'COMMON SENSE AND THE LAW DO NOT ALWAYS GO TOGETHER!'

AN OBJECTIVE LOOK AT WHAT WE COULD DO BETTER

By Douglas Silas[1]

INTRODUCTION

The title of my talk - '*Common sense and the law do not always go together!*' may seem blindingly obvious to some and mischievous to others. Yet I often find myself these days reminding myself or other people of this fact. So I have subtitled my talk - '*an objective look at what we could do better*' although I know I have not got all the answers.

My paper is a chance for me to share some of my thoughts with you. It is publicised as my ideas to improve our appeal system. However, it asks more questions than it answers. I have taken it on myself to see if there is a way that we can first reduce disputes and then, if there has to be an appeal, whether we can make the appeal process more efficient for everyone. Although I am a lawyer, I try to avoid litigation wherever possible. I genuinely believe that we can do this sometimes by just using a bit of common sense.

On the whole our current SEN framework is not that bad. Some actually say that it is the best system in the world![2] However, I believe that there are some things that could be changed for the better but I know that I cannot change the SEN system by myself. If you agree with some of what I have to say then maybe we can change some things together for the better.

I always try to adopt a neutral stance. Everything that I am saying is based on my own observations. Last year I made a point of saying that you could please some of the people some of the time but not all of the people all of the time, but that I still

[1] *With thanks to Helene Israel and Laxmi Patel who assisted with my preparation of this paper and also to David Wolfe and David Bateson for comments on its draft*

[2] *Lorraine Peterson, Head of NASEN, speaking at the Westminster Education Forum on 2 November 2010*

wanted to try. This year I am adopting a different stance; I am going to criticise everyone. So I am probably going to please none of the people for any of the time!

Ironically, most of you here today will not be the ones that I am criticising. Funding cuts aside, most of you have made the effort to be here because you are trying to keep up with and do the right things. It is usually those people who think that they already know everything who do not come to these kinds of events that probably need the most training!

MY PAPER

There are six sub-headings in my paper today as follows:

1. Overview of current appeal procedures
2. Differences between what should happen in theory and what does happen in practice
3. Presenting evidence: parental versus LA 'experts' - whose 'side' are you on anyway?
4. Are cases getting more complicated – or is it just me?
5. What we always need to remember – especially the child/young person
6. Some suggestions for the future

My primary focus (like all of ours) is on the needs of the child. I believe that we should always try to resolve matters of dispute between parents, schools and LAs as early as possible in order not only to get the right provision/placement for the child but to also maintain a relationship between the parents, school and LA wherever possible. But we need to start with the premise that LAs see the SEN system as biased towards parents and parents see it as biased towards Las. Schools feel they are sometimes stuck between a rock and a hard place.

I am always conscious that at Jordans I am speaking to a 'mixed' audience so I try to be as neutral and objective as possible. Some of the things that I am speaking about may seem to be viewed only from one way or another or may not make sense

immediately but on make sense later if you are faced with the kind of situation that I am describing. Also, much of this paper focuses on statements.

LATEST STATISTICS

Firstly, although I am reluctant to make too much of statistics, I want to share some '*stats.*' with you in order to try and put what I am going to say in context.

DfE STATISTICAL RELEASE

The Department for Education (DfE) issued a statistical release on 23 June 2010 entitled 'Special Educational Needs in England: January 2010' which stated, amongst other things, that:

- In January 2010 some 220,890 (or 2.7% of) pupils across all schools in England had statements of SEN, the same percentage as the previous year;

- The percentage of pupils with statements of SEN placed in mainstream schools (including nursery, primary, secondary, academies, city technology colleges) was 54.9% (compared to 55.6% in 2009);

- The corresponding figures for the proportion of pupils with statements of SEN placed in maintained special schools were 38.1%, with 4.3% in independent schools, 2% in non-maintained special schools and 0.8% in pupil referral units;

- There were some 1,470,900 pupils with SEN without statements representing 18.2% of pupils across all schools. (This is an increase of 0.4% from 2009);

- The incidence of pupils with SEN both with and without statements is greater in state funded secondary schools (2% and 19.7% respectively) than in maintained primary schools (1.4% and 18.5% respectively).

