

## DECISION

**Appeal No:** 06-02754  
**Appeal By:** Mr H and Mrs H  
**Against Decision of:** The London Borough of Hillingdon  
**Concerning:** M (born 5 July 1994)  
**Hearing Date:** 1 February 2007  
**Tribunal panel:** Tony Askham (Chair)  
Val McCartney  
John Sheppard

### Appeal

Mr and Mrs H appeal under Section 326 of the Education Act 1996 against the contents of a Statement of Special Educational Needs made by the London Borough of Hillingdon (LEA) for their son, M.

### Attendance

On behalf of the parents:-

Mr and Mrs H (Parents)  
Douglas Silas (Representative Solicitor)  
Mr F (Educational Psychologist)  
Mrs O (Speech and Language Therapist, R School)

On behalf of the LEA:-

Mr Andrew Sharland (Representative Counsel)  
Mr S (Educational Psychologist)  
Mrs D (Speech and Language Therapist)

### Preliminary matters

(a) At the commencement of the Hearing Mr Sharland applied on behalf of the LEA for Mrs Casey, an LEA Officer, to be a third witness under Rule 34. A previous application had been made to the President and had been refused. His ground was "equality of arms". Alternatively Mr Sharland made the application that Mrs Casey be allowed to be the LEA's second representative to act as his "client". Mr Silas opposed the applications. We dismissed the application for Mrs Casey to be an additional witness. We could see nothing from an evidential point of view that she would add to the case but we did grant her application to be a second representative and hence to remain within the Hearing and throughout it.

(b) We were met with a request for a considerable number of admissions of late evidence in cases where the evidence had been served on the opposite party and the Tribunal within the required period. We admitted the reports from the recent annual review at M's school. We also admitted evidence from the Educational Psychologist and evidence of the status of P

School and R School.

(c) We finally admitted evidence which had not previously been served which was a letter from the Department of Education of 30 January 2007 which dealt with the status of P School in respect of its capability to deal with children on the Autistic Spectrum.

(d) Finally, we received an application from Mr Sharland to compel the parents to amend their Notice of Appeal given the contents of the working document which the parties had presented to us which dealt with the ongoing negotiations between them as to Parts 2 and 3 of the Statement. Mr Sharland's submission was that the Tribunal could only deal with the matter in accordance with the original Notice of Appeal and the Statement of Case served with it. We rejected this application. This was an appeal against Parts 2, 3 and 4. Quite clearly during the course of any Tribunal case from its inception until its hearing the position about the drafting of Parts 2 and 3 was likely to vary. It was the Tribunal's policy not to suggest that a Notice of Appeal needed to be amended to reflect the ongoing drafting of Parts 2 and 3 between the parties. The issues were clear to both parties and there was no gain in having such a restrictive approach to our jurisdiction at the Hearing.

(e) At the close of the proceedings Mr Sharland asked to present his closing submissions by way of a written document. Mr Silas objected to this. We declined to accept the document on the basis that it was evident that the parents were not in a position to deal with the matter in the same way and thus it was potentially unfair on the parents.

## **Facts**

1. M has special educational needs acknowledged by all to be both severe and multiple, which relate to his speech and language, communication and social skills. He has severe Dyspraxia of speech and has been diagnosed as being on the Autistic Spectrum. He has a series of occupational therapy needs, which are educational needs in nature, and physiotherapy needs, which are the subject of this appeal.

2. He has been the subject of previous decisions of this Tribunal. On 14 June 2005 Mr and Mrs H had appealed to this Tribunal (differently constituted) also under Section 326 of the Education Act 1996 against the contents of a Statement of Special Educational Needs. At that time M was at V School, an independent day special school for pupils aged five to eleven with severe speech and language difficulties. The appeal related to his proposed transfer to secondary school in September 2005. At that stage the LEA was proposing that M attended P School and his parents were proposing R School. We refer in more detail to both schools in due course in this decision. That Tribunal made amendments to Part 3 of the Statement and dismissed the parents' appeal to name R School in Part 4.

