



# Tribunals Service

Special Educational Needs  
and Disability

## DECISION

**Appeal No:** 09-00299  
**Appeal By:** Mr and Mrs T  
**Against Decision of:** Hampshire County Council  
**Concerning:** H T (born 28 November 1997)  
**Hearing Date:** 30 June 2009  
**Tribunal Panel:** Mrs Jane Lorn (Tribunal Judge)  
Mr Peter Cates  
Mrs Sheila Higgins

### Appeal

Mr and Mrs T appealed under section 326 of the Education Act 1996 against the contents of their son H's statement of special educational needs issued by Hampshire County Council (the LA) on 13 January 2009,

### Attendance

Mr Silas represented Mr and Mrs T who attended the hearing. Their witness was Mr D U an educational psychologist. Ms Laxmi Patel attended to support Mr Silas.

Mr Cawthra represented the LA. Their witness was Mr J the head teacher at G School. Ms F attended as an observer.

### Preliminary matters

Mr Cawthra applied to the Tribunal for leave to produce a report from Mr H the head teacher of D H School. This report had become necessary because Mr H was unable to attend the hearing due to his attending his daughter's graduation ceremony. The application was not allowed because:

- i. The LA had known or should have known about Mr H's inability to attend as a witness when it submitted late evidence on 22 June 2009. Had the report been submitted then, Mr and Mrs T would have had the opportunity to satisfy themselves as to the matters raised in the report,
- ii. The Tribunal already had a great deal of evidence relating to the capacity of D H School.
- iii. To admit the report would have been unduly prejudicial to Mr and Mrs

T and contrary to the overriding objective set out in *Rule 2 of The Tribunal Procedure (First -tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008*.

## **Facts**

1. H lives at home with his mother and siblings in Petersfield, Hampshire, He stays with his father on a regular basis.
2. He has an autistic spectrum disorder (ASD) having been diagnosed as having Asperger's syndrome in 2003. As a result he has learning difficulties. It has been impossible to conduct an effective psychometric assessment of H's underlying cognitive ability. In some areas he functions as a child with moderate learning difficulties, yet some of his attainments are within the average range. He is a Year 6 pupil coming to the end of Key Stage 2 but his academic attainments are at the level of a pupil in Key Stage 1. In reading he has achieved Level 2C and his writing is at Level 1A. His Number skills are at Level 1A. He has very poor concentration unless engaged in something which interests him. He needs a high level of Individual support. However, when motivated he can perform very well. For example he is very interested in and knowledgeable about choral music and religious art and enthusiastically engages in discussions on these subjects. He can type and ride a bike; but he tends to wander around the class room and work alongside rather than with his peers. He dresses himself but cannot manage buttons. At his father's home he is able to adapt to a different home and younger siblings. He has good avoidance tactics at school and does not engage in activities that do not interest him. In his chosen areas he exhibits significantly greater ability than his National Curriculum Levels would suggest. He has recently begun to re-write and dramatise his favourite Oscar Wilde children's story.
3. During his primary school years H has attended S Primary School (SPS), which is a maintained mainstream primary school. He is supported in the school by a Teaching Assistant (TA) for 25 hours each week and has received some Individual tuition. He has settled well in the school and has begun to develop friendships amongst his peers. The curriculum has to be differentiated for him, particularly in areas involving abstract thought. He enjoys music and singing and is becoming an independent reader. He has worked on life skills and is able to go shopping and will travel on public transport when accompanied. He can send Emails and access the internet. At his Annual Review in June 2009 staff from SPS identified developing appropriate social interactions and greater independence as priorities for H. Ms J the SENco at SPS confirmed that for secondary education H would benefit from a special school placement,
4. In anticipation of his move to secondary education Ms T made comprehensive enquiries into all of the possible options. H wished to move to his local mainstream secondary school. However, Ms T and all those working with H concluded that he would not cope with the busy atmosphere of a large secondary school and he now requires more specialist educational provision. Ms T looked at maintained special schools for pupils with moderate learning difficulties including G School (GS). She concluded that such schools would not offer a curriculum which

sufficiently focused on learning difficulties arising from ASD rather than moderate learning difficulties. She also felt that a school primarily for pupils with moderate learning difficulties would not provide a genuine peer group for H. In her words she did not find any "Hs" in these schools. She made enquiries within the independent sector but none of the autism specific schools are sufficiently close to permit H to attend on a daily basis and she did not want him to board. The only school which she visited which she thought was suitable for H was D H School (DHS). DHS is a special school maintained by the LA in Basingstoke. Though It Is designated as being a school for pupils with moderate learning difficulties, in fact it has a significant number of pupils with ASD and over a number of years it has developed considerable expertise in meeting the needs of pupils with ASD. At DHS Ms T saw a number of pupils who presented in much the same way as H and she felt the school would be able to provide him with a programme specifically responding to his needs arising from ASD and also with a suitable peer group. At DHS she felt he would make progress and be happy. She asked the LA to name DHS as the school H should attend from September 2009. This request was supported by Ms J.

