

Case No: C3 2004 0486

Neutral Citation Number: [2004] EWCA Civ 770
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT – Mr Justice Pitchford

Royal Courts of Justice
Strand,
London, WC2A 2LL

Wednesday 23rd June 2004

Before :

LORD JUSTICE MAY
LORD JUSTICE JONATHAN PARKER
and
LORD JUSTICE DYSON

Between :

THE QUEEN ON THE APPLICATION OF MH Appellant
- and -
(1)THE SPECIAL EDUCATIONAL NEEDS AND Respondents
DISABILITY TRIBUNAL
(2) THE LONDON BOROUGH OF HOUNSLOW

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr David Wolfe (instructed by **Messrs Alexander Harris**) for the **Appellant**
Mr Steven Kovats (instructed by **Treasury Solicitor**) for the **First Respondent**
Mr Peter Oldham (instructed by **Legal Services of London Borough of Hounslow**) for the
Second Respondent

Judgment
As Approved by the Court

Lord Justice Jonathan Parker:

This is the judgment of the court.

INTRODUCTION

1. This is an appeal from a judgment of Pitchford J delivered on 20 February 2004 in which he gave general guidance as to the meaning and effect of sections 316 and 316A of the Education Act 1996 (“the 1996 Act”), which were introduced into the 1996 Act by way of amendment by the Special Educational Needs and Disability Act 2001 (“the 2001 Act”).
2. The appellant is the mother of a twelve-year old son, whom we will call “D”. D has emotional and behavioural difficulties, and is the subject of a statement of special educational needs made by The London Borough of Hounslow as local educational authority (“the LEA”) under section 324 of the 1996 Act.
3. Prior to making the statement, the LEA (as it was required to do by paragraph 3 of Schedule 27 to the 1996 Act) offered the appellant the opportunity to express a preference as to the maintained school at which she wished education to be provided for D. The appellant expressed a preference for the “C” school, a mainstream school within the meaning of the 1996 Act. In the event, exercising its judgment under paragraph 3(3) of Schedule 27, the LEA declined to specify the name of the “C” school in the statement of special educational needs; instead, it specified the name of the “S” school, a special school within the meaning of the 1996 Act.
4. The appellant appealed to the Special Educational Needs and Disability Tribunal (“the Tribunal”), which upheld the LEA’s decision to reject the appellant’s expressed preference for the “C” school. The appellant appealed to the High Court, joining the Tribunal and the LEA as respondents. She appealed on two grounds. First, she contended that in rejecting her preference for the “C” school and in naming instead a special school the LEA had failed to discharge its statutory duty under sections 316 and 316A of the 1996 Act. Secondly, she contended that the Tribunal’s decision was in any event defective in law in that it had failed to give sufficient reasons.
5. Before the judge, the respondents conceded that the appeal should be allowed on the second ground (the reasons challenge), and that the matter should be remitted for rehearing by a differently constituted Tribunal. However, the appellant nevertheless invited the judge to address the first ground of appeal, and to give guidance to the Tribunal on the rehearing as to the meaning and effect of sections 316 and 316A and as to the approach which the Tribunal should adopt to the application of those sections. The Tribunal (as respondent) consented to that course, but the LEA opposed it. The judge was concerned as to whether it was

appropriate for him to accede to the appellant's invitation in circumstances where the facts of the case had not as yet been properly explored. However, after hearing argument, the judge acceded to the appellant's invitation, and in his judgment he gave guidance, albeit of necessity in general terms, on the issues of law which had been raised.

6. In giving such guidance, to which we refer in detail below, the judge effectively rejected the appellant's submissions. The appellant now appeals to this court.
7. Permission for a second appeal was granted by Longmore LJ on the papers on 5 May 2004.
8. The appellant appears by Mr David Wolfe of counsel (who also appeared below). The Tribunal appears by Mr Steven Kovats of counsel (before the judge, the Tribunal was represented by Miss Jenni Richards of counsel). The LEA appears by Mr Peter Oldham of counsel. Mr Oldham did not attend at the hearing before the judge, but he prepared written submissions which the judge considered.
9. The judge having given general guidance on the issues of law raised before him under the first of the appellant's grounds of appeal, it must, as it seems to us, be appropriate for this court to review that guidance on appeal. Indeed, none of the parties to this appeal has suggested otherwise.

THE LEGISLATIVE FRAMEWORK

10. The relevant sections of the 1996 Act are all to be found in Part IV, which is headed '*Special Educational Needs*'. Section 312(1) provides that a child has '*special educational needs*' for the purposes of the 1996 Act if he has '*a learning difficulty which calls for special educational provision to be made for him*'. Section 312(4)(a) defines the expression '*special educational provision*' as meaning, in relation to a child who has obtained the age of two, '*educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the local authority (other than special schools)*'. The expression '*special school*' is defined in section 337(1) as meaning a school which is '*specialised to make special educational provision for pupils with special educational needs*'.
11. Section 321 imposes a general duty on local education authorities to exercise their powers with a view to securing that, of those children for whom they are responsible, they identify those who have special educational needs, and in respect of whom it is '*necessary for the authority to determine the special educational provision which any learning difficulty he may have calls for*'. Where a local education authority is of the opinion that a child for whom it is responsible falls or probably falls within that category, it is required by section 323 to notify the child's parent that (among other things) it is considering whether to make an

assessment of the child's educational needs. If at the expiry of that notice, and after taking account of any representations made in the meantime, the local education authority remains of the same opinion, it is required to make such an assessment. Section 324(1) provides that if, in the light of such an assessment and of any representations made by the child's parent under Schedule 27 to the 1996 Act, it is necessary for the local education authority to determine the special educational provision which any learning difficulty he may have calls for, the authority is required to make and maintain a statement of his special educational needs.

12. Section 324 goes on to provide as follows (so far as material):

“(2) The statement shall be in such form and contain such information as may be prescribed.

