

DECISION

Appeal Number 04-01313
Appeal By Ms W
Against The London Borough of Hillingdon Council
Concerning J
(Born 15 July 1993)
Dates of Hearing 31 October and 11 November 2005

Appeal

Ms W appealed under Section 326 Education Act 1996 against the contents of a Statement of Special Educational Needs particularly Parts 2, 3 and 4, made by The London Borough of Hillingdon Council (LEA) for J .

The case had been remitted back to the Tribunal by the High Court following an appeal from a previous decision dated 5 October 2004. It was decided by a previous Tribunal that J should attend N School a non-maintained special school for pupils with severe learning difficulties. Mr Justice Stanley Burnton gave useful guidance in the High Court hearing as to the calculation of transport costs.

A fresh panel was constituted and reheard all the issues afresh.

Parties Present

Ms W attended and was represented at both hearings by Ms Wolford, Solicitor, (instructed by IPSEA). Mrs M, Speech and Language Therapist at S School and Mr F, independent Educational Psychologist attended as witnesses.

Mr Sharland, a barrister, represented the LEA. Mrs R, Educational Psychologist and Mrs C attended as witnesses for the LEA.

Preliminary Matters

It was agreed by the parties to use as a working document that which was marked final amended statement and dated 8 October 2004

The parties agreed the contents of a document which is attached hereto and marked 'First attachment'.

A further document was produced by the parties indicating further areas of agreement. This document is attached hereto, marked 'Second Attachment' and numbered for the identification of areas of agreement and disagreement. Those paragraphs marked 2, 3b and 4 were agreed by the parties.

We were invited to decide upon paragraphs marked 1 and 3(a) of the Second Attachment. Paragraph 1 referred to 'overlearning' and, in fact, referred to provision, not needs.

We admitted late evidence under Regulation 33 (2) of the Special Educational Needs Tribunal regulations 2001, in the form of

- An assessment report from S School dated 19 October 2005

This evidence had been sent to the Tribunal and the LEA at least five days prior to the hearing. It would not impede the efficient conduct of the hearing and was not available prior to the end of the case statement period.

We admitted late evidence under Regulation 33 (3) of the Special Educational Needs Tribunal regulations 2001, in the form of

- A letter from I, Deputy Head teacher of E School dated 14 October 2004
- A letter from O, Acting Deputy Head teacher dated 17 July 2000

We considered that whilst this evidence failed to fulfil the criteria of Regulation 33(2), it was wholly exceptional bearing in mind the long delays in the matter caused by the High Court Appeal and was relevant to the kernel of dispute between the parties, namely that J should have a school placement which provided for a waking day education.

Ms Wolford asked us to consider as late evidence a recent Tribunal hearing and decision on a child MH. Ms Wolford alleged that the LEA had given misleading information on transport costs to the tribunal on MH, an assertion that was roundly denied by Mr Sharland. Ms Wolford asserted that the MH decision was under review and stated that should we refuse to admit the MH decision an application for an adjournment and an appeal to the High Court would be lodged. We indicated that we were minded not to admit the MH decision on the grounds that we were not party to all the facts of a hearing regarding another child and that Tribunal decisions are not precedents. On instructions from her client, Ms Wolford withdrew this application.

Facts

1. J was 12 years old and had a diagnosis of childhood autism (ASD). His expressive and receptive language skills were described as severely delayed and his Statement of Special Educational Needs agreed by the parties included his ASD and described him as having moderate learning difficulties. His academic, social interaction and life skills were delayed.
2. J was currently (and had been since the last hearing) out of school. His mother was attempting to provide a programme of education other than at

school for him. There had been a review of that programme with his mother carried out by LEA at the end of the last academic year.

3. At the hearing Ms Wolford made an application to amend her grounds of appeal to include references to occupational therapy. We invited the parties to discuss the matter with relation to Part 2 and 3 and to be exact as to the requests that were proposed following which we would rule on whether we permitted such an amendment. We granted permission for this amendment during the hearing as it was nearly a year since the statement had been reviewed.
4. Mr F gave evidence that although J had been assessed at the moderate learning difficulties (MLD) level, his functional behaviour was lower and that the description of J within the statement of having MLD should be qualified with the following statements

'J's short term memory is poor. He is showing great difficulties with memory for faces and names. It also makes it difficult for him to plan and use executive skills like self monitoring and planning ahead'

and

'J has great difficulty with his auditory memory skills and this is impacting on his language processing skills resulting in low assessed scores when processing language. This means he finds making sense of oral language difficult and interacting with others difficult'.