5. H was first issued with a statement by the LA In .June 2003. In anticipation of his move to secondary school he was issued with an amended statement on 13 January 2009. Part 4 provided that H should be educated in a special school for pupils of secondary school age with learning difficulties and G School was the school named.

6. On 9 February 2009 Mr and Ms T lodged their Notice of Appeal. They wished H's statement to recognise that his learning difficulties stem from his ASD and to provide for him to receive speech and language and occupational therapy, some Individual tuition and for DHS to be named in Part 4. The LA opposed the Appeal maintaining that as H is functioning as a child with moderate learning difficulties he would be appropriately placed at G, The LA maintained that to name DHS would be incompatible with efficient education of the other pupils at DHS and H; and would also result in the inefficient use of public funds. DHS is at a considerably greater distance from H's home and the additional transport costs amounted to £14,000 per annum. The LA maintained that DHS was full to capacity.

7. Prior to and at the hearing the parties agreed a number of amendments to Parts 2 and 3 of the statement .Those agreed amendments are set out in Appendix 1 which the parties invited us to order in any event. The remaining issues were:

- The correct description of H's cognitive potential
- The type of provision H requires.
- The peer group H requires.
- Whether H should have individual tuition from a specialist teacher for pupils with specific learning difficulties
- The speech and language therapy H should receive.
- The occupational therapy H should receive.
- The ability of G School to make the provision to be specified in Part 3.
- The relative costs of places at G School and D H

School.

- Whether H's attendance at DHS in September 2009 would be incompatible with the efficient education of the pupils in that school.

8. In any formal cognitive assessment it has proved impossible to secure H's co-operation. N J, an educational psychologist employed by the LA in January 2008 had described H as presenting with moderate learning difficulties. This conclusion was reached primarily by her having regard to the National Curriculum levels he was working at. She noted that he can achieve at a higher level when he sees a value or relevance to himself in what he is doing. She gave an example of how he would read chunks of the Guardian newspaper to avoid going to bed. She observed that his motor skills were generally age appropriate and that his social skills were becoming more developed. She reported that he enjoyed seeing other children out of school. She summarised him as being a cheerful, chatty boy who has social and communication difficulties as part of his ASD and who presents as having moderate learning difficulties. Ms M another educational psychologist employed by the LA reported in March 2009 that there had been no significant change in H's needs since Ms J report. She did not assess H.

9. Mr U, a Chartered Educational Psychologist, was commissioned by H's parents to assess H. He met with H on 25 May 2009. He could not conduct a complete formal cognitive assessment because H would not engage sufficiently with him. He observed H at school and reached the conclusion that H was dictating how he accessed activities and as a result had not made the progress that might have been hoped for during his primary education. Mr U had no doubt that the staff at SPS had gone to great lengths to accommodate H but he was not convinced that the strategies they had employed had been entirely appropriate in that H dictated what he would or would not do at school. Mr U observed that H had significant cognitive strengths and weaknesses. His memory, for example, is excellent. Mr U did not believe it was correct to reach a view as to H's learning potential on the basis of his National Curriculum Levels. He observed that when motivated H could perform at an age appropriate level and the major impediments to H accessing education are the features of his Asperger's Syndrome. He did not accept that H was correctly described as having moderate learning difficulties. At the hearing before us Mr U drew attention to the recent report of Ms L, a speech and language therapist who had assessed H's understanding of language as being within the average range. He suggested that with this evidence we could not conclude that H should be described as having moderate learning difficulties. Mr U believed that H's weak academic skills might reflect some specific difficulties with the acquisition of literacy and numeracy skills. He suggested it would be appropriate for H to receive some individual tuition from a teacher with additional training in specific learning difficulties as this would provide opportunities for a more accurate assessment of all of H's learning difficulties.