3. As a result, M has been attending P School, but on 1 September 2006 Mr and Mrs H lodged an appeal to the Tribunal in respect of the Statement issued by the LEA on 15 August 2005 (that Statement being the result of the Tribunal Order to which we have referred). The appeal was lodged as the LEA had insisted that Mr and Mrs H had a right of appeal to us under Section 326 (1) c. The alternative (which was being threatened by Mr and Mrs H) was a judicial review of the Authority's decisions. Upon the parents submitting this appeal, the LEA applied to strike it out on the grounds that it was frivolous and vexatious since it only reiterated the previous grounds of appeal, namely that M needed a waking day curriculum. They argued that the issue had been fully explored by the Tribunal in 2005.

4. This Tribunal (differently constituted) dismissed that application on the basis that the passage of time and the existence of new evidence supported the right of the parents to have this matter decided again in detail by us, as it had been eighteen months since the case had

previously been decided.

5. As we have indicated, M attends P School in High Wycombe, Buckinghamshire. P School is a non-maintained school for pupils aged eleven to nineteen who have communication difficulties associated with hearing impairment or speech and language difficulties. Almost half of their pupils have associated Autistic Spectrum Disorder whilst a few have severe ASD. Nearly a third of the pupils stay in residence for varying periods from Monday to Friday. M attends as a day pupil only. The school became non-maintained in December 2001 when Camden LEA sold it to the newly established Rayners Special Educational Trust who assumed responsibility. P School was the subject of an OFSTED inspection in May 2005. That inspection described P School as being a “good school” providing “good value for money”. The quality of education was described as “good” as was teaching and learning for pupils and post-sixteen students. Teachers were described as being “less successful in teaching the few pupils with severe ASD”. A letter of 30 January 2007 from the Department of Education and Skills informed us that the Secretary of State had agreed a proposal from P School to increase its number of pupils from sixty to eighty, increase the age range from eleven to nineteen years and include Autistic Spectrum Disorder in its approved range of special educational needs.

6. Evidence that we heard from M’s parents supported by evidence in the bundle shows that when at home M is socially isolated. Efforts to enable him to attend out of school activities such as Cubs have proved unachievable.

7. Mr and Mrs H also say that M is expressing at home that there is something at school that he is unhappy about. It is unclear to them or to the school what this refers to. It is clear from their evidence that whatever techniques are being used at school, M cannot transfer and generalise his learning into the home environment or the local surroundings.

8. As is apparent from our earlier description, Mr and Mrs H have never been content that P School was the right placement for M. As a result they asked R School, to assess M again ( he previously having been assessed by them prior to the previous Tribunal case) and this assessment took place (without the knowledge of P School or the LEA) on 2, 3 and 4 October 2006.

9. The four day multi-disciplinary assessment showed that M settled into the school environment much more quickly than when he had previously been assessed and that he had accepted the support and guidance of the assessment teacher across the school setting, but without this he was unable to independently access the curriculum. The assessment showed that he was very reliant upon frequent, individual and explicit direction from the assessment teacher as he was primarily driven by sensory demands and internal motivations rather than being able to engage in a naturally independent manner. It was thus important that he had the opportunity to transfer and generalise his learning. In the assessment report it was said that it was important that he had access to a specialist, holistic waking curriculum in a residential setting where he could be taught individually and in small groups. The assessment suggested that he needed a specific focused programme that was consistently implemented in school and residential settings so that continuity was achieved. It was important also that learning goals be set in care, therapy and education environments and implemented by staff who collaborated regularly and used the same teaching styles and approaches across the day. M needed consistent boundaries and routines, with clear expectations, and time to adjust to new plans and added staff support at times of change. The school confirmed that M would benefit from the structured therapy and structured curriculum at the school and offered him a residential placement.

10. R school is a non-maintained mixed special school for pupils with speech, language and social communication disorders. Many pupils have additional areas of need, including

moderate learning difficulties, physical disability, hearing impairment, Autistic Spectrum Disorders or complex medical difficulties. It has one hundred and twenty nine pupils with Statements of Special Education Needs and nearly all take advantage of the school's age-appropriate boarding provision. It too has been the subject of a recent OFSTED inspection (June 2005). That inspection said that R school gave pupils "an outstanding education". Despite being described as providing such outstanding education the school was further praised for being aware of how good the school was and how many new ideas for further ways there were to improve. The inspection noted the onward improvement in standards in English, Science and ICT. Boarding provision was described as very effective and that care staff were fully involved in the pupils' school work. The quality of the boarding accommodation is described as outstanding. We heard evidence from Mrs O, the school's lead Speech and Language Therapist, supporting the details of the assessment and that R school was the appropriate placement for M. The LEA concede that R School would meet M's needs but maintain that a placement there would be over-provision and as such it would be inappropriate.