5. Mr F thought that J's ASD was pervasive and would affect all areas of his learning and social communication. ASD was his primary need. Ms M confirmed that the semantic pragmatic language disorder was consistent with his learning difficulties and that his expressive language was disordered not just delayed. J had difficulties with auditory memory and extreme difficulties with high-level language. His difficulties with memory also indicated a requirement for overlearning. J required considerable exposure to consistent situations in order to develop his understanding.
6. Mr F stated that J experienced considerable difficulty with the testing process. The protocols expected him to remember at levels higher than he could achieve. His reading, comprehension and number skills' assessments placed him at the first centile. Mr F confirmed that J presented with complex difficulties and with splinters of strength such as visual attention, sensorimotor skills and oral expression, in his profile.
7. The Educational Psychologist for the LEA, Mrs R stated that she did not disagree with these assessments. The last time Ms R saw J was 3 years ago at E School. Mrs R had attempted to arrange an appointment with Ms W to assess J but this had not been possible.

8. Mr Sharland asserted that J's needs could be met during the day and that overlearning could take place during school hours. In the light of Ms W's request that J have an extended day the LEA had attempted to be conciliatory by offering one extended session at N School. Overlearning could be achieved without offering a residential setting.
9. Mrs R told us that the extended evening at N offered a social communication group between 3.30 and 4.30 and this was staffed by Speech and Language therapists. A range of different activities was offered including running coffee bars to assist with money management skills and shopping and visits to improve their social skills. She thought that overlearning could occur naturally. Mrs R agreed that J's social learning was of importance. She was of the opinion that knowledgeable adult support would be adequate. She thought that at the end of the day J would be too tired to access an extended curriculum. Mrs R agreed that J indicated potential for social skills but it was important to teach him skills in a structured way with a knowledgeable adult to guide him.
10. Mr F thought that J as an ASD child together with his short term memory difficulties needed to integrate old and new learning. His particular areas of weakness require changing environments to reinforce the learning. The setting at S offered integrated provision and would offer learning in different contexts because of the extended day. Weekly boarding would cost £12,705 per term which would include therapies required. To transport J to the pick up point for the bus to S School the cost would be £4,560 per annum without an escort or £7,980 with an escort. Ms Wolford agreed those figures.
11. Mr Sharland told us that the Education Services in Hillingdon would not agree to extended day curriculum as being educational. Social Services funded overnight provision. The LEA was not prepared to offer a place at N School on a residential basis because this would be more expensive still than a residential place at S and was not needed.
12. The Head teacher of N School was confident that the school could meet J's needs. The team of therapists were trained in sensory integration and the school was developing TEACCH. Mrs R gave evidence that some of the activities referred to at S such as cooking and shopping could be undertaken at home. For J interaction was the most important part of the curriculum and she queried whether this should be conducted by less qualified staff at the end of the day.

J found generalisation difficult and he did not manage to generalise, for example, road safety. She stated that J did not learn incidentally.

13. Ms M stated that much could be done during the school day for J but it was important that this should be translated into the extended day. Ms M confirmed that all the speech and language therapists worked at S until 8pm at night to ensure continuity of provision. The waking curriculum at the school was devised monitored and reviewed by all staff. The care staff were appropriately qualified and Team TEACCH was deployed by all staff. The evening provision was not incidental learning but structured provision. Mr Sharland quizzed Ms M as to whether the programme identified for J was in fact personal for him.
14. On the question of transport Mr Sharland questioned Mr F as to whether he had emphasised in his later evidence J's aggression. Mr F resisted this suggestion and referred us to his 2004 report. Mr Sharland pointed out that no incidents had been recorded in the transport report log. Ms M gave evidence that there were difficulties during the assessment when J could not physically isolate himself.
15. On transport costs we considered the *additional cost* to the LEA of transporting J to N School. The cost of existing transport (without J) was £23,132 whilst the extra cost of placing J on this run would be £27,360. The additional cost would be £4,228. Mr Sharland stated that we had three options to consider: N School without the extended day; N School with the extended day; and S School as a weekly boarder.
16. The costs at S for the year 2005/6 are £38,115 per annum. The costs of day placement at N School are 23,076. The cost of extended of an extended day placement would be £522 per annum for one day per week. In essence Mr Sharland argued that the cost of S would be £38,115 and the cost of N School would be £27,825 (with one extended day).