1Q. To enable H to fulfil his potential Mr U agreed that H's secondary education should be in a special school. Having regard to his failure to make significant progress whilst at SPS, Mr U believed that H now requires a placement in a school with a high level of expertise in teaching pupils with Asperger's Syndrome so that appropriate approaches are

used to develop his potential. He recommended that H's teachers should have additional qualifications. In meeting the needs of pupils with autism and strategies such as TEACCH and PAATHS should be integrated across the whole school. Mr U suggested that only a school with a significant number of students with ASD including Asperger's Syndrome would have the necessary expertise and culture to meet H's needs.

11. Mr Cawthra acknowledged that H does have an ASD, namely Asperger's Syndrome, but this alone did not account for his failure to make age appropriate progress. Mr Cawthra invited us to accept the description of H given by P G and to conclude that H's attainments in terms of National Curriculum Levels provided us with the best guide as to his cognitive potential. He suggested that these attainments were consistent with H having moderate learning difficulties and we should have regard to this evidence when considering the type of special educational provision he should receive in his secondary placement. Mr Cawthra invited us to accept that the correct description for the type of school H should attend was one for pupils with moderate learning difficulties.

12. In May 2009, at his parents' request, H was seen by JL an independent speech and language therapist she used the CELF-3 tests. H scored below average in all of tests administered except the test relating to the recall of sentences. He had poor concentration throughout the formal testing. From her observation and assessments of H, Ms L concluded that he presented with a good basic understanding of the grammatical rules of language as well as a grasp of the foundations of semantics. He had less understanding of higher level semantics or grammar. He exhibited social use of language consistent with his diagnosis of Asperger's Syndrome. She recommended that he should have a programme developed and delivered by a qualified speech and language therapist with individual therapy session for 30/45 minutes per week and also small group sessions to develop his understanding of social communication developed by the therapist but delivered by school staff. She also suggested that the therapist should provide training to all staff working with H for 60 minutes each term.

13. On 24 March 2009 H was assessed by H L a speech and language therapist from the local Primary Care Trust using the CELF-4. He scored within the low average range for understanding of spoken language. This represented progress from the previous assessment when he had scored below average. Ms L observed that H continued to present with moderate difficulties in some areas of understanding and use of language. She also noted that he found it difficult to articulate how he is feeling and the reasons behind his emotions and this impacts upon his social skills. She recommended that instructions for H be broken down into smaller chunks and reinforced visually where possible and that instructions should be repeated on a 1 to 1 basis where necessary. She also recommended social skills activities for H including participation in small groups.

14. At the same time he was seen by MB, an occupational therapist. She found that H had significant difficulties with gross motor skills; his fine motor skills were below average and he had significantly

impaired visual perceptual, sensory processing and modulation difficulties. She recommended that H have an occupational therapy programme devised by a therapist experienced in sensory Integration and in working with pupils with Asperger's Syndrome. The therapist should initially work with H for 2 hours and then weekly for 45 minutes with his programme being reviewed and modified each term with 45 minutes per term being allowed for this exercise. Both therapists recommended that H should be taught in a school where all teaching and support staff have regular training in working with children with Asperger's Syndrome.

15. Mr Cawthra drew our attention to the fact that prior to the Appeal no concerns had been expressed about H's motor skills or problems modulating sensory information. He accepted that H does require speech and language therapy but suggested this should be delivered as suggested across the curriculum by school staff and once a week he should participate in a social language and communication programme.

15. Mr J the headteacher at GS gave evidence that his school is a school for pupils with moderate learning difficulties. He has 97 pupils on the roll. Most of the pupils within the school have moderate learning difficulties but there is a broad spectrum of additional needs resulting from a range of difficulties including sensory impairment, ASD, and social and emotional difficulties. In Year 7 (the Year Group H would be joining) there are currently 23 pupils who are likely to be attending. There will be 11 pupils in one class and 12 in the other. This is a larger teaching group than was expected when the school was named in H's statement. At that time the teaching group were to be comprised of 9 to 10 pupils. The additional number will result in additional funding from the LA. The school does not comply with building recommendations in respect of square meterage per pupil. The deficit is at least 1.2 square metres per pupil. Approximately 10 to 15% of the children in the school have aspects of ASD, H will be taught in a group of 11 pupils. By September, 4 of the staff within the school will have PAATHS training and experience. This is a programme which provides approaches for autism for teachers in Hampshire and involves attending a 9 day course. The school will also have an ASD base providing low stimulation and opportunities for individual and small group work with autistic pupils. The school has a speech and language therapy assistant trained by the local Primary Care Trust. The school does not have an occupational therapist. The school was last assessed by Ofsted in May 2008 and was found to be outstanding with its pupils making outstanding progress both academically and in their personal developments. The school was then described by Ofsted as a school for pupils with moderate learning difficulties.