We heard evidence from Mr S, an Educational Psychologist employed by the LEA. Mr S had not worked with M previously but had visited P School on 8 and 14 December and carried out a cognitive assessment of M and a classroom observation. So far as the assessment, using BAS2, showed that his cognitive abilities were at the low and very low ranges, these results agreed broadly with results of previous cognitive assessments including those carried out on behalf of the parents. Importantly Mr S spent time identifying whether or not there was evidence that M had progressed appropriately in the relatively short period of time he had been at P School. Mr and Mrs H maintain there has been no improvement and indeed that in some areas there has been regression. Using school assessments Mr S was able to show that from assessments on 22 July 2005 at V School where M was still functioning at P scales (save for number and algebra) he was now functioning within level 1 in all areas. There thus appeared to be some evidence of academic progress.

11. The LEA also relied on the evidence that M no longer needed as much one to one support; the fact that evidence suggested that he initiated conversations at P School with adults and will speak to other pupils during class, but also during evening activities; that he is well integrated into his peer group and that the R school's Report shows "some improvements with his mechanical reading skills and his expressive skills had shown improvement since his previous R review". They also rely on the annual review of 2007 which indicated in the educational report and the speech and language report evidence of progress, for instance in retaining forty two phonic sounds over the summer holidays.

The LEA also pointed to the absence of observed negative behaviours as reported by P which they regarded as further evidence of progress.

12. Mr S also gave evidence as to the issue of whether or not M required a waking day curriculum. His evidence dealt with whether or not there was any academic research which supported the view that there was any justification for a waking day curriculum for children with ASD. He indicated that he could find no such supportive evidence.

13. We also heard evidence from F, an Independent Chartered Psychologist, who assessed M on behalf of his parents in May 2006. At the time of this assessment P School had just provided an Educational Report for annual review on 17 January 2005. That did not show the level of improvement which was subsequently recorded in the autumn of 2006. Mr F was therefore concerned that there might not have been the appropriate improvement whilst he has been at P School. He too described M's functioning at the level of moderate to severe mental retardation.

14. He supported the need for a waking day curriculum. The reason for this, Mr F

explained to us in his evidence, was that he could see from his observations of M at school that M was at the stage where he was seeking interaction with his peer group but he did not have the skills to properly interact, and as a result he was getting frustrated. This view was supported by the evidence of M's parents and written evidence in the papers. This resulted in him biting his fingers and expressing levels of frustration which his parents told us about in their evidence. With access to a twenty four hour waking day curriculum, M would get the opportunity to consistently practise the skills he learnt at school, for example with his peer group, but with proper adult support. This would enable his new learning to be consolidated and appropriate ways of responding to peer group situations could be monitored and procedures be implemented.

15. Clearly the relationship between P School and Mr and Mrs H is not a good one. As a result there is a lack of cooperation between the school and the home and this inevitably has an effect on any ability to try and ensure that progress made at P School is reflected outside of the classroom and in particular at home. The parents' evidence clearly showed that in reality M is isolated when at home. We heard evidence from Mr F that he was concerned that at P School in any event (there was a lack of a collaborative approach across all setting.) He gave examples of this to illustrate the point. This was rejected by the evidence of Mrs D who said that the school was the most collaborative environment that she had worked in within special schools.

16. We have written evidence of M's speech and language difficulties from Ms L, an independent Speech and Language Therapist. She concluded that M presented with severe speech and language disorder and social communication impairment associated with his diagnosis of an Autistic Spectrum Disorder. He presented with a short listening span, moderate to severely impaired receptive language skills and severely impaired expressive language development. He also showed a severe speech disorder affecting the intelligibility of his expression. She stated that Part 3 of the Statement outlined an intensive speech and language therapy programme which she agreed with. She concluded that he needed a minimum of twice weekly sessions of speech and language therapy from a qualified Therapist of at least thirty minutes per session, that he needed access to a communication skills group session led by a qualified Speech and Language Therapist on a weekly basis and a communication programme set up and integrated throughout his waking day. She also concluded that he needed a school environment where he could have access to verbal peers who provide appropriate role models for language and social disorders.