Tribunal's Conclusions and Reasons

We carefully considered all the evidence given at the hearing and the papers which the parties submitted. When reaching its conclusions, we complied with S9 Education act 1996 which states that

“In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State, local education authorities and the funding 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 we must have regard to parental wishes”

We also took into account the Code of Practice on Special Educational Needs 2001.

- A. It was accepted by the parties that we were to consider the matter de novo. In its case statement the LEA accepted that S and N could both meet J's needs.
- B. Both parties agreed the terms of the statement of special educational needs as drafted by the LEA at the 8 October 2004 with the exception of references in Part 2 to statements regarding J's complex needs and his proprioceptive skills, the concomitant provision in Part 3 and the placement in Part 4. We have ordered the agreements made by the parties.
- C. We did agree to the insertion of the paragraph marked 1 on the Second Attachment. From the evidence received from both Mrs R and Mrs F we considered that overlearning was an essential component to J's progression.
- D. We have included the reference to J's auditory memory which we thought was evidenced in the Mr F's reports and the S assessment.
- E. Mr F had conducted two assessments of J nearly a year apart. Despite a misconception that he had only observed J in school for 45 minutes, Mr F had observed J in 2004 both in class and in a social context at E school. Mr F had also discussed J with the E staff. In 2005 Mr F had observed J in the house between 11 am and 5.30 pm. He observed during this time potential stress triggers for J, which were avoided in order to make him less labile. We concluded that Mr F had conducted thorough assessments of J; was the only psychologist who had seen him recently and who could offer comparative assessments; and was a credible witness.
- F. We noted that Mrs R had recently offered to assess J but we considered that this assessment could have been undertaken at some point during the last year.

G. The crucial issue was whether J needed a waking day curriculum.

H. In Mr F's first report dating from 2004 he commented that J had a

'rigid literal understanding of language, very poor social understanding and an inability to make friends. He is very isolated and doesn't play with other students. If supported by an adult he can play with students he likes'.

At the hearing Ms M stated that J's social learning was of importance. Mrs R's evidence appeared to contain some inconsistencies. On the one hand she asserted that J could not learn incidentally but then proceeded to argue that he could learn some skills naturally. Mrs R did, however, confirm that J needed a structured environment within which to learn.

- I. At the hearing Mr F confirmed that J's ASD was pervasive and of primary importance. He proceeded to report that J was functioning as an isolate particularly in the home environment even with the best attempts of his mother and that he was only able to play and interact with others when there was knowledgeable adult support. Mrs R queried the level of skill of the care staff in being able to deliver a structured curriculum out of school hours. We were persuaded by Ms M, that speech and language qualified staff were available until 8 pm each day at S; and that the structured curriculum, though delivered by a range of staff outside formal school hours, was planned and monitored by a multi disciplinary educational team.
- J. Mr F in his first report stated "I consider that J's education should be focussed on the areas of greatest weakness that affect his ability to function as a member of society when he is an adult'. In his later report Mr F confirmed this view by stating that as J had complex learning difficulties he required considerable impunities to practice in real life contexts so that he is better able to generalise and maintain his new learning. He considered that J required planned opportunities to be consistently practised in appropriate contexts, for example within his peer group, with adult support. Mrs R herself confirmed that J learned best in a structured environment and Mrs M confirmed that knowledgeable adults would be present with the direction of a SALT until 8 pm. This would take place at least 4 evenings a week.
- K. We further considered whether extraneous evidence supported Mr F's contention that J needed a waking day curriculum. We did not agree with Mr Sharland that the new pieces of evidence provided by Mr F, S and the Deputy Head teacher of E School were not of fundamental importance. This evidence was not available to the previous tribunal and cast important new light on the views and recommendations then put forward by Mr F but not accepted by the previous tribunal.

- L. The last Annual Review made available to us was dated January 2004. We accept that this review (conducted by E School at which J was then placed) made no mention of extended provision and accept that three teachers signed it report. However, the then Acting Deputy Head teacher, Mr O, had recorded his comments regarding extended provision for J in a letter written in 2000 (which we had admitted as late evidence).
- M. The letter stated that 'J's response to this extended day has been very positive....We have now seen the clear benefits for him from his extended day and would support her request [for overnight placement]'. Mr O's reasoning included that J would be able, in the extended day, to 'further develop his communication and interaction skills' and his development of play with other children.
- N. Mr I, the Deputy Headteacher of E School in 2004, although registering a reservation concerning his experience to comment on 24 hour curriculum, also commented in his letter dated 14 October 2004 (which we had also admitted as late evidence) as follows.