[(3)]

(4) The statement shall –

(a) specify the type of school which the local education authority consider would be appropriate for the child,

(b) if they are not required under Schedule 27 to specify the name of any school in the statement, specify the name of any school which they consider would be appropriate for the child and should be specified in the statement, and

[(c)]

[(4A)]

(5) Where a local education authority maintain a statement under this section, then –

[(a)]

(b) if the name of a maintained school is specified in the statement, the governing body of the school shall admit the child to the school.

[(5A)]

[(6)]

(7) Schedule 27 has effect in relation to the making and maintenance of statements under this section.”

13. The Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 (S.I.3455) (“the 2001 Regulations”) provide, by regulation 16, that a statement under section 324 shall be in a form ‘*substantially corresponding*’ to that set out in Schedule 2 to the Regulations. Schedule 2 to the Regulations requires that Part 4 of the statement shall specify (among other things):

“the type of school which the [local education] authority consider appropriate for the child and if the authority are required to specify the name of a school for which the parent has expressed a preference, the name of that school, or, where the authority are otherwise required to specify the name of a school ..., the name of the school ... which they consider would be appropriate for the child and should be specified;”

14. We turn next to Schedule 27 to the 1996 Act, which (by virtue of section 324(7) above) has effect in relation to the making and maintenance of statements under section 324.

15. Paragraph 2 of Schedule 27 provides for service on the child’s parent of a copy of the proposed statement. The proposed statement must leave Part 4 blank (see *ibid.* subparagraphs (2) and (4)). Paragraph 2A provides that the procedure prescribed by the Schedule shall also apply to any proposed amendment of an existing statement. Paragraph 3 is in the following terms (so far as material):

“3(1) Every local education authority shall make arrangements for enabling a parent –

(a) on whom a copy of a proposed statement has been served under paragraph 2,

(b) on whom a copy of a proposed amended statement has been served under paragraph 2A, or

[(c)]

to express a preference as to the maintained school at which he wishes education to be provided for his child and to give reasons for his preference.

(2) Any such preference must be expressed or made within a period of 15 days beginning –

(a) with the date on which the written notice mentioned in paragraph 2B was served on the parent, or

[(b)]

(3) Where a local education authority make a statement in a case where the parent of the child concerned has

expressed a preference in pursuance of such arrangements as to the school at which he wishes education to be provided for his child, they shall specify the name of that school in the statement unless –

(a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or

(b) the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources.”

16. A ‘*maintained school*’ is one which is funded and/or administered by the local education authority, in contrast to an independent school.
17. Paragraph 3A of Schedule 27 requires the local education authority to consult with the governing body of any school which it is considering specifying (including, where the school in question is maintained by another local education authority, that authority). Paragraph 4 provides that a parent on whom a copy of a proposed statement has been served under paragraph 2 (or, as the case may be, a parent on whom a copy of a proposed amended statement has been served under paragraph 2A) may make representations and may require the authority to arrange a meeting. Paragraph 5 provides that where representations have been made under paragraph 4, the local education authority must consider them before making or amending the statement. Paragraph 6(1) provides for service of the statement, or amended statement, on the parent. Paragraph 6(2) provides that at the same time the local education authority must give the parent written notice of his right to appeal under section 326 of the 1996 Act (to which I refer below).
18. Lastly, so far as Schedule 27 is concerned, we note paragraph 11(3)(b), on which Mr Wolfe relied in argument. Paragraph 11(1) provides that a local education authority may cease to maintain a statement if (and only if) it is no longer necessary to maintain it. Paragraph 11(2) provides that the child’s parent may appeal against a determination by the local education authority to cease to maintain a statement in respect of the child. Paragraph 11(3)(b) provides that on such an appeal the Tribunal may order the local education authority to continue to maintain the statement in its existing form or with such amendments to the description in the statement of the authority’s assessment of the child’s special educational needs, or the special educational provision specified in the statement, and such other consequential amendments, as the Tribunal may determine.
19. We now return to the 1996 Act itself. As stated in paragraph 1 above, the particular sections with which this appeal is concerned are sections 316 and 316A, which were substituted by the 2001 Act for section 316 of the 1996 Act as originally enacted.

20. Section 316 as originally enacted provided as follows:

“(1) Any person exercising any functions under this Part in respect of a child with special educational needs who should be educated in a school shall secure that, if the conditions mentioned in subsection (2) are satisfied, the child is educated in a school which is not a special school unless that is incompatible with the wishes of the parent.

(2) The conditions are that educating a child in a school which is not a special school is compatible with –

(a) his receiving the special educational provision which his learning difficulty calls for,

(b) the provision of efficient education for the children with whom he will be educated, and

(c) the efficient use of resources.”

21. Sections 316 and 316A, as substituted by the 2001 Act, provide as follows:

“316 Duty to educate children with special educational needs in mainstream schools

(1) This section applies to a child with special educational needs who should be educated in a school.

(2) If no statement is maintained under section 324 for the child, he must be educated in a mainstream school.

(3) If a statement is maintained under section 324 for the child, he must be educated in a mainstream school unless that is incompatible with –

(a) the wishes of his parent, or

(b) the provision of efficient education for other children.

(4) In this section and section 316A ‘mainstream school’ means any school other than –

(a) a special school, or

(b) ...

316A Education otherwise than in mainstream schools

(1) ...

(2) ...

(3) Section 316 does not affect the operation of –

(a) ...

(b) paragraph 3 of Schedule 27.

(4) If a local education authority decide –

(a) to make a statement for a child under section 324, but

(b) not to name in the statement the school for which a parent has expressed a preference under paragraph 3 of Schedule 27,

they shall, in making the statement, comply with section 316(3).

(5) A local education authority may, in relation to their mainstream schools taken as a whole, rely on the exception in section 316(3)(b) only if they can show that there are no reasonable steps that they could take to prevent the incompatibility.

