Case No: CO/817/2001

Neutral Citation Number: [2001] EWHC Admin 823
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
LEEDS CROWN COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday 23 October 2001

B e f o r e :

THE HONOURABLE MR JUSTICE NEWMAN

- -

RHONDDA CYNON TAFF COUNTY BOROUGH COUNCIL — Appellant

- and -

(1) THE SPECIAL EDUCATIONAL NEEDS TRIBUNAL
(2) 'V' — Respondents

- -

(Transcript of the Handed Down Judgment of
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David Wolfe (instructed by Rhondda Cynon Taff County Borough Council) for the Appellant
Clive Lewis (instructed by Levenes Solicitors) for the 2nd Respondent

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Judgment
As Approved by the Court

MR JUSTICE NEWMAN:

1. This is an appeal by Rhondda Cynon Taff County Borough Council ("the LEA") against a decision of the Special Educational Needs Tribunal ("the Tribunal") issued on 3l January 2001. The Tribunal allowed an appeal by the mother of S, a boy, in connection with the school named by the LEA in the statement of special educational needs for S, who suffers from severe dyslexia.

2. The Tribunal placed S, by direction issued to the LEA to amend the statement, at a boarding school in England: Kingham Hill, Chipping Norton, Oxfordshire. It is a small, independent school with a unit for dyslexic pupils. Enabling consent had been given by the Secretary of State. The school named in Part 4 of the statement by the LEA was Tonypandy Comprehensive School.

3. The Decision records that it was "LEA policy ... not to place children outside of the LEA and to educate in the mainstream wherever possible"., The parentally preferred choice of Kingham Hill stemmed from the mother's belief that S would not be able to manage at a mainstream secondary school and required a school with a special unit. The main element of special provision at Tonypandy would be five lessons per week from a peripatetic teacher for specific learning difficulties. Further, S's teachers would be informed of his difficulty. The Tribunal concluded:

"We were not convinced that the system of a peripatetic teacher going into the school would enable there to be sufficient liaison nor that subject teachers would be able to offer sufficient support and differentiated materials for S."

There is no appeal against this finding.

4. The Tribunal record the submission by the LEA as being that it was accepted that " ... placement" at Kingham Hill " ... could meet S's needs" but " ... placement there would be unreasonable public expenditure as his needs can be met at Tonypandy ... at a lesser cost". The Tribunal had been provided with the cost differential.

5. The Tribunal stated its conclusion as follows:

"A case is therefore made for the provision on offer at Kingham Hall for [S] now. It may be that sufficient progress can be made in equipping S with strategies of study that would mean

that he could transfer into a mainstream maintained placement before starting his GCSE courses."

6. The case for the LEA advanced on the appeal to this court is supported by a number of witness statements naming schools within the area of the LEA or in Wales, which it was said would have been put forward to the Tribunal, had the LEA been given, as it should have been, the opportunity to suggest alternatives to Tonypandy. Further, the LEA asserted by this fresh evidence that there was "no educational reason for (sic) him to be a boarder." The gravamen of the attack upon the Tribunal is that it appeared to have concluded that, if it did not consider Tonypandy to be appropriate, it should "automatically name Kingham Hill".

7. Evidence in response was provided by various statements for the parent. It was to the effect that the LEA had been asked whether the provision of peripatetic teacher support was the only provision which it provided for teaching pupils with dyslexia and it had informed the Tribunal that it only provided such a system for dyslexic pupils.

8. In the first witness statement of Jessie James made in support of the appeal and dated 28 February 2001, it is stated that, had the LEA been given the opportunity to state alternatives it would have put forward: Y Pant Comprehensive School at a cost of £5363 per year, Porth Comprehensive School, at a cost of £5363 per year, and Aberdare Boys School at a cost of £5363 per year. Each of these is a mainstream school. It is submitted for the second respondent that, having regard to the conclusion of the Tribunal that mainstream schooling was inappropriate, they cannot be regarded as alternatives to Kingham Hill. The LEA submit that the Tribunal did not find mainstream schooling inappropriate, but only that Tonypandy was inappropriate.

9. On l6 May 2001 Jessie James made a second witness statement. In this statement she suggested Cardiff High School as a suitable school, within an adjoining local authority area, at a cost of £5000 per year. Cardiff High School offers a unit attached to the school for dyslexic pupils and is therefore unlike any school within the appellant's area. She also gave details about Y Pant which she suggested made it suitable notwithstanding that it had no unit.