16. We were advised by Mr J that GS does not accept pupils at any particular cognitive level but rather looks at the levels at which the pupils are functioning and attaining. There are a small group of pupils at GS who are able to work at an average level but need the additional support his school is able to offer. All classes follow the national curriculum and work is differentiated for each pupil. H's work would be differentiated to meet his needs. The staff at GS have experience of working with pupils with ASD and the intention is to increase the provision for ASD pupils over the next 5 years. The staff have access to the LA's educational psychologist and specialist teachers if they need further support. The ASD pupils are included in their

class for most lessons but there are opportunities for withdrawal. Mr J was confident that GS would be able to make effective provision for pupils with ASD.

17. Mr and Mrs T did not doubt that GS was an excellent school but they did not think it was the school for H. They invited us to accept that H's learning difficulties are dictated by his ASD and that he needs to be taught in a school which makes specific provision for higher functioning children with ASD. Mrs T had visited GS and observed that none of the children appeared to present in the same way as H. It seemed like a gentle and excellent school providing for children with different needs to H. Mr U confirmed that having viewed GS he also felt that it was not a suitable school for H. He expressed his concern that H was possibly currently underachieving due to the lack of focused educational provision during his primary years. He believed it was vital for H that his secondary provision is tailored to his needs as a pupil with ASD which will include a peer group with similar difficulties, staff with a high level of experience of pupils with ASD (Asperger's Syndrome) and access to appropriate therapists and specialist staff.

18. DHS is designated as a school for pupils with learning difficulties but between 40 and 50 % of its pupils have ASD. Mrs T observed from her visits to the school that there are pupils like H within the school who are able to thrive academically and for whom there are high expectations. DHS has a specialist Asperger's Syndrome teaching group and offers a lot of literacy support with a significant number of pupils doing GCSEs. She was satisfied that DHS would offer H a peer group which GS would not. The most recent Ofsted of DHS recorded that pupils with ASD make outstanding progress.

19. The LA accepted that DHS could make suitable educational provision for H but opposed his placement there on the grounds of the additional cost of transport and the fact that DHS is already full to capacity. The evidence given at the hearing was that DHS already had 30 pupils who would be attending in Year 7 in September 2009. There are 8 outstanding appeals to this Tribunal in respect of the school and it is anticipated that the number in Year 7 could increase to 33 or 34. In the current Year 7 there are 34/35 pupils. The Governors of the school wish to keep the roll at or below 150 but in September 2009 it will be 155 /156. The square meterage for each pupil in the school is less than that recommended under Building Bulletin 77, although per student the square meterage is greater than that at GS. The LA submitted that the H's admission to DHS would have a direct and detrimental affect on the quality of teaching and learning for pupils already admitted to the school. The site cannot accommodate more pupils. DHS occupies a 1960s building and the accommodation is well short of that available in a modern special school. Specialist areas have been used in calculating the space available. The school has temporary classrooms and the funds are not in place for permanent replacements. There is specific pressure on toilet facilities and there are only 5 wcs for boys and 6 for girls .The recommended number would be 15/16. It is no longer possible for all students to take lunch together and whole school events are difficult. The circulation in the corridors has become increasingly difficult and Mr Cawthra stated that the quick evacuation of students is in danger of being compromised. Play areas are

crowded and staffing ratios are being put under pressure. There was no evidence of falling attainments. DHS does have therapists who work within the school. The additional cost of transporting H to DHS would be £73 per day as there are no pupils with whom he could share transport. This figure was challenged by Mr Silas who suggested that there were existing transport services which H could join.

20. In the course of the closing submissions the Tribunal Judge asked the parties whether a recent case considered by *Standlen J* in which Hampshire County Council was a party, was relevant. Mr Cawthra informed us that the case concerned DHS. We took the view that the guidance from this case should be available and we gave directions that Mr Cawthra should supply the Tribunal and Mr Silas with a copy of the judgement and both parties should have the opportunity to make written submissions not later than 6 July 2009. Mr Cawthra provided copies of the decision in the case of *Hampshire CCVR and SENDIST IO February 2009* to the Tribunal and Mr Silas. Mr Cawthra's only submissions were those made at the hearing and set out above. He chose not to make any written submissions.