(6) An authority in relation to a particular mainstream school may rely on the exception in section 316(3)(b) only if it shows that there are no reasonable steps that it or another authority in relation to the school could take to prevent the incompatibility.

(7) The exception in section 316(3)(b) does not permit a governing body to fail to comply with the duty imposed by section 324(5)(b).

(8) An authority must have regard to guidance about section 316 and this section issued –

(a) for England, by the Secretary of State,

[(b)]

[(9)-(11)]”

22. Section 326 deals with appeals against the contents of a statement. It provides as follows (so far as material):

“(1) The parent of a child for whom a local education authority maintain a statement under section 324 may appeal to the Tribunal –

(a) when the statement is first made,

(b) if an amendment is made to the statement,

(c) if, after conducting an assessment under section 323, the local education authority determine not to amend the statement.

(1A) An appeal under this section may be against any of the following –

(a) the description in the statement of the local education authority's assessment of the child's special educational needs,

(b) the special educational provision specified in the statement (including the name of the school so specified),

(c) if no school is specified in the statement, that fact.

(2) Subsection (1)(b) does not apply where the amendment is made in pursuance of –

(a) paragraph ... 11(3)(b) (amendment ordered by the Tribunal) of Schedule 27, or

[(b)]

....

(3) On an appeal under this section, the Tribunal may –

(a) dismiss the appeal,

(b) order the authority to amend the statement, so far as it described the authority's assessment of the child's special educational needs or specified the special educational provision, and make such other consequential amendments to the statement as the Tribunal think fit, or

(c) order the authority to cease to maintain the statement.

(4) On an appeal under this section the Tribunal shall not order the local education authority to specify the name of any school in the statement (either in substitution for an existing name or in a case where no school is named) unless –

(a) the parent has expressed a preference for the school in pursuance of arrangements under paragraph 3 (choice of school) of Schedule 27, or

(b) in the proceedings the parent, the local education authority, or both have proposed the school.”

23. At this point we turn back to the 2001 Regulations in order to note regulation 34, which deals with evidence at an appeal hearing before the Tribunal. Paragraph (1) of regulation 34 is in the following terms:

“In the course of the hearing the parties shall be entitled to give evidence, to call witnesses, to question any witness and to address the tribunal both on the evidence, including the written evidence submitted before the hearing, and generally on the subject matter of the appeal:

Provided that neither party shall be entitled to call more than two witnesses to give evidence orally ... unless the President has given permission [i.e. in advance of a hearing] or the tribunal gives permission at a hearing.”

24. Lastly, so far as the legislative framework is concerned, we turn to the guidance issued by the Secretary of State, to which a local education authority ‘*must have regard*’ (see section 316A(8)). In the course of argument, we were referred to a number of passages in DFES Guidance 0774/2001 (“the Guidance”). We note some of them.
25. Paragraph 22 of the Guidance, under the heading ‘Deciding where children who have statements are to be educated – The general duty’, reads as follows:

*“The starting point is always that children who have statements will receive mainstream education. The new section 316 states that a child who has special educational needs and a statement *must* be educated in a mainstream school unless this would be incompatible with –*

- (a) the wishes of the child’s parents;*
- (b) or the provision of efficient education of other children.*

These are the only reasons why mainstream education can be refused outright.”

26. Paragraph 24, in the same section of the Guidance, reads as follows (so far as material):

“Mainstream education cannot be refused on the grounds that the child’s needs cannot be provided for within the mainstream sector. The general duty assumes that with the right strategies and support most children with

special educational needs can be included successfully at a mainstream school. The local education authority should be able to provide a mainstream option for all but a small minority of pupils. Local education authorities should look across all of their schools and seek to provide appropriate mainstream provision where possible.”

27. Paragraph 30, in a section in the Guidance headed ‘When parents want mainstream provision’, reads as follows:

“Where the parents do not express a choice or their preferred choice of school is not named in the child’s statement **section 316** requires that the local education authority must name another mainstream school. It should look across all of its schools. It can only refuse mainstream education where the child’s inclusion would be incompatible with the efficient education of other pupils. In addition, the local education authority must demonstrate that there are no reasonable steps it or a maintained school could take to prevent the incompatibility. Parents can appeal against a local educational authority’s decision.”

28. Paragraph 32, in the same section of the Guidance, reads as follows (so far as material):

“Option 3 – parents do not express a preference for an individual mainstream school: Where parents want mainstream education, but do not indicate what their preferred choice of school is, the local education authority must decide which mainstream school should be named in the child’s statement. Again mainstream education can only be refused where the child’s inclusion would be incompatible with the efficient education of other pupils and there are no reasonable steps to prevent the incompatibility.”

29. Finally, so far as the Guidance is concerned, paragraph 50 contains the following passage:

“All reasonable steps must be taken to enable pupils to be included without [compromising] the efficient education of other pupils. The decision not to educate a pupil in a mainstream school – against their parent’s wishes – should not be taken lightly. It is important that all cases are judged on the individual circumstances. There may be a range of reasons why it may not always be possible to take reasonable steps to prevent a child’s inclusion being

incompatible with the efficient education of others. For example –

(a) a child’s behaviour systematically, persistently and significantly threatens the safety of others; and

(b) a child’s behaviour systematically, persistently and significantly impedes the learning of others.

An extreme incident may be sufficient to make the child’s inclusion incompatible with the education of others where it is highly likely that it would occur again and there are no reasonable steps that could be taken to prevent this.”

THE AUTHORITIES

30. A number of authorities were cited to us. The only two authorities which we found to be assistance are the decisions of this court in *Richardson v. Solihull MBC & Anor.* [1998] ELR 319 (“*Richardson*”) and *London Borough of Bromley v. Special Educational Needs Tribunal & Ors.* [1999] ELR 260 (“*Bromley*”).