10. Mr Wolfe developed the argument for the LEA by reference to the case of Herefordshire County Council v Lane [1998] ELR 319. In that case the parent was claiming that her child, who had cerebral palsy, needed a 24 hour curriculum and that the appropriate school was therefore Ingfield Manor, a residential school. The authority argued that the child did not require a 24 hour regime and that it would not be an efficient use of its resources were the Tribunal to order the school to be named. The Tribunal concluded:

"Whilst we were not convinced that [K] needed a 24 hour curriculum, the evidence presented to us did not persuade us that Chadsgrove School [the LEA named school] could deliver the provision as outlined in the LEA's own statement. The only alternative which we had before us was Ingfield Manor school, we therefore decided to name Ingfield in Part 4 of the statement."

In what I regard as an unsurprising conclusion the Court of Appeal concluded that the Tribunal had erred in naming a school which provided, by way of its educational regime, more than the child required. It inevitably meant that there would be unnecessary expenditure. It can be said that overprovision in respect of an educational element of the regime at an institution means that the institution is capable of being regarded as inappropriate for a child, even though the institution can meet the less demanding educational needs of the child.

11. Mr Wolfe submitted that the case of Lane governed the position on this appeal. Adopting the evidence advanced on appeal, which was not before the Tribunal, he submitted Kingham Hall overprovided for S, there being "no educational reason for him to be a boarder". That being so even though Tonypandy was inappropriate, Kingham Hall should not have been named and the LEA should have been given the opportunity to suggest alternative schools. I reject the submission. Kingham Hall had not been put forward because it offered residential education, being an element required in the education of S. His need to reside there was simply a consequence of the distance of the school from his home. The LEA did not submit that Kingham Hall overprovided for S. On the contrary, it submitted that the school was appropriate even though it was clear S would have to board at the school. The Decision records that the argument was that unreasonable expenditure arose, not because of the need to board, but because "his needs" could be "met at Tonypandy". It was open to the LEA to submit to the Tribunal that boarding was unnecessary and that it gave rise to unnecessary expenditure. Had it done so, the issue would not have been whether there would be educational overprovision but whether a special unit at a school where he would not have to board was available. Had it done so the attention of the Tribunal would have been drawn towards making an inquiry as to whether any school could be named which could provide for S's need for a special unit without him having to board. I am bound to say that in the light of the way in which the evidence has come out on appeal it cannot be assumed that Cardiff High School, being the only qualifier, would have been named at the first opportunity.

12. Further, it has to be said that the firm position adopted by the LEA was that it did not provide a system which included schools having a special unit for dyslexic children. It was therefore plain that it could not name a school within its area which met the category of school which, it is submitted, the Tribunal had decided was required. It was reasonably foreseeable to the LEA, if not obvious, that if it failed to persuade the Tribunal that mainstream education, with peripatetic support, was appropriate, it was "not possible" to educate S within the area and in accordance with its policy. Its emphasis on its policy (repeated in the appeal) "to educate all children within the area if possible" was hardly in point. Indeed since the first statement of Jessie James took issue with the Tribunal without meeting or challenging the Tribunal's decision as to the need for a special unit, it can be

inferred that the weight of the argument before the Tribunal was directed, as the first statement was, to an argument to the effect that a special unit was not required and that as a result it gave rise to unnecessary expenditure.

13. As to the issue whether the Tribunal decided that mainstream education was inappropriate, Mr Wolfe suggested, in his written argument, that the Tribunal had not concluded that all mainstream placements were inappropriate, but only that Tonypandy was inappropriate. I regard the argument as untenable. The Tribunal would not have asked whether there was any provision other than peripatetic support in a mainstream school if it had wished to consider some other mainstream school. It must have been obvious that mainstream schools in the area, other than Tonypandy, existed. The decision letter speaks of " ... the school", referring to Tonypandy because the details of teacher support and so forth were given in connection with Tonypandy. It was for the LEA to advance material which demonstrated significantly different educational provision in the other schools.

14. As the argument was developed by Mr Wolfe it became more and more apparent that he was close to submitting that at the conclusion of every Tribunal hearing, where the school named in Part 4 is held to be inappropriate, an LEA should be given an opportunity to suggest alternatives which might be less expensive than an independent school preferred by the parent. In my judgment the case of Lane manifestly fails to support such a principle. Further, to allow it to do so would go against the priority to be given to expedition in the resolution of these disputes, tend to give undue prominence to resource considerations, which are one important factor, at the expense of the interests of the child, which are also an important consideration, and to relieve an LEA of the duty to put forward its case as fully and comprehensively as it can at the outset.

15. For all these reasons the appeal is dismissed.