21. At the hearing Mr Silas invited us to find that principal cause of H's special educational needs is his ASD (Asperger's Syndrome) and that he should receive educational provision which is specifically tailored to meet the needs of pupils with ASD (Asperger's Syndrome). Mr Silas invited us to accept that the assessments as to H's cognitive ability were unreliable but there was clear evidence that he is capable of functioning age appropriately in a number of areas and that it would be wrong to describe him as having moderate learning difficulties. Equally Mr Silas invited us to accept that it would not be appropriate to provide for H to be educated other than in a special school which has expertise and a history of making provision for pupils with the type of learning difficulties H experiences. He submitted that GS is a school for pupils with moderate learning difficulties and as such unsuitable for H. In contrast DHS is a school for pupils like H and would be able to make all of the provision he requires. Mr Silas invited us to accept that H does require the levels of therapy recommended by Ms L and Ms B. Mr Silas invited us to accept that the issue of resources was not material to our considerations because we should find that GS was not a school which could make the provision H requires.

22. Mr Silas made a written submission on 6 July 2009 on the guidance provided by *Hampshire CCVR and SENDIST 2009*. Mr Silas asked us to note that the LA had not brought the decision to our attention notwithstanding that it was directly on point. He submitted that the actions of the LA in this respect had not been appropriate. In both the case considered by *Standlen J* and H's case the LA accepted that DHS could make suitable provision but had submitted that it should not be named as full. However, the decision considered by *Standlen J* referred to a child who sought admission to the year above H. There are fewer students admitted for the year in which a place is sought for H. The number given to us was 30 for the year, which would amount to 3 classes of 10 pupils. In the *Hampshire CCVR and SENDIST 2009* there were 33 students in the year group and classes of 11. Mr Silas invited us to first look at the requirements of Paragraph 3(3) of Schedule 27 of the Education Act 1996, and only if we felt that H's attendance at DHS would be incompatible with the provision of efficient education for the children

with whom he would be educated should we then consider Sections 324 and Section 9 of the Education Act 1996. He submitted that the LA had not demonstrated the necessary level of incompatibility and the benefits to H of attending DHS far outweighed any disadvantage the LA sought to allege. In these circumstances Mr Silas submitted that as we had no other school to name which could make appropriate provision for H we must name DHS.

### **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 were:

A. The evidence available to us clearly established that H's has been diagnosed with Asperger's syndrome and his ASD is the principal cause of his special educational needs. His social communication skills are weak, he is only motivated when pursuing his own particular Interests and otherwise is easily distracted and cannot keep on task. He lacks empathy for others. These represent the major impediments to his accessing formal education. Part 2 of H's statement should record that his special educational needs stem from the effects of his having ASD (Asperger's Syndrome).

B. H's academic attainments are significantly delayed. We were not persuaded however that this delay could be attributed to, or was indicative of H having moderate general learning difficulties and low cognitive ability. H refuses to co-operate with cognitive assessments but his recent speech and language assessment undertaken by Ms L indicated that his understanding of language was progressing and was within the low average range. We accepted the evidence that when pursuing his own interests or when evading the wishes of others H can exhibit age appropriate skills. In certain circumstances H can exhibit literacy skills in excess of those demonstrated by children of his age e.g. reading the Guardian or dramatising short stories by Oscar Wilde. We accepted that H has a very uneven cognitive profile and that he presents as pupil with delayed literacy and numeracy skills but we did not accept that he would be correctly described as a pupil with moderate learning difficulties. This was a description suggested by the LA but was not a description supported by the evidence we received. Part 2 of H's statement should not record that he has general learning difficulties.

C. We were not persuaded that H has significant problems with gross motor skills. We agreed with Mr Cawthra that had this been a significant issue it would have been raised by the professionals who have worked with H over a number of years. It has not been. We were persuaded that as part of his ASD(Asperger's Syndrome) H is more likely than not to have difficulties with perceptual skills and modulating sensory information and this should be incorporated into Part 2 of his statement. We found Mr U's suggestion that H may have specific leaning difficulties of a dyslexic nature to be speculative and such speculation could not be appropriately

recorded in a H's Statement .However we would hope the weekly specialist teaching the parties have agreed will provide the opportunity to investigate further Mr U's concerns in this respect.