31. In *Richardson*, which was decided prior to the amendments made to the 1996 Act by the 2001 Act, this court held that whilst the definition of ‘*special educational provision*’ in section 312(4) of the 1996 Act is wide enough to include naming a particular school, it is not implicit in the subsection that a particular school must be named; and that section 324(4)(b) does not impose a duty on the local education authority to name a particular school, it merely confers on it a discretion whether or not to do so. The leading judgment was given by Beldam LJ. In the course of his judgment he said this:

“... it seems to me that the words in section 324(4)(b) ‘... which they consider would be appropriate for the child and should be specified in the statement’ require the authority only to specify the name of a school if it considers the school appropriate and that it should be specified. The authority thus has a discretion whether to name a school or not. Section 324(5) requires the authority to arrange that the specified educational provision specified in the statement is made for the child unless the child’s parent has made suitable arrangements and it is implicit in section 324(5)(b) that there may be cases in which the name of a maintained, grant-maintained, or grant-maintained special school is not specified in the statement.

As to the position on appeal to the tribunal, I share the judge’s view that it is inconceivable that Parliament would have required the tribunal to order the authority to name a particular school if it had not made it obligatory for the authority to do so. I am satisfied that the judge was

right to hold that the authority has a power, not a duty, to specify the name of a school which it considers appropriate and that on the hearing of an appeal under section 326 the tribunal is not obliged to order the authority to specify the name of a school.”

32. The leading judgment in *Bromley* was given by Sedley LJ. In the course of his judgment Sedley LJ considered the nature of the Tribunal’s functions. At pages 293-294 he said this:

“In the new regime, the first independent arbiter of this question [viz. a question as to the special educational provision to be specified in Part 3 of the statement] is the tribunal. Unlike the High Court, it is a specialist tribunal with a lawyer chairman and lay members chosen for their knowledge and experience. In my view this restructuring has jurisprudential implications. Where previously the parent’s only resort from the local education authority was to the court, which had therefore to do its best to construe the statutory language in so far as construction was an appropriate exercise, there is now interposed a specialist tribunal whose remit is not necessarily the same. In particular, where a court has to limit itself to the interpretation of terms of legal art and the setting of outer limits to the meaning of ordinary words in their statutory context, the tribunal is empowered to take a much closer look at the LEA’s statement. Indeed, for many purposes it stands in the LEA’s shoes, re-evaluating the available information in order if necessary to recast the statement. But in carrying out this function it also has a supervisory role – to interpret and apply the relevant law. Where that law is expressed in words which, while not terms of legal art, have a purpose dictated by – and therefore a meaning coloured by – their context, it is clearly Parliament’s intention that particular respect should be paid to the tribunal’s conclusions.”

THE FACTS

33. The facts are not in dispute and can be shortly stated.
34. D was born on 7 October 1991. It is common ground that due to emotional and behavioural problems he has special educational needs, for the purposes of the 1996 Act.
35. The appellant expressed to the LEA a preference that D attend a mainstream, as opposed to a special, school. She nominated the “C” school, which is a

mainstream secondary school. However, in Part 4 of the statement, which is dated 11 March 2003, the LEA nominated a special primary school, and (from September 2003) the “S” school, which is a special secondary school.

36. In September 2003 the LEA served a draft of a proposed amended statement, in which Part 4 was unchanged.
37. In the meantime, the appellant appealed to the Tribunal. Although it had been hoped that the Tribunal hearing would take place before September 2003, when D was due to start at secondary school, the hearing was not listed until October 2003. In the event, there was further delay in that the hearing was adjourned to allow an additional witness to attend to give evidence, and the effective hearing did not take place until 14 November 2003. The Tribunal’s decision was promulgated on 20 November 2003. The appellant appealed to the High Court.
38. On 1 December 2003 the LEA served an amended statement, Part 4 of which merely specified the “S” school.
39. The hearing of the appellant’s appeal took place on 18 February 2004. The judge delivered judgment on 20 February 2004. By his order of that date, the judge allowed the appellant’s appeal and ordered that the matter be remitted to be reheard by a differently constituted Tribunal.

THE JUDGE’S JUDGMENT

40. Having set out the legislative framework, the judge quoted extensively from the Guidance. He concluded (in paragraph 19 of his judgment) that whilst the Guidance was instructive as to the policy objectives behind the amendments made to the 1996 Act by the 2001 Act, it could not prevail over a proper construction of the legislation itself.
41. The judge then turned to the submissions which had been made to him. He began by noting the written submission of Mr Oldham (for the LEA) to the effect that section 316 does not affect the operation of paragraph 3 of Schedule 27; and that section 316 will only come into play if, at the rehearing, the Tribunal upholds the LEA’s rejection of the appellant’s nomination of a mainstream school, and even then it will come into effect only in a generalised way, in that the LEA is not required “to work its way through [its] school stock with a view to finding compliance with section 316”. Mr Oldham’s submission was supported by Miss Richards (for the Tribunal), who submitted that the discharge of the LEA’s duty under section 316, in the event of the Tribunal upholding the LEA’s rejection of the appellant’s nomination, did not require the LEA “to trawl through [its] mainstream schools to identify a single school to be named in the statement”. The judge recorded that Mr Wolfe (for the appellant) did not dissent from that proposition.