SEND Tribunal

According to the SEND Tribunal's Annual Report for 2009-2010, the majority of appeals brought against LAs are for refusals to assess (36%) followed by appeals

against the contents of a whole statement (31%) or various parts of a statement (11% for parts 2 and 3 and 12% for part 4). There were also a small number of appeals against refusals to make a statement (6%), decisions to cease to maintain statements (2%) and refusals to reassess (1%). There were no appeals against refusals to change the name of a school in 2009-2010.

The main types of SEN that the appeals concern are autism (26%); specific learning difficulties (16%); behavioural, social and emotional difficulties (16%); moderate learning difficulties (13%); and speech, language & communication needs (10%). Physical disabilities, severe learning difficulties, hearing and visual impairments and profound and multiple learning difficulties (together with 'others/unknown') make up the remainder.

The proportion of registered appeals relating to boys was 71% and girls 29% (the same as in previous years) with 3280 appeals registered but only 707 decisions needing to be issued (including strikeouts) with an appeal taking on average 6.2 months (down from the previous year of 6.4 months).

Contrary to popular belief, parents are legally represented in only 9% of hearings (down from 18% the year before) although other representatives (such as from IPSEA – Independent Parents for Special Educational Advice) provide 11% of representation (down from 18% the year before). LAs were only legally represented in 10% of hearings (down from 15% the year before). 17% of parents had a legal representative through the appeal process (down from 18% the previous year) and 7% had a voluntary representative through the appeal process (up from 6% the previous year).

1. OVERVIEW OF CURRENT PROCEDURES

Most of you are already aware of the current SEN legal framework, '*statementing*' and Tribunal appeal procedures. However, there may be some delegates who are not so I am first going to try and summarise things here. Please note that this is only basic information.

- LAW/CODE OF PRACTICE - The law regarding SEN/SEP is mainly contained in Part IV of the Education Act 1996 (as amended by other later legislation). The SEN Code of Practice 2001 provides additional statutory guidance. Although there is also a plethora of case law to follow, it must be remembered that, at the end of the day, there must always be factual evidence for any decision about a child's SEN.

- DEFINITION OF SEN[3] - A 'special educational need' ('SEN') is defined as where a child has a 'learning difficulty' which calls for 'special educational provision' ('SEP') to be made for them. A 'learning difficulty' is where a child:

    - Has a significantly greater difficulty in learning than the majority of children of the same age;

    - Has a disability which prevents or hinders them from making use of educational facilities of a kind generally provided for children of the same age in schools within the area of the LA; or

    - Is under compulsory school age and falls within the definition above or would do so if special educational provision was not made for them.[4]

- DEFINITION OF SEP - SEP means educational provision which is additional to or otherwise different from the provision made generally for children above the age of 2 in schools maintained by an LA, other than special schools.[5] If children are under 2, special educational provision is educational provision of any kind.[6]

- NUMBER OF CHILDREN WITH SEN - We have about 20% of children in our schools who have SEN of one sort or the other but only about 2-3% of those children have 'statements' of SEN. This means that the vast majority of

[3] *s.312(1),(2) Education Act 1996 (EA)*
[4] *s.312(3) EA*
[5] *s.312(4) EA*
[6] *s.312(4)(b) EA*

children with SEN have their needs met within the provision that can be made for them directly by a mainstream school.

- SCHOOL BASED INTERVENTION FOR SEN - If a school identifies a child as having SEN, it should try to provide intervention which is additional to or different from the normal classroom curriculum at either '*School Action*' or, if the child requires further assistance then, in consultation with parents, the school may involve external specialists to advise and assist the school on what is known as '*School Action Plus*'. The school only has a '*best endeavours*' duty[7] to meet the child's needs which is sometimes a cause for concern of parents as what different schools provide can vary.

THE 'STATEMENTING' PROCEDURE

- NEED FOR STATUTORY ASSESSMENT - Where an LA believes that the child has, or probably has, SEN which are either not being met through school based intervention or where those needs are so substantial that a mainstream school would not be able to meet them effectively within their resources, the LA must conduct a statutory assessment.[8]

- REQUEST FOR STATUTORY ASSESSMENT - Unless the LA initiates the assessment itself then an assessment can be requested by the child's parents, the school or responsible body on their behalf provided that an assessment has not been made within the six months preceding the date on which the request is made. A child does not necessarily have to be on '*School Action*' or '*School Action Plus*' for this to happen although this may provide good evidence.[9]

