

DECISION

Appeal No: 06-03255
Appeal By: Mr V and Mrs V
Against Decision of: London Borough of Barnet
Concerning: A (born 8 February 2002)
Hearing Date: 28 February 2007 and the panel also met on 29 March 2007 to make the decision
Tribunal panel: Jennifer Buckle (Chair)
Jean Richardson
Michael Partington

Appeal

Mr & Mrs V appealed under section 326 of the Education Act 1996 against the contents of a statement of special educational needs made by London Borough of Barnet (LEA) for their son, A.

Attendance

Mr Douglas Silas, a solicitor, represented Mr and Mrs V, who both attended the hearing. Their witnesses were Mrs B, an independent educational psychologist, and Ms B, Head Teacher of the T School.

Mr Clive Rawlings, of Counsel, represented the LEA. Their witnesses were Mrs G, Senior LEA educational psychologist, and Mrs B, Head Teacher N School.

Mr Samuel attended as an observer.

Preliminary matters

(a) The LEA produced an amended statement which incorporated some amendments as a working document and Mr Silas also produced a working document. We decided to work from the LEA amended statement with the parental document as an aide memoire.

(b) Mr Rawlings asked the Tribunal to accept by way of late written evidence under Regulation 33 (2) 139 pages of further evidence including:

- (i) An educational psychologist report dated 8 February 2007 from Ms G, an LEA educational psychologist;
- (ii) Annual review papers;
- (iii) A speech and language therapy report dated 18 January 2007 from Ms G;
- (iii) Observation by Ms L at A;
- (iv) Information re N School including staff qualifications and prospectus

- (vi) Ofsted report of 2003 on N;
- (vii) An amended statement naming N School;
- (viii) A letter dated 8 February 2007 from Ms W, a paediatric occupational therapist.

Mr Silas did not have any objection to their admission. We accepted the documents as meeting the requirements of Regulation 33 (2).

(c) Mr Silas asked the Tribunal to accept by way of late written evidence under Regulation 33(2):

- (1) An educational psychology report from Mrs B dated 6/7 December 2006;
- (ii) Parental note of school visit to N School dated 10 January 2007;
- (iii) Report on observation of A provided by N School dated 16 January 2007;
- (iv) Annual review Report dated 18 January 2007;
- (v) School visit reports dated 31 January and 6 February 2007;
- (vi) Letter from Douglas Silas to Barnet LEA dated 13 February 2007;
- (vii) Secretary of State consent letter.

Mr Rawlings did not have any objection to their admission. We accepted that they satisfied the conditions set out in Regulation 33(2).

(d) Mr Rawlings also asked the Tribunal to accept a document setting out the P scores for N School for 2005 /2006 under Regulation 33(3) but we did not accept that the case was wholly exceptional and unless the evidence was admitted that there was a serious risk of prejudice to the interests of the child.

(e) At the hearing on 28 February 2007 the parent's representative, Mr Douglas Silas, was called away urgently for family reasons. In view of this an adjournment was offered by the Tribunal but Mr Silas said that Mr & Mrs V preferred to continue in his absence. The Chair checked this with Mr & Mrs V when the proceedings continued. Before Mr Silas left it was agreed that in lieu of closing speeches each representative would be able to file a written statement and that there would be an opportunity for each to see the draft which the other had prepared before sending them in to the Tribunal. Having received the written closing submissions the Tribunal panel then met on 29 March 2007 in order to make their decision.

Facts

1. A is aged 5 years and has been attending four sessions a week at the A Assessment Centre, the LEA's Early Years Centre on the O Special School site. He has also been attending three mornings a week at Y Nursery. He has been diagnosed as having an Autistic Spectrum Disorder and is thought at the moment to have moderate learning difficulties.
2. The LEA made a first statement for A on 11 September 2006 which named A Early Years Centre with O School from April 2007 with a

full time teaching assistant.