42. That, however, was the limit of the common ground between the parties. The judge accordingly turned to the competing submissions of Mr Wolfe and Miss Richards as to the nature and scope of the LEA's duty under sections 316 and 316A in the event of the Tribunal upholding the LEA's rejection of the mainstream school nominated by the appellant under paragraph 3, and in particular as to the approach which the Tribunal is required to adopt in relation to particular schools proposed either by the parent or by the local education authority. Miss Richards submitted that in that event it would be a sufficient recognition of the LEA's duty under section 316 if the Tribunal were to direct the LEA to amend Part 4 of the statement so as to specify mainstream schooling as the appropriate *type* of education for D, without naming any particular mainstream school. Mr Wolfe, on the other hand, submitted that that was not enough, and that unless the LEA could demonstrate incompatibility for the purposes of section 316(3) (which would in turn involve showing that there were no reasonable steps which could be taken to prevent such incompatibility: see section 316A(5) and (6)), the Tribunal should require the LEA to name the school of parental choice, alternatively to name some other mainstream school. Mr Wolfe, whilst accepting that the rejection by a local education authority of a school of parental choice on grounds of unsuitability (under paragraph 3(3)(a) of Schedule 27) leaves the authority's duty under section 316 intact, pointed out that section 316 does not include any requirement as to suitability in the terms of paragraph 3(3)(a). He accordingly submitted that in discharging its section 316 duty a local education authority is not permitted to have regard to suitability as a relevant factor. Whilst not suggesting that the Tribunal was required to consider every one of its mainstream schools individually, he submitted that it was at the very least required to consider whether education in a mainstream school could be rendered compatible by the taking of '*reasonable steps*', within the meaning of section 316A(5) and (6).
43. To illustrate his argument, Mr Wolfe took the example of a child in a wheelchair who required special equipment which took up space in the classroom. The fact that in the case of the particular school being considered under section 316A(6) the classrooms were too small to accommodate such equipment, thereby rendering that school incompatible (in circumstances where the incompatibility could not be removed by the taking of reasonable steps) did not absolve the local education authority of its duty to specify mainstream schooling in Part 4 of the statement unless it could show that all its mainstream schools were similarly incompatible.
44. In paragraph 37 of his judgment, the judge concluded that the LEA, having rejected the "C" school on paragraph 3(3) grounds, was required by section 316A(4) to exercise its duty under section 316(3). He went on to conclude (in paragraph 41 of his judgment) that, the LEA having named instead a special school, the Tribunal at the rehearing must examine both the paragraph 3(3) grounds for the rejection of the school of parental choice and the question whether the LEA had demonstrated incompatibility within the meaning of 316(3) and section 316A(5) and (6).
45. In paragraph 42 of his judgment, however, the judge said this:

“It must follow, I think, if the LEA has established the unsuitability of the parent’s preference under paragraph 3(3)(a) or incompatibility with the efficient use of resources under paragraph 3(3)(b), neither it nor the Tribunal need be further concerned with the section 316 criteria *in relation to that particular school.*” (Our emphasis)

46. The judge then addressed the situation which would arise if the LEA failed to establish either of the paragraph 3(3) grounds, concluding (in paragraph 43 of his judgment) that in that situation:

“... the LEA must justify its reliance on paragraph 3(3)(b) incompatibility with the provision of efficient education for the children with whom he would be educated, against the section 316(3)(b) and section 316A(4), (5) and (6) criteria.”

47. In paragraph 44 of his judgment he concluded that in that event:

“... the Tribunal perforce must examine the parent’s preferred school against those criteria, and if the LEA justifies its decision not to specify the parent’s preferred school the Tribunal must go on to consider the same criteria against mainstream schools in general.”

48. The judge continued, in paragraphs 45 to 47 of his judgment:

“45. Section 316 does not remove the suitability ground from paragraph 3(3). Section 316A(3) provides the contrary. But if the Tribunal accepts the LEA’s paragraph 3(3) unsuitability case upon the parent’s preference and proceeds to examine mainstream schools in general, it does not seem to me that the suitability criterion remains an issue.

46. Formerly, the duty under section 316(1) was to provide mainstream education, provided that was compatible with the parent’s wishes and with (a) the special educational provision the child needed and (b) the efficient education of other children and (c) the efficient use of resources.

47. Parliament’s wholesale substitution of section 316, without a re-enactment of the saving for compatibility with special educational provision, must be regarded as deliberate, and deliberate given the statutory guidance, because Parliament wished to create the presumption in favour of mainstream schools for children with special educational needs, save in the more narrowly defined circumstances now provided in section 316(3).”

49. The judge turned to Mr Wolfe's example of a case in which a particular mainstream school was incompatible, saying this (in paragraphs 48 and 49):

“48. The process in which the Tribunal is engaged is a judgment: what should be the contents of the statement of special educational needs? If the Tribunal has rejected the parent's preference on suitability grounds and is considering only the issue of mainstream against special schooling generally, then there is no occasion for the application of paragraph 3(3) criteria, since paragraph 3(3) only applies to the selection by the parent of a particular school.

49. I therefore accept Mr Wolfe's illustration establishing that unless the LEA can show that all of its mainstream schools have similar disadvantages which cannot be overcome, the Tribunal should order that mainstream be specified as a type in Part 4.”

50. In paragraph 50 of his judgment the judge turned to the central question as to the approach which the Tribunal should take if, at the rehearing, the appellant were to come forward with an alternative nomination of a mainstream school. He recorded Mr Wolfe's submission that in such a situation the Tribunal would be concerned only with the section 316(3) criteria and not with the paragraph 3(3) criteria, and Miss Richards' submission that the paragraph 3(3) criteria would still apply to any such alternative nomination.

51. In paragraphs 54 to 56 of his judgment the judge ruled on those submissions, saying this:

“54. Notwithstanding the repeal of the original section 316, I consider Miss Richards must be right. There can be no doubt of the legislative intention, in the event that a parent takes the statutory opportunity of expressing a preference for a school. Any later proposal, must, it seems to me, be treated as a substitution for the original preference or a late statement of preference and therefore subject to the same criteria. The LEA is, in other words, being invited to consider, and the Tribunal to judge, a fresh statement of preference which should be judged against the criteria which applied in the first place.

55. Had Parliament intended otherwise I consider a revision of schedule 27, paragraph 3, would have been required together with section 316. I agree with Miss Richards' submission that Mr Wolfe's construction would render paragraph 3(3) in practice otiose.