D. We were satisfied that the amendments to Parts 2 and 3 of the statement agreed between the parties and set out in Appendix 1 were supported by the evidence before us and we have ordered that the statement do follow that document and that it provide the starting point for any amendments we make.

E. Having accepted that H does have some perceptual and sensory modulation difficulties this should be reflected in an objective for H's special educational provision.

F. We agreed with the parties that H's special educational needs are such that he does require his secondary education to be provided in a special school. We agreed with Mr U and Mr and Mr T that having regard to the specific and complex nature of H's special educational needs, whilst he may have been happy at SPS during his primary years, H has not received educational provision tailored to his needs and this lack of specialist provision to date may have impeded his progress. We had no hesitation in concluding that H's secondary education must be highly focused upon his specific needs as a student with ASD. He requires a programme of education delivered by staff with a high level of expertise in meeting the needs of pupils with Aspergers Syndrome. He should be educated in a school where the staff have that expertise and where the needs of ASD students are accommodated in the classroom, specialist areas and common space and where there is a genuine peer group of other pupils with similar difficulties and able to provide more able role models. We were concerned that if educated in a school without these characteristics there would be a real risk that H would be failed by the process of formal education.

G. Difficulties with the use of language and social and communication skills are at the heart of H's learning difficulties. He has not received any significant input from a speech and language therapist to date. This is unfortunate. We were pleased to note the parties had agreed H should now participate in a social communication group at least once per week. This should be part of a communication programme which should be devised monitored and revised by a speech and language therapist working with school staff and delivered by the therapist to H for at least 30 minutes each week. In reaching this conclusion we were assisted by the evidence of Mr U and Ms L.

H. We accepted that H's difficulties with perceptual skills and sensory integration need to be incorporated into his individual education plan and for that purpose there will need to termly input to the programme from a qualified occupational therapist with experience in delivering sensory integration therapy. We were not persuaded that H should have direct therapy but he will need to be seen by the therapist termly to review the success of the programme they have devised. We have amended Part 3 to provide for 45 minutes per term of occupational therapy from a qualified therapist for the purpose of devising, reviewing and revising H's occupational therapy

programme and also an Initial meeting to establish the programme

I. Having concluded that H requires a programme of education devised by professionals with experience in delivering education to pupils with ASD (Asperger's Syndrome) In a setting where there is an established culture of making provision for pupils with ASD; and that he needs to be educated with a peer group of pupils with similar difficulties, we were not persuaded that GS could meet his needs. The recent Ofsted report unequivocally establishes that GS is an excellent school for pupils with moderate learning difficulties and has excellent leadership. We had no doubt that over the next few years Mr J will use his expertise to develop the provision for pupils with ASD within his school as the new facility develops. It will, however, take several years for GS to have the level of expertise in high functioning ASD that H requires and to build up a suitable peer group. H requires appropriate focused provision now, having not received specialist educational provision in the past.

J. The parties and we agreed that DHS would be able to meet all H's educational need .It is the only school we were asked to consider which can meet H's needs, and accordingly the Issue of resources was not relevant, The outstanding issue we had to consider was whether H's attendance at DHS would be

*"incompatible with the provision of efficient education for the children with whom he would be educated"*

Within the meaning of section 3(3) (b) of Schedule 27 of the Act.

K. In the recent case of *Hampshire County Council V R and the Special Educational Needs Tribunal 2009*, at Paragraph 56 *Standlen J* gave the following guidance on how the Tribunal should approach this issue.

*"56. In my judgement it should carry out the following steps. The first step is to reconsider paragraph 3(3)(b) of Schedule 27 to the Act In considering that, and in particular in considering whether J's attendance at D H School would be incompatible with the provision of efficient education for the children with whom he would be educated, they should consider not just the question which they appear to have considered, whether it would have an impact on the efficiency of the education of those children, but whether that Impact is so great that his attendance would be incompatible with the Efficiency of their education.*

In Paragraph 59 *Standlen J's* guidance is:

*"59. if they do not conclude that J's attendance would be incompatible with the provision of*

*efficient education for the children, that is the end of the matter and they then are under an obligation under paragraph 3 to direct the Council to specify D H School"*

In Paragraph 59 *Standlen J* indicates that if this first hurdle is not overcome the Tribunal must then exercise its general discretion which arises in this case under sections 324(4) and 9 of the Act, before dismissing an Appeal. His guidance on exercising that discretion was as follows:

"If, on the other hand, they find that his attendance would be incompatible with the provision of efficient education for the children with whom J would be educated, then they must go on to consider their discretion under section 324 of the Act.