3. A had an early history of glue ear and has had two operations to insert grommets. In January 2006 he was assessed by Ms K, an independent speech and language therapist. In her report she said that there was evidence of A having situational awareness but no evidence of cuRity or exploratory action. His attention and concentration is self directed as are his listening skills. Ms K noted that some important work had been done on his pragmatic skills at his schools and that he was slowly beginning to use babbling and some meaningful words when he really wants something. It was not possible to say what A's level of comprehension was. She agreed with other reports from experts that A presented with a pervasive developmental disorder. She concluded that he would need specialist intensive speech and language therapy probably on a daily basis within a specialist setting from a therapist.
4. A report dated January 2006 from C. Ms W, an independent Senior Paediatric Occupational Therapist, said that A presented as a happy and calm little boy with a gentle nature. She said that he appeared to be developing his gross motor skills well and showed independent walking and running skills but was not able to complete ball games and sequences of movement. She thought that he had some sensory processing problems. She made various recommendations and thought that he would benefit most from accessing therapeutic advice on a flexible consultation basis depending on concerns at the time. A report of 29 November 2006 from Ms Q, an independent Senior Paediatric Occupational Therapist, updated this to say that A has good gross motor strength but immature visual motor skills with significantly impaired sensory processing skills that impact his attention and organisation as well as his safety awareness. She thought that A needed an occupational therapy programme developed by a therapist in conjunction with classroom staff. She also thought that he needed direct individual occupational therapy from an occupational therapist once a week for 45 minutes. In January 2007 A was assessed by Ms W, an NHS Paediatric Occupational Therapist who observed him both in the home and also at the A Centre. She thought that A would benefit from a "Sensory Diet" of activities incorporated into his daily routine to cater for A's specific sensory needs such as appropriate vestibular activities to meet his vestibular seeking behaviours. Ms W also recommended a daily structured routine to manage his low threshold for performance demands. A also needed a structured programme to help him sequence his functional daily living tasks and would also benefit from participating in simple fine motor tasks. She made supplemental recommendations on 8 February 2007 for the period after A starts at his new school. These included 3 observational session of 1 hour each, discussions with staff and a review meeting with staff. She pointed out that all pupils at N have access to the occupational therapist and that blocks of individual sessions are available where required and advice to parents. She said that there are weekly opportunities for the staff and therapist to meet to discuss a pupil if necessary.
5. A report dated 23 January 2006 from Ms E, a cognitive

Psychology-Neuropsychology consultant, said that in August 2004 she had started to work with A on a programme to individualise instruction and implement appropriate teaching tactics to maximise his learning potential. In her report she suggested that he would need full time one to one support in a small classroom with children with similar difficulties and recommended teaching with an emphasis on a range of structured play activities using some principles of Applied Behavioural Analysis (ABA).

6. In December 2005 Dr G & Dr R assessed A both at home and in the clinic. They noted that A's most striking behaviour was his lack of interest in people and lack of desire to communicate. They felt that his behaviour could not be explained by his intermittent hearing loss but that it was the desire to communicate and social reciprocity which was lacking. Dr R saw him again in June 2006 and recommended an early intervention programme of systematic instruction for 25 hours a week 12 months of the year.
7. At the time of his statutory assessment in early 2006 A was learning to use PECS and As were working on building his vocabulary to use and discriminate up to 10 pictures. At this stage he was still showing very little awareness or desire to acknowledge the other children in his class. Ms H, his class teacher, and Ms G, the Head Teacher, said that he was physically very able and can coordinate his movements round furniture and people. They recommended that he have a small peer group and high staff ratio in a well structured environment that uses TEACCH and PECS run by staff experienced with children with a diagnosis of Autistic Spectrum conditions with input from a speech and language therapist who would work in close conjunction with his family and school to create a programme designed to increase his language and communication skills.
8. Ms M, an LEA educational psychologist, said in her report of January 2006 that A would require a high level of adult intervention in a structured and supportive early years environment with access to teachers experienced in dealing sensitively with pupils with autism, language and communication difficulties and severe learning difficulties. She said that specialist intervention would be required to develop language and communication.
9. A report dated 24 October 2006 from Ms H, an independent speech and language therapist, recommended that A have a weekly session of 45 minutes direct intervention from a speech and language therapist and liaison with his Learning Support Assistant (LSA) with a further hour and a half on a termly basis to review and develop his programme. She also suggested that A needs a school placement where he has access to a total communication approach including PECS, visual timetables and Makaton signing.
10. A report of 18 January 2007 from Ms G, a speech and language therapist based at O School, reviewed the progress which A had been making. She said that his poor attention and cooperation meant that his receptive language could not be assessed but informally A demonstrated