56. Thus I conclude that when considering an individual school proposed by a parent, the LEA and the

Tribunal are entitled to and should apply the paragraph 3(3) criteria to the decision whether the parent's preference should be named in the child's statement of special educational needs. The qualified presumption, however, will in all cases be that a child with special educational needs will receive a mainstream education.”

THE ARGUMENTS ON THIS APPEAL

The argument for the appellant

52. Mr Wolfe accepts the judge's conclusions up to the point in his judgment when he addressed the question of the approach which the Tribunal should adopt if at the rehearing the Tribunal upholds the LEA's rejection of the appellant's nomination of the "C" school but concludes that pursuant to section 316(3) the LEA is required to specify mainstream schooling as the *type* of schooling which is appropriate for D, and the appellant at that stage proposes a *particular* mainstream school.
53. Mr Wolfe submits that section 316 imposes a (qualified) duty on the LEA not merely to specify mainstream schooling as the *type* of schooling which is appropriate for D, but also to name a particular mainstream school. He submits the decision in *Richardson* has effectively been overtaken by the amendments made to the 1996 Act by the 2001 Act, and that paragraph 30 of the Guidance is correct in stating that (the substituted) section 316 "requires that the local education authority must name another mainstream school". He points out that under section 316A(4) there is a duty on a local education authority, '*in making a statement*', to comply with section 316(3). He submits that compliance with section 316(3) requires that the local education authority name '*a mainstream school*' (that is, a particular mainstream school) in Part 4 of the statement.
54. In support of that submission, Mr Wolfe relies on paragraph 11(3)(b) of Schedule 27 (quoted in paragraph 18 above). He submits that unless a particular mainstream school is named in Part 4 of the statement, the effect will be that it will be left to the LEA to arrange a placement for D at a particular mainstream school in circumstances where the appellant will have no right of appeal against that placement.
55. Mr Wolfe further submits that the judge was in error in concluding (in paragraph 54 of his judgment) that an expression of preference made by the parent at an appeal hearing "must be treated as a substitution for the original preference and therefore be subject to the same criteria [i.e. the paragraph 3(3) criteria]". He submits that such a construction effectively ignores the amendments made to the 1996 Act by the 2001 Act, and in particular the removal of the 'suitability' requirement in section 316(2)(a) as originally enacted, in that it would have the effect of reintroducing, at the stage of considering particular mainstream schools,

the very criterion (suitability) which the judge correctly found had been removed from the original section 316 by the new sections 316 and 316A. The result of that, he submits, would be that if at the rehearing the Tribunal were to agree with the LEA that, notwithstanding the specification of mainstream schooling as the appropriate *type* of schooling for D, each of the particular mainstream schools under consideration was ‘unsuitable’ (for the purposes of paragraph 3(3)), either no school would be named in Part 4 of the statement, or a particular *special* school would be named (which would render the statement internally inconsistent).

56. He points out that particular mainstream schools could be under consideration in a variety of situations: for example, where the parent has not expressed a preference under paragraph 3(3), or has not done so timeously; where the parent has expressed alternative preferences under section 3(3); or where the parent has requested a particular school within the terms of paragraph 3(3), but the Tribunal has concluded that there is no paragraph 3(3) duty to name that school in Part 4 of the statement, although it remains open to it to do so under section 316(3).
57. He submits that there is no reason why Parliament should not have put in place two parallel legal duties: a qualified duty under paragraph 3(3) to give effect to parental preference, and a qualified duty under section 316(3) to ensure that a child is educated at a mainstream school. The discharge of either of those duties could lead to the naming of a particular mainstream school, but following consideration of different factors.
58. He submits that the proper approach is as follows. If the Tribunal upholds the LEA’s rejection of the “C” school under paragraph 3(3), the section 316 duty will remain and D must be educated in a mainstream school unless incompatibility is established within the meaning of section 316(3) and section 316A(5) and (6). Absent such incompatibility, mainstream schooling must be specified in Part 4 of the statement as the type of schooling which is appropriate for D. Where the Tribunal has before it the names of particular mainstream schools as candidates for naming in Part 4 of the statement, it must consider each of them, but it must not do so by reference to paragraph 3 of Schedule 27 since paragraph 3 is no longer in play. Mr Wolfe accepts that once the paragraph 3 procedure has been exhausted, and it has been held that the local education authority has lawfully rejected the parent’s expression of preference, all further nominations of particular schools, whether put forward by the appellant or by the LEA, must be considered by the Tribunal on an equal footing, as possible candidates for naming in Part 4 of the statement. He submits that at this secondary stage there is nothing to prevent the parent nominating the same school as that which was previously nominated by the parent under the paragraph 3 procedure; but, he submits, different considerations will apply to it.