Section 324(4) requires them to specify the name of any school or institution which they consider would be appropriate for J, and should be specified in the statement.

That, in my judgment, involves an exercise of discretion and it is one in which they are entitled, and indeed bound, to take into account and balance all relevant factors.

60. One of the matters that they will have to take into account in addressing their discretion under section 324(4) is what, if any, impact section 9 of the Act has? That exercise will involve their considering whether educating J in accordance with the wishes of his mother, that is to say at D H, would be compatible with the provision of efficient instruction and training.

61. In considering that question they must ask themselves not just whether it is compatible with the provision of efficient instruction to J, but whether it is compatible with the provision of efficient instruction generally, which, on the facts of this case, must include both J and the other children with whom he would be educated. If they conclude that it would be incompatible, then they are not obliged in considering their discretion under section 324(4) to give effect to the wishes of J's mother."

I. In the present case we were considering 2 schools both of which are oversubscribed, both of which will have rolls above those they have previously experienced, both of which are failing to comply with guidelines on class number and pupil space. Yet paradoxically the LA was arguing that H could be placed in one (GS) but not at the other (DHS). In all the evidence submitted to us the only distinction between the two in terms of their ability to take additional pupils seemed to be that the Governors at GS had taken a more flexible approach to the numbers the school should admit and GS is housed in more modern buildings. Year 7 at GS will in fact have classes which will quite possibly be larger than those at DHS and the total space available at GS will be less. The evidence before us was that Year 7 classes

at DHS will be smaller than they were in September 2008 although the total roll of the school will be higher. There was no evidence of failing standards in either school. We accepted that the common areas at DHS may be relatively less able to cope with an increased roll than those at GS. However, we found the evidence that educational standards or safety at DHS would be compromised by H's attendance vague and unconvincing. We were not persuaded by the evidence we received that H's attendance at DHS would be incompatible with the efficient education of the other children there. The school consistently secures outstanding outcomes for its pupils. We were not persuaded that the LA had satisfied the first test described by *Standlen J* above and set out in Paragraph 3(3) (b) of Schedule 27 of the Act. We were not persuaded that Mr and Mrs T's preference for DHS should be denied. Accordingly we have ordered Part 4 to be amended to name DHS and we hope steps will be taken without delay to put in place an induction programme for H.

## Order

That the statement of H T be amended:

1. To be in the terms and form agreed between the parties and set out in Appendix 1.
2. That all further amendments be to the statement amended as aforesaid;

1. In Part 2 include the following words:

"Perceptual and Sensory difficulties.

H has perceptual, sensory processing and modulation difficulties which impact upon his behavioural responses, attention and organisation all of which impact on his ability to learn and interact with others,"

- ii. in Part 3

- a. Under the heading **Objectives** include the following words.

"To develop H's ability to better use his perceptual skills and also to modulate sensory information"

- c. Under the heading **Educational Provision to meet needs and objectives.**

Insert the following words before Paragraph 1

"All of H's education should be delivered by staff with experience and/or training in working with Pupils with Asperger's Syndrome and where there is a culture of meeting the needs of such pupils .H should have a peer group of pupils with similar learning difficulties including more able pupils who can act as role models for him and with whom he can share social experiences.

d. Under the heading **Speech and Language Therapy Provision**

After the first sentence insert the following.

"The programme should be reviewed and revised by the speech and language therapist and for that purpose the speech and language therapist should work with H for at least 30 minutes per week individually or in small groups. The therapist should also provide training and guidance to all working with H."

e. Under the heading **Occupational Therapy Provision**

Insert the words:

"H will have a programme devised by a qualified occupational therapist to Address his perceptual and sensory modulation difficulties. The programme should be incorporated into H's individual education plan and delivered across the curriculum.

For the purpose of devising the programme the occupational therapist should meet with H and those working with him for 1 hour and thereafter each term the occupational therapist should meet with H and review and revise the programme. For this purpose the occupational therapist will need to meet with H and those working with him for 45 minutes each term."

iii. in Part 4.

Delete the exiting and insert:

"A special secondary school that can make provision for pupil with Asperger's Syndrome.

D H School. Basingstoke" Dated 21

July 2009

Signed:

Mrs Jane Lom

Tribunal Judge