understanding of a range of single words and phrases and he was also demonstrating increased comprehension by a reduction in echolalia. His expressive language had progressed well over recent months and he is producing a range of single words or phrases spontaneously. His social interaction is improving in that he will usually respond to clear instructions to look and make eye contact. He is also more responsive to the actions of others. His speech sounds remain immature. His attention and listening skills remain poor. His following of instructions is improved when he is required to look at the speaker. Ms G said that A had been receiving 4 to 6 individual therapy sessions of up to 30 minutes per term, plus discussion with and advice to staff and parents. Ms G went on to list new targets for A and recommended that he continue to receive the same level of help over the next academic year.

11. The LEA have four special schools, these being the K Unit at L School, the P Unit in C School, O School and N School. Whereas the LEA had named O School in Part 4 of A's statement they subsequently decided that N School would be more appropriate for A and issued an amended statement naming N School in Part 4. A's parents are of the opinion that none of these schools can meet A's special educational needs and that these needs can only be met at T School, an independent special school for children with a diagnosis of autism which integrates ABA into the school day.
12. A's statement includes a provision that he will have a one to one teaching assistant in his new placement. His current weekly programme is that he attends A Assessment Centre 4 afternoons a week. He attends Y Nursery two mornings a week with S, a one to one support assistant provided by his parents. On two mornings a week and one afternoon he has an educational –cognitive and independent skills based programme with elements of TEACCH and ABA delivered by S or an educational and cognitive neuro-psychologist, with private speech therapy on the remaining morning.
13. In December 2006 Ms B, an independent educational psychologist, carried out an assessment of A observing him in various settings. She was not fully convinced that A has severe cognitive delay in all areas although his standard scores showed that he is functioning approximately two years below his chronological age. She said that in order to ensure his emerging skills come to fruition he required one to one adult intervention to circumvent his more autistic behaviours. She also observed that one of the most important objectives is for A to tolerate adult interventions and demands as otherwise he would not learn and that it would necessitate working through his passivity and possible temper tantrums. She concluded that the only effective way he could be taught was by an adult trained in ABA techniques or equivalent. She also said that it would not be conducive to developing language for him to be in a peer group who are primarily non-verbal as he requires normal speech models around him. Ms B went on to visit both N and T Schools and to give her observations on both.
14. Ms G carried out an assessment of A in February 2007. She

recommended educational objectives and that A be taught through an approach which adheres to behavioural principles such as task analysis and reinforcement. She noted that the ABA approach had been criticised in a review of intensive behavioural interventions as encountering problems with generalisation. Programmes that avoid these difficulties capitalise on naturally occurring teaching opportunities and incorporate a degree of flexibility in responding to the child's behaviour. Ms G thought that in A's case, given his social passivity, he will benefit from a flexible approach which takes his particular needs into account with an individualised programme with a high level of adult support and a combination of an approach incorporating elements of intensive interaction which have proven effectiveness for socially passive or hard to reach children. She also recommended the continuation of a PECS programme, the TEACCH approach, a structured behavioural approach with targets broken down into tiny steps with reinforcers used to elicit interest and motivation, an environment with appropriate models of social language and behaviour, a visually supported curriculum and an educational environment which places language high on its list of priorities, key staff who are experienced in working with children with ASD and good home to school liaison.