The argument for the Tribunal

59. Mr Kovats submits that the approach urged by the appellant is a wrong approach, in that it enables a parent in effect to bypass the provisions of paragraph 3; and that the guidance given on this aspect by the judge is substantially correct.
60. He submits that where a parent has duly expressed a preference for a particular mainstream school, the local authority should apply the criteria in paragraph 3(3). He points out that section 316A(3)(b) provides in terms that section 316 does not affect the operation of paragraph 3. If none of the disqualifying factors in paragraph 3(3) apply, the local education authority must name that school in Part 4 of the statement. If, on the other hand, one or more of the disqualifying factors applies, the authority may lawfully reject the parent's expression of preference. It must then discharge its duty under section 316(3) (see section 316A(4)).
61. Mr Kovats submits that the Guidance is simply wrong when it states (in paragraph 30) that "section 316 requires that the local education authority must name another mainstream school". It follows, he submits, that since in that respect the Guidance is attempting to do no more than summarise the legal effect of the section, there can to that extent be no obligation on the LEA of the Tribunal to 'have regard' to it. In any event, he submits, the Guidance cannot prevail over the terms of the relevant statutory provision.
62. Mr Kovats relies on *Richardson* for the proposition that section 316 does not impose any duty on a local education authority, or on the Tribunal, to name a particular school. He submits that the amendments made to the 1996 Act by the 2001 Act do not impact in any way on the decision in *Richardson*, which is still good law. He accordingly accepts that (contrary to the argument of the LEA, to which I refer below), although not bound to do so, the Tribunal may, as a matter of discretion, name a particular school (that is to say, order the local education authority to name a particular school) in Part 4 of the statement. He submits that sections 326(4) and 316A(6) provide support for this proposition.
63. On the other hand, Mr Kovats relies generally on the Guidance as supporting the view that in discharging its duty under section 316 a local education authority is not required to produce evidence relating to each of the schools in its area; rather, it suffices, he submits, that it should produce evidence of a strategic nature, covering the situation in its area as a whole. If, in the light of such evidence, incompatibility for the purposes of section 316(3) is not established, the Tribunal will direct, pursuant to section 326(3)(b), that Part 4 of the statement specify mainstream schooling. It will then be left to the local education authority to find an 'appropriate' school.
64. Mr Kovats submits, however, that in considering whether to exercise its discretion to name a particular school the Tribunal should adopt a cautious approach, and should not name a particular school unless there has first been consultation both

with the local education authority and with the governing body of the school. Moreover, he submits, the Tribunal should treat any nomination of a particular school suggested by the parent at the appeal hearing as if it were made under paragraph 3. In other words, he submits, paragraph 3 will apply whenever the parent proposes a particular mainstream school. If the statutory provisions are operated in this way, there will, he submits, be no conflict between paragraph 3 and sections 316 and 316A.

The arguments for the LEA

65. Mr Oldham submits that it is Schedule 27 alone which governs parental choice for a particular mainstream school, and that under paragraph 3(3) the parent has the right to propose only one particular school. He submits that section 316 is concerned with *type* of schooling, whereas paragraph 3 is concerned with *particular* schools. He agrees with Mr Kovats that once the appropriate *type* of schooling has been specified in Part 4 of the statement, it is up to the local education authority to progress the matter further and to identify an ‘*appropriate*’ school. He relies in this connection on regulation 34 of the 2001 Regulations (quoted earlier), which provides that the LEA may not bring more than two witnesses to the rehearing save with the consent of the President or of the Tribunal at the hearing. He submits that regulation 34 is consistent with the limited scope of appeals under section 326.
66. He submits that it would be contrary to the 1996 Act and the Guidance, as well as being a practical absurdity, if parents could achieve a placement at a particular school via the provisions of sections 316 and 316A in circumstances where they were unable to insist on that choice under paragraph 3.

CONCLUSIONS

67. We begin by sounding a cautionary note. In our judgment the scope for giving general guidance on the meaning and effect of sections 316 and 316A in the absence of detailed findings of fact – of giving guidance, as it were, in a factual vacuum – must inevitably be limited. Accordingly, in what follows we shall not address every submission which has been made to us; rather, we shall confine ourselves to a general consideration of the broad questions which the Tribunal at the rehearing will necessarily have to consider if the LEA’s rejection of the appellant’s expression of preference under paragraph 3 of Schedule 27 is found to have been lawful, and mainstream schooling is found to be the appropriate *type* of schooling to be specified in Part 4 of the statement.
68. At the outset it is, in our judgment, of crucial importance to recognise that the process for recognition of parental choice of a particular school contained in paragraph 3 of Schedule 27 (‘the paragraph 3 process’) is entirely distinct both in its nature and in its purpose from the process whereby a local education authority discharges its duty under sections 316 and 316A (‘the section 316 process’).

69. Under the paragraph 3 process, parents have a qualified right to insist on their preference for a particular school. The right is qualified by paragraph 3(3)(a) and (b), in that if any of the conditions in those subparagraphs is met, the local education authority is not bound to specify the name of that school in Part 4 of the statement (although there is nothing in paragraph 3 which expressly prevents it from doing so). The conditions are 'suitability' (in subparagraph (a)) and incompatibility with either with '*the efficient education for the children with whom he would be educated or the efficient use of resources*'. Although a modified version of the 'incompatibility' condition appears in section 316(3)(b) ('*the provision of efficient education for other children*'), read with the '*no reasonable steps*' provisions in section 316A(5) and (6), the 'suitability' condition in paragraph 3(3)(a) has no equivalent in the section 316 process. So much at least appears to be common ground.
70. We turn, then, to the section 316 process. Section 316(3) imposes a duty on a local education authority to educate a child in a mainstream school if the parents wish it, unless '*that*' (i.e. the education of the child in a mainstream school) is '*incompatible ... with the provision of efficient education for other children*'. That condition is itself qualified by the '*no reasonable steps*' requirement in section 316A(5) and (6).
71. Section 316 is not expressly directed to the making or maintaining of a statement, but the necessary link is provided by section 316A(3). Section 316A(4) provides that where a local education authority decides to make a statement for a child under section 324, and lawfully rejects a parent's preference for a particular school (i.e. where the paragraph 3 process has been exhausted), it must, in making the statement, comply with section 316(3). It is in our judgment clear from section 316A(4) that, in the context of issues as to the contents of Part 4 of a statement, the section 316 process is subordinate to the paragraph 3 process in the sense that it only comes into operation where the paragraph 3 process (if lawfully invoked by the parent) has been exhausted. Where the paragraph 3 process has been lawfully invoked, the starting point for the local education authority, and hence for the Tribunal standing its shoes (see Sedley LJ in *Bromley*, quoted in paragraph 32 above), must be the question whether the parent is entitled to insist on his or her choice of school. The parent will be so entitled unless either the 'unsuitability' condition in paragraph 3(3)(a) or either limb of the 'incompatibility' condition in paragraph 3(3)(b) applies. Subject to that, the chosen school must be named in Part 4 of the statement, and (so far as Part 4 of the statement is concerned) the section 316 process will not come into operation. However, if one or other of the prescribed conditions applies, and the local education authority decides not to name the chosen school in Part 4 of the statement, then by virtue of section 316A(4) the section 316 process comes into operation.
72. We turn, then, to the section 316 process, and to the nature and extent of the duty imposed on a local education authority by sections 316 and 316A. In the first place, we reject Mr Wolfe's submission that, on its true construction, section 316 imposes a duty on a local education authority to name a particular school in Part 4

