and oral) from Ms B. She noted that C was still very emotionally fragile and suffered from poor self esteem. Even at F School, progress during the last year had been limited. She did, however, believe that the necessary building blocks had been put in place for progress to happen in the future. Distractibility was a difficulty for C even in a small class of 11 pupils. It would be very much more of a problem in a mainstream class of 24 pupils plus. She did not think too much reliance should be placed on the "Wave 3" approach without proper research. In her view, C could not access the lesson she saw at R. The pace was too fast and so he would become dependent on his LSA. Because of his memory difficulties, he would also have difficulty in dealing with the combination of the Teacher and LSA. It would be very difficult for him to produce written work. If a scribe were to be employed, he could become dependent. Given these difficulties "wrapped around" with his social and emotional difficulties, she believed that it was too much of a risk for there to be a placement at R Junior School. In her view, there would be great reliance on the LEA's advisory service with no guarantees as to how quickly that service could deliver provision. She considered the level of C's achievements showed that he was highly unusual and at the very severe end of the spectrum of children with specific learning difficulties. R Junior School had not had the necessary level of experience to make effective provision for him.

- (c) We also heard detailed evidence from Ms M. She told us that F School was a specialist school (not a special school). In general, the expectation was that pupils would be able to return to mainstream education within 2-3 years. In C's case, the period was likely to be more than this. She told us the full national curriculum would be delivered with staff to pupil ratio of 1:3½. There were integrated speech and language therapists and an occupational therapist on site with specialist teachers. She was confident that the provision described in Part 3 of document "CE1" was being delivered by her school and would continue to be delivered. She clarified that both speech and language therapy and occupational therapy was delivered to two children (in other words C was one of a pair).
9. We heard detailed evidence from both parties with regard to the issue of the respective costs. In summary, Mr Silas argued that the difference in cost did not amount to unreasonable public expenditure for the purposes of Section 9 of the Education Act 1996. Mr Luck was unable to accept the calculations made by Mr Silas and submitted that the additional costs of a placement at F School were unreasonable public expenditure. We have not set out, in full, the arguments made by the parties bearing in mind our conclusions as set out below.

Tribunal's conclusions with reasons

We carefully considered all the written evidence submitted to the Tribunal in advance and the representations and evidence made at the hearing. We also took account of the Code of Practice and the relevant sections of The Education Act 1996 and the Special Educational Needs and Disability Act 2001. Our conclusions are:-

- A. We approved the agreements reached between the parties.
- B. We do not think the headings employed by the LEA in the Statement (i.e. "to be provided by the School" and "to be provided by Barnet Local Authority") are helpful. The LEA's statutory duty under Section 324 (5) of the Education Act 1996 is clear and, in our view, the wording may confuse a reader as to the legal position. In our view, the parents will wish to know what provision is to be made rather than the specifics of how the provision is to be funded. If details of funding sources are included, there should be clarity that the overall responsibility for delivery of the provision rests with the LEA.
- C. With regard to speech and language therapy and occupational therapy, we accepted the expert advice from the respective experts, namely, Ms D and Ms K. The LEA were not able to provide any expert evidence to the contrary. We have incorporated the recommendations made by Ms D and Ms K in the wording of Parts 2 and 3 of the Statement.
- D. As to the remaining issues in dispute between the parties concerning Parts 2 and 3 of the Statement, the contents of our Order will be noted. To a large extent, we think that the terms of our Order will be self explanatory. However, we would say that:-

- i) we did not think that the evidence provided by Ms B purported the conclusion that C required a “wholly specialist environment”. We think that the phrase “holistic environment” is appropriate.
 - ii) we wish to stress that Part 3 of the Statement sets out our view of C’s current requirements. We would very much hope that, in due course, he will be able to return to mainstream education.
- E. In our view R Junior School is not in a position to make appropriate provision for C’s Special Educational Needs, at the present time. In this regard, we are bound to say that all the evidence presented to us suggested that R Junior School is an excellent school which would make its very best efforts to make appropriate provision for C. However, it seemed to us that Ms B was correct in noting that C is very emotionally fragile after very many years of failure. We accepted her evidence that C did not, at the present time, require a generalised peer group. Rather, he needed a peer group of children with similar difficulties. Further, it is true that Ms B did not see the delivery of a lesson at R Junior School when C was actually present. Nonetheless, we were persuaded by her evidence that he would become dependent on his LSA and would be disadvantaged by his memory difficulties and distractibility to the extent that he would not be able to access lessons at R Junior School.
- F. C’s various difficulties combine to constitute a complex set of difficulties which, from the evidence presented to us, are somewhat outside the level of experience at R Junior School. In consequence, we think that there would have been a considerable reliance on the LEA’s advisory team and we were not satisfied from the evidence presented to us that the necessary quick level of response would always be available.
- G. We were very impressed by the open and sensitive approach from Ms W. Nonetheless, in our judgement, the approach which she advocated does seem to us to constitute an unacceptable risk, at this stage. It may be that C would have benefited from the “Wave 3” programme (as locally amended) but, at this time, there do seem risks in placing reliance upon it. Further, even if successful, the programme would not overcome the issues to which we have referred above.

Order

- (a) Parts 2, 3 and 4 of the Statement are to be amended in accordance with the wording in document “CE2” attached.

Date: 20 November 2006

Signed:

Chair: J E Akers