'In order for J to gain social independence and establish friendships he would have required specialist support and intervention in structured leisure times, collaborative group activities and other social settings. He certainly benefited from the consistent application of rules and routines here. Had he remained a boarder, the care staff are confident that he would also have gained from supported social opportunities such as Youth Club Boy's Brigade or Gym Club..'

- O. The letter concluded

'in summary, J's needs in this area of his development are in terms of self-care, independence and social integration. It is our experience that pupils like J benefit considerably from access to our extended day and overnight stay programmes'.

We concluded that this was persuasive evidence to support the contention of Mr F and indeed Ms W that J needed a waking day curriculum.

- P. The letter from Mr I made clear that the extended day at E School was funded by social services. The LEA confirmed at the hearing that it did not view extended day provision as educational. We disagreed. In the London Borough of Bromley v SENT [1999] ELR 260 education was defined as the systematic instruction, schooling or training given to the young ...in preparation for life'. We accepted that for J social learning and overlearning was educational and provision to address these needs should be defined as educational provision.

- Q. We noted that the LEA had previously offered two days per week extended provision at N school, this was now restricted to one day. However since the LEA asserted that J did not need this provision we were surprised that the LEA had agreed to write it into the statement, albeit in a gesture of conciliation. We would view the inclusion of provision within a statement which was not deemed necessary an 'overprovision' and thus outside the terms of Section 324 Education Act 1996 and the Code of Practice at paragraph 8.34. In sum, an offer to write extended day provision into a statement, despite the assertion that it was only in the spirit of conciliation, could not be made without an implicit acceptance that it was special educational provision and that extended day provision was needed for an educational need. Notwithstanding this observation, we recognise that the LEA was only offering one day a week. However, we did not find this level of provision appropriate and concluded that it would not meet J's special educational needs. Rather, in view of J's complex difficulties and need for regular systematic overlearning, we were persuaded that he needed more than one days extended provision. We considered that he needed this provision for at least for four nights each week during term time. .
- R. As the LEA had insisted that no more than one day a week extended day provision was available for Hillingdon pupils at N School; was unprepared to consider that school on a weekly boarding basis because of the higher cost of boarding provision at that school compared with S; and suggested no alternative provision, we found that J should be placed as a weekly boarder at S School and that school should be named in Part 4 of his statement.
- S. The appeal was allowed entirely on the above reasoning. However, on an entirely separate issue we were curious regarding the DFES approval for N School. Our curiosity does not form part of our judgement but there was no evidence that N School had altered its approval status with the DFES under Section 342 Education Act 1996 since 2002. At that point it was registered as a school for pupils with hearing impairment, language impairment and associated difficulties.

Although half of the school's population was on the ASD spectrum there was no specific mention of this special educational need.

- T. In the May 2005 Ofsted Report N School was referred to as being for pupils who have communication difficulties associated with hearing impairment or speech and language difficulties. Regulation 7 of the Education (Non-Maintained Special Schools) (England) Regulations 1999 states that 'no pupil shall be admitted to the school unless he falls within the category specified in the arrangements mentioned in paragraph 1'. Paragraph 1 refers to the number, age and sex of pupils and their respective special educational needs. Clearly for admission pupils must fall within the category of special educational needs approved by the DFES.
- U. The Head teacher of N School in her letter of 26 May 2004 stated 'at N we meet the special educational needs of pupils with Speech and language Difficulties as their main area of difficulty'. J's main area of difficulty was ASD.
- V. This matter was remitted to the Tribunal on a point of costs. We were directed to consider the matter afresh. For the reasoning given above, we did not find the provision offered at N School appropriate. Therefore to proceed to a cost analysis would be an otiose exercise.

ORDER

That the Statement of Special Educational Needs of J be amended in accordance with the documents attached hereto and marked 'First Attachment' and 'Second Attachment'. The second attachment is to indicate additions to the First attachment

For the avoidance of doubt Part 4 should read

Type: Special School

S School

Date 2 December 2005

Signed

**HELEN RIMINGTON
CHAIRWOMAN**