15. N is an LEA maintained special school for pupils with complex learning difficulties functioning in the moderate learning difficulties range of ability. The school currently has 70 pupils on roll aged 3 to 11 years. At least 50% of pupils have a diagnosis of ASD. The Early Years class currently has 8 pupils with one teacher, one NNEB and two full time classroom assistants. If A joins the school he will bring his own one to one support. A would be likely to spend approximately 4 terms in the Early Years class. Following the restructuring of the school last year the remaining year groups are divided into two classes, one a specialist ASD class and the other a non-specialist class. Mrs B said that whilst she would prefer A to join the Early Years Class the possibility of A going straight into the ASD class could be explored if this was the parental preference. All their teaching throughout the school uses a very small step approach applying a whole range of strategies including a structured approach to behaviour management programmes whilst building up life independence and skills.
16. N has three speech and language therapists employed for the equivalent of five days each week. They undertake one to one work, classroom work and group work. An occupational therapist is in the school for one day each week. Three physiotherapists work in the school one day each week and a physiotherapy assistant works in the school every day from 10.00 to 14.00 to carry out daily therapy. The school also has a full time PECS Co-ordinator, a part-time music therapist, full time drama teacher, swimming teacher, sports coach and counsellor.
17. Mrs B said that the teacher of her school's Early Years class had a huge amount of experience and had been working on autism in early years for the last 12 years. Mrs B went through the staff qualifications and experience for us together with the course and programmes which they use for behaviour management and TEACCH and the training staff receive

and the fact that all staff receive this training with teachers receiving a longer training than non teaching staff. She described the teaching assistants as hugely experienced and said that she would allocate a very experienced existing teaching assistant to A and recruit another teaching assistant to be used elsewhere. She did stress that she preferred to get a child used to working with several adults.

18. The T School has been in existence for 10 years and takes children from 3 to 12 but are eventually hoping to go up to age 19. They use a multi-sensory teaching method. The class leaders manage a team of programme specialists who participate in the planning and teaching of the curriculum and individual programmes. There are 10 classes which are paired and share a programme consultant under the direction of a senior behavioural analyst. One of the programme consultants is a teacher and the others have masters degrees in behavioural analysis. The speech and language therapist and occupational therapist provide additional support to classes. Ms B described her staff as multi-disciplinary teams working together. Each individual class has a 1:1 staff ratio with a class leader / programme specialist with a background in home based ABA or specially trained by T School. The maximum class size is 6. Each pair of classes is supported by a team of teacher, speech and language therapist, occupational therapist and supervisor. The teacher works 40% of the time with each class and the remainder of their time is spent on working with an ABA consultant on the curriculum.
19. Fees at T are £53,403 for primary pupils. Transport costs for each school are £3,328 plus £865 for escort for N School and £3,952 and £967 for T.

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. Numerous amendments were agreed between the parties during the course of the hearing. An amended Part 2 was agreed. The points left for decision by the Tribunal in Part 3 were as to whether A required 45 minutes of one to one therapy each week from a speech and language therapist and those amendments requested by Mr & Mrs V in Part 3 which were ABA specific. The school to be named in Part 4 was also for us to decide.

B. Everyone agreed that A needs occupational therapy for his fine motor skills. It is a sensory diet that appeared to be his main need as he does not have proprioception difficulties which require the suspended equipment which was mentioned in a report and there was no evidence before us that he required this. Ms W summed up A's difficulties well in her report and recommended a "Sensory Diet" and we agree with her recommendations. A sensory diet should be delivered throughout the school day by a teaching

assistant who has been trained to deliver the programme by the occupational therapist. We did not agree to the inclusion of the parents requested paragraph beginning “the focus and purpose should be agreed” as we thought this was tautologous.

C. In the proposed speech and language paragraphs the wording “delivered by ... dedicated staff” is not necessary as it would be impossible for this to be delivered by untrained staff. As regards to the parental suggestion of 45 minutes weekly direct intervention from a speech and language therapist we thought that a whole school approach to speech and language therapy was required, delivered in short sharp bursts and repeated throughout the week by a classroom assistant would work far better. There is a need for generalisation of his skills and this will ensure that he has situation specific approaches

D. The remaining requested amendments related to purely ABA points which are considered hereafter.

E. Where the parental choice is for an independent school, Section 9 of the Education Act 1996 applies. This provides that *Local Education Authorities ... shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.* The LEA said that it would be unreasonable public expenditure for A to go the T School but that they were not going to say that T could not meet A’s special educational needs. Mr Silas said that he was not going to make an argument that there was any parity of cost between the two placements. He acknowledged that the only grounds on which we could order placement at T School would be if we accepted that N School would be unable to meet A’s special educational needs and that he required an ABA programme which could only be provided at T. Mr Silas also said that he was not arguing for some part of A’s education to be provided at home, as had been indicated in the parental documents, so there was no need for us to consider Section 319 of the Act.