of the statement. In our judgment the amendments brought in by the 2001 Act do not in any way impact upon the decision of this court in *Richardson* (see paragraph 31 above) that section 324(4) confers a discretion on the local education authority in this respect. Nor can we see anything in the wording of section 316 or section 316A to suggest that that discretion is intended to be elevated into a duty.

73. As to paragraph 30 of the Guidance (quoted in paragraph 27 above) we agree with the judge that guidance, however strongly expressed, cannot alter the meaning of a statute. Accordingly if (as we think) section 316 does not, on its true construction, impose a positive duty on the local education authority to name a particular school in Part 4 of the statement, then in our judgment such a duty cannot be supplied by the Guidance.
74. At the other extreme, it follows from the conclusions we have expressed in paragraph 72 above that we reject Mr Oldham's submission that the scope of a local education authority's duty under section 316 is confined to the specifying of the appropriate *type* of schooling and accordingly that in the context of the section 316 process there is not merely no obligation but no power for the authority (and hence the Tribunal) to consider *particular* schools. We can see nothing in sections 316 or 316A to support such an extreme and, as it seems to us, unrealistic construction.
75. So in our judgment the correct analysis is that whilst section 316 does not require a local education authority to name a particular school in Part 4 of the statement, it does not prohibit it from doing so; and that in carrying out the section 316 process the local education authority (and hence the Tribunal) has a discretion to consider particular schools as candidates for naming in Part 4 of the statement.
76. At this point, as it seems to us, paragraphs 30 and 32 of the Guidance come into play. Although the bald statement in paragraph 30 that "section 316 requires that the local education authority must name another mainstream school" is (as we have concluded) wrong as a matter of law, it does not follow, in our judgment, that it falls to be ignored for all purposes. The tenor of the Guidance is clear, as a matter of practice. The absence of any *duty* in law to name a particular school is entirely consistent with guidance to the effect that a local authority should nevertheless normally exercise its *power* to do so. Accordingly we conclude that, having regard to the Guidance (so long as it remains in substantially the same terms in this respect), in carrying out the section 316 process a local education authority (and the Tribunal, standing in its shoes), having concluded that mainstream schooling is the appropriate *type* of schooling for the child, ought normally to exercise its power to name a particular mainstream school in Part 4 of the statement. The Tribunal will of course concentrate on deciding the issues which arise on the appeal before it, and we imagine that there may occasionally be appeals in which the only issue is as to the type of school.

77. The conclusion that the power to name a particular school should normally be exercised is in our judgment reinforced by a consideration of the practicalities of the situation. At some stage, a placement must be made in a particular school. It is, as it seems to us, plainly desirable that that placement should be specified in Part 4 of the statement, not least because (as Mr Wolfe pointed out) the parent will then have a right of appeal against it under section 326(1A)(b).
78. On the footing, therefore, that in the course of the section 316 process consideration will be given to particular schools as candidates for naming in Part 4 of the statement, we turn to the question of the approach which the local authority (and hence the Tribunal) should adopt in that respect.
79. We reject the respondents' submission that where, in the course of the section 316 process, the parent has proposed a particular mainstream school or particular mainstream schools, such expressions of preference fall to be treated as if they had been made in the course of the paragraph 3 process. If that were the correct analysis, the effect would be to reintroduce into section 316 the 'suitability' condition which Parliament specifically removed from the original section 316 when it enacted the 2001 Act.
80. Nor can we accept the respondents' submission that such an interpretation of sections 316 and 316A enables a parent to 'bypass' the stricter test laid down by paragraph 3(3). In our judgment, the fallacy in this submission lies in its failure to recognise that the paragraph 3 process is wholly distinct from the section 316 process. Whereas, under paragraph 3, parents have a qualified right to insist on a placement at the particular school of their choice, in the context of the section 316 process there is no such right. In that context, any preferences expressed by a parent for a particular school or for particular schools are no more than nominations of candidates for consideration in accordance with the section 316/316A criteria. In the context of the section 316 process, the Tribunal must in our judgment consider all candidates for nomination on an equal footing, whether they are proposed by the parent or by the local education authority (it is not open to the Tribunal to consider proposals from any other source: see section 326(4)(b)).
81. Finally, as to Mr Oldham's reliance on regulation 34 of the 2001 Regulations, we agree with Mr Wolfe that the 2001 Regulations cannot dictate the operation of the relevant statutory provisions: the tail cannot wag the dog. In any event the Tribunal has ample procedural discretion under the 2001 Regulations to enable it to accommodate the section 316 process appropriately.
82. We have now reached the point where it would, as it seems to us, be imprudent to attempt to give any further guidance as to the meaning and effect of sections 316 and 316A in the absence of specific findings of fact. We accordingly conclude by saying merely that, for the reasons we have given, we respectfully differ from

the judge as to the nature and scope of what we have called the section 316 process.

Order:

- 1. The First Respondent to pay the Appellant's costs of the appeal, including the costs of the appeal before Pitchford J, to be assessed if not agreed.**
- 2. The Appellant's costs will be subject to a detailed Community Legal Service funding assessment.**
- 3. There will be no further order on the appeal.**

(Order does not form part of the approved judgment)