17. We also had in front of us a report from Ms N of 15 December 2006. Ms N is a Speech and Language Therapist at P School. We also heard evidence from Mrs D, the Senior Speech and Language Therapist at P School. The report confirmed that M has been seen by the Speech and Language Therapist on a weekly basis for a combination of individual therapy input twice a week, class based therapy input, social skills support, liaison with classroom staff, setting of a communication profile and setting of appropriate written communication targets for inclusion in his class based programme. It was reported that his understanding of language had developed well, as had his understanding of vocabulary concepts. It was also reported that M was using his language functionally across a variety of settings and had shown good progress in attention and listening skills and social communication skills.

18. One of the big issues arising out of the annual review was the evidence from P School that they considered the need for M to have close one to one assistance from a Learning Support Assistant to have diminished and they were gradually "weaning him off" reliance on an LSA. This position, which had not been communicated previously to Mr and Mrs H, and which was contrary to the provisions of the Statement, concerned Mr and Mrs H. The position is that P School consider that M has made such progress that his need for close one to one support has diminished and that he is considerably more self-reliant. As we have

already noted, the assessment of R was to the contrary. This might be explained by the fact that at R the school is set up for M's key stage (age group) and beyond on the basis that he has to change classroom between classes, whereas at P School he is educated in the same classroom for each academic lesson.

19. There remains a major dispute between the parties as to occupational therapy. We had no oral evidence of this, but we did have two written reports. The first was a report from Ms Z, a Paediatric Occupational Therapist at P School. This showed that in the twelve months to December 2006 M had had extensive individual occupational therapy treatment but he was currently receiving two hours of occupational therapy a week consisting of a regular one hour individual treatment; inclusion in a weekly fine motor/visual perception group in his class, inclusion in a weekly sensory motor/alertness group in his class; a home programme to address fine motor skills during the Summer holidays; liaison with and advice to classrooms and parents as appropriate on request. Ms Z set out objectives for the forthcoming year and proposed occupational therapy with a further block of one hour of individual occupational therapy treatment or individual occupational therapy classroom support for inclusion in a further weekly fine motor visual perception group, weekly sensory, motor and alertness group. She suggested a change to the Statement to provide for the further block of one hour individual occupational therapy treatment or individual occupational classroom support and a need to evidence the fact that M required ICT to support written recording and verbal communication.

20. The other report for us was a report of Ms A, an Independent Occupational Therapist who assessed M in March 2006. She advised also the need for weekly one hour individual sessions together with consultation and advice with regard to designing implementation of a sensory diet with the training of all those involved at school. She made other recommendations as to furniture, IT and handwriting.

21. Importantly, it was advised by Ms A that there was a need to encompass advice regarding sensory strategies in the home situation which will require regular home visits since the application of the advice is very different to the school's situation. She advised the situation would only be effective if there were close and constant links between home and school to allow for uniformity of approach. M would be slower to respond where there were variables.

22. Ms Z specifically commented upon this issue in her report, to which we have referred above. She said that the NHS waiting list to provide this service was lengthy, but the Head of P School had agreed that the Therapist could offer to use the time allowed for M's therapy sessions at school to do a one-off home visit to assess these strategies. However that home visit had not taken place.

23. The proposed amendments to Parts 2 and 3 of the Statement were primarily to take into account the advice which the parents had received from the various independent experts to whom we have referred. For the purposes of this Decision we will record that we have heard argument from both parties on the various amendments in Parts 2 and 3 and from the witnesses as appropriate.

24. The one other outstanding issue is the issue of whether or not physiotherapy is an educational need for M. We had before us a physiotherapy assessment of 21 January 2007. M had been referred to an Orthopaedic Surgeon to assess a possible curvature of the spine. Luckily his spine was straight but his parents were advised that due to the low tone M needed physiotherapy to maintain good posture and power. Ms Mane concluded that M's body symmetry could lead to long term back and hip problems particularly when his teenage growth spurt occurred and she maintained also that M was markedly weak in his hands which needed exercise to develop small muscles and improve his hand control. She recommended a series of physical exercises. On behalf of Mr and Mrs H it was maintained that clearly this

physiotherapy need was an educational need because without the work which was suggested M would increasingly find it difficult to sit properly at school, nor would he be able to improve his handwriting and other fine motor skills. On behalf of the LEA it is maintained that physiotherapy in this case is clearly a non-educational need.