F. Mr Rawlings argued that if it was agreed that T would constitute unreasonable public expenditure then the Tribunal could disregard parental preference under Section 9 as the section would not apply.

G. There were many diverging views of A in both the documentary and oral evidence. He was described in some of the reports as a passive child but also indulged in many behaviours directed to draw attention to himself, including possibly when he displays his extreme passive behaviour. In a mainstream setting A’s behaviour was referred to as self directional. His behaviour appears to be quite knowingly directed when he climbs on to high surfaces and seeks dangerous situations. The two psychologists had differing views of A’s level of functioning. Ms G concluded in her latest report that A was functioning at P level 3 and above which normally equates with profound and multiple learning difficulties whereas Ms B thought that A had moderate learning difficulties.

H. In looking at a school placement for A we looked first at whether N

School would be able to meet A's special educational needs and in doing so had to decide whether A required an ABA approach as argued by his parents. Clearly both N and T Schools could deliver the therapeutic programmes now set out in the Statement. We had been given detailed evidence about the training and qualifications of staff at both schools, and at N there was only one member of staff who had a post graduate qualification in autism although the commitment of Head Teacher and staff to meeting the needs of autistic pupils could not be faulted. In looking at how A had fared in his varied educational settings so far, we noted that at A Assessment Centre, a special nursery, A was at his most challenging and it was they who recommended that he needed one to one support to manage his behaviour. However in an appropriate educational setting such as Y, effectively a mainstream nursery, A responded and could even take work home to show his parents. We concluded that A was not functioning well within the As setting, although in the other settings where ABA was used it was clear from the various reports that A did respond and could consistently be seen to respond.

I. We had the benefit of extensive evidence from Mrs B about N School which is clearly an excellent special school for children with moderate learning difficulties. Mrs B told us that over 50% of the pupils have a diagnosis of autism and that the staff use a range of approaches to meet their pupils special educational needs. The one exception to this was that Mrs B said that they would not have anything to do with an ABA approach, although otherwise they were fully flexible. We gathered that the question of whether N School might offer employment to S, the lady currently employed by Mr and Mrs V to act as his ABA tutor and to accompany him to the Y Nursery, had already been mooted with Mrs B. She said at the hearing that she would not consider this but would allocate a very experienced learning support assistant to A and get him used to working with probably three different LSA's so that he was not wholly reliant on one person. We fully understood and accepted the reasons for this decision but it did mean that there would be no-one at N School capable of using ABA techniques with A if that is what is required to get him to respond.

J. The evidence before us showed that A did in fact respond to an ABA approach as the one thing a child has to do in ABA is respond to an adult and he is clearly doing that with the ABA approach used by S both in home tuition and when she accompanies him to the Y Nursery. He clearly does not respond to the methods used at the A Assessment Centre where he displays his worst behaviour and we thought that he might respond just the same way at N School. We noted, and mostly agreed with, G's criticisms of ABA programmes as not offering a universal panacea for autistic children, which is the impression that many parents receive when they encounter these programmes. However, we also acknowledge that there are a few children for whom an ABA scheme is the only answer to make that essential breakthrough when other tried and trusted methods sometimes fail to achieve. The aim of an ABA programme, which sometimes seems to get forgotten, is that it should be a time limited intensive intervention with the aim of getting the child to a position where he can return to mainstream schooling. We concluded that ABA methodology does have an advantage over other approaches for this particular child at this particular time and according to Mrs B it cannot be delivered at N School. We therefore conclude that N School will be unable to

meet A's special educational needs and that T School must be named in Part 4 of A's statement. The Secretary of State has given an enabling consent and a place is available for A for the Summer term 2007. We hope and trust that this will prove a gateway to A being able to transfer to a mainstream setting later on in his education. We have therefore included the ABA specific paragraphs in Part 3 of A's statement.

Order

- a) The LEA shall amend Parts 2 and 3 of the statement as per the annexed amended statement initialled on each page by the Chairman.
- b) The LEA shall amend Part 4 of the statement to say
"Commencing April 2007 an independent special school for children with autism, namely T School."

Date: 16 April 2007

Signed:

Chairman: Jennifer Buckle