### **Tribunal's conclusions with reasons**

We carefully considered the written evidence submitted to the Tribunal in advance and the evidence given to us 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. There are in reality in this case two crucial issues for us. First, has M been making the appropriate progress at P School and is P School meeting his needs? Secondly, does M have a need for a waking day/twenty four hour curriculum as maintained by his parents, R School, Ms L and Mr F?

B. If the Tribunal were satisfied on this second point, the LEA concedes that it would be right for us to name R School.

C. It is conceded on behalf of the parents that if we conclude that P School is meeting M's needs then a placement at R would amount to unreasonable public expenditure.

D. We started our determination of this decision by considering whether or not we were satisfied that M has made the appropriate progress at school. Whilst there is evidence of progress, we prefer the evidence of Mr F and in particular accept his view that M should be making more progress than that which he is exhibiting.

E. We have also carefully considered the evidence which is before us as to the need for a waking day curriculum. We can see the merits of the argument advanced for this and we believe the position has changed from the situation that our colleagues were faced with some eighteen months ago. It seems to us clear from Mr F's evidence and the evidence of his family that M is now at a stage where he is exhibiting the wish to begin to interact with his peers but needs assistance in how to do this and contexts in which to do so and it is essential that what he learns in the classroom setting is carried on throughout his waking day.

F. We are supported in this view by the clear evidence that whatever progress he is making at P School is not being demonstrated away from school and the lack of relationship between the school and Mr and Mrs H makes that position more difficult. There is in effect no opportunity for M to interact with children of his own age whilst he is at home because of the isolation to which we have referred in the facts. It is essential in our view that M attends a school where there is real interrelationship between the teaching staff and the care staff and we believe that this is apparent at R.

G. We have considered the inability of the LEA to provide the occupational therapy advice for Mr and Mrs H at home and the effect this is having on M. It seems to us that this supports the need for M to be in an environment where therapies can be delivered throughout the waking day.

H. We have carefully considered the evidence of Ms L, Ms A, Mr F and the assessment of R School itself. All of the evidence which supports the need for a waking day curriculum is

very cogent and we accept it. We do not accept the argument advanced by the LEA that occupational therapy, although accepted as an educational need, should be limited to the normal school day so far as it relates to M. It is that thinking that illustrates one of the reasons why we have decided that a waking day curriculum is required.

I. We have considered carefully the advice from R and from Mr F as to the need initially for M to have one to one LSA support to enable him to settle into the school and to function. We have concluded whatever the view adopted at P School that this must be correct and we will be ordering that one to one support.

J. Finally, we have considered the issue of physiotherapy. We find this a difficult issue to resolve. As a general rule we would not find that physiotherapy is an educational need, but the actual physiotherapy required here and the reasons for it link so closely with occupational therapy that it is difficult to reach a conclusion that physiotherapy is not an educational need. Given the decision that we have made as to placement, and to the other amendments to Parts 2 and 3 of the Statement, we anticipate that R will provide appropriate physiotherapy without us deciding as a matter of law and fact that physiotherapy is or is not an educational need in this case.

K. We have reached this conclusion also because the overwhelming evidence produced in fact by both sides is that M is primarily driven by sensory demands and internal motivations rather than being able to engage in a naturally independent manner. We can see the merits in seeking to overcome this difficulty by a waking day curriculum and can fully understand why without this approach the problem will not be overcome, because however well-intentioned it will never be possible for his parents to properly emulate what is taught to him in the classroom. Indeed we cannot order the parents carry out education at home.

L. We are mindful of the LEA's contention that moving M would cause a further change for him which would be unhelpful to his progress. Whilst we see the force of that argument given our view that P is not meeting M's needs and that he requires a waking day curriculum on balance we are satisfied that a move is in M's long term interests.

M. For all of these reasons we intend to name R School in Part 4 and to make the amendments to Parts 2 and 3 to reflect our decision that he requires a waking day curriculum.

## **Order**

That Parts 2 and 3 be amended in accordance with the statement attached and signed by the Chairman.

That Part 4 is amended to name R School.

Signed:

Chairman: Tony Askham