- RESPONSE TO REQUEST FOR STATUTORY ASSESSMENT - If the parents or school request an assessment, the LA will have six weeks in which to respond to any request and issue a decision. If the decision is to refuse to conduct an assessment, the parents will be sent a decision letter giving reasons why and informing them of their right to appeal to the Special Educational Needs &

[7] *s.317 EA*
[8] *s.323 EA; para 7:50 SEN Code of Practice (CoP)*
[9] *s.329 & 329A EA; para 7:7 CoP*

Disability Tribunal ('SEND Tribunal') within two months of being sent the decision.[10]

- TEST FOR STATUTORY ASSESSMENT - A statutory assessment will only be undertaken where the evidence suggests that the child's learning difficulties have not responded to relevant and purposeful measures taken by the school and/or external specialists and where the learning difficulties may call for SEP which cannot reasonably be provided for within the resources available to maintained mainstream schools within the LA's area. The LA will need to be satisfied that the child 'probably' has SEN and that the LA '*needs*' or 'prob*ably needs*' to determine their SEP by making a statement. [11]

- PROCEDURE FOR STATUTORY ASSESSMENT - If the LA initiates an assessment itself or agrees to a parental/school request then it has a period of 10 weeks in which to carry it out. It will do this by seeking a written '*advice*' from the parents; the school/nursery (or other people working with the child educationally); a medical professional; social services; and any other advice which is considered desirable (e.g. from a speech & language, occupational or physiotherapist) and where the child may have sensory difficulties, the LA must also obtain an advice from a qualified teacher of the visually impaired or hearing impaired as well as from the school.[12]

- DECISION TO MAKE/NOT MAKE ASSESSMENT - Having received the advices, the LA must decide whether or not to make a statement and, if so, must then within a further 2 weeks draft and send a proposed statement to the parents with a copy of all the advices received. These are 'appended' to the statement (and then known as the 'appendices'). If not, the LA must notify the parents that they believe that making a statement is not necessary in which case they will usually provide a 'Note in Lieu' (of a statement) which may be in a similar form to a statement but does not have any legal status. If doing the

[10] *s.329(2) EA*
[11] *s.323 EA*
[12] *Para 7:82 - 7:84 CoP*

latter the LA must also give reasons why and notify the parents of their right to appeal to the SEND Tribunal within two months of the decision.[13]

- PROPOSED STATEMENT - If the LA does agree to make a statement and issues one in a proposed form it will set the statement out in six parts: where part 1 is personal details; part 2 identifies the child's SEN (i.e. learning difficulties) and part 3 sets out the SEP that the LA considers necessary to meet those needs. It will leave the statement blank in part 4 where it refers to the school or type of school in order to allow the parents to express their own preference for a school. It will state the child's non-educational needs and non-educational provision in parts 5 and 6.[14] The LA has no strict legal duty to provide for these needs or make the provision in parts 5 and 6.[15]

- REPRESENTATION/SCHOOL PREFERENCE - At the same time as sending the proposed statement to the parents the LA should also provide them with information on maintained schools in their authority and other independent/non-maintained special schools.[16] After receiving the proposed statement parents will be given 15 days in which to make any representations about its contents to the LA as well as to express a preference for a school. [17] They must also set out their reasons for so doing.[18]

- MEETING TO DISCUSS PROPOSED STATEMENT - The parents also have a right to request and attend a meeting with the LA to discuss the statement within these 15 days and then after the meeting have a further 15 days in which to make additional representations or request a further meeting.[19] Unless the parents have requested a meeting (which removes the time limit[20]) the LA has eight weeks from issuing the proposed statement to finalise the statement

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[13] *s.324 & s.325 EA; Chapter 8 CoP*
[14] *Chapter 8 CoP*
[15] *The wording in the regulations is actually "…which the authority propose to make available or which they are satisfied will be made available by a Primary Care Trust, a social services authority or some other body"*
[16] *Chapter 8 CoP; SEN Regulations 2001, Schedule 1, Part A*
[17] *For maintained schools, the LA has to consider the preference under Schedule 27, para. 3 (3) Education Act 1996 but for independent/maintained schools under section 9 Education Act 1996 (the latter also for maintained schools)*
[18] *Para 8:60 CoP*
[19] *SEN Regulations, Schedule 1, Part A; Para 8:105 CoP*
[20] *Regulations 17(4)(c)&(d) remove the 8 week time limit.*

(including the initial 15 days for representations) and to make any amendments they consider necessary after considering the parental representations and preference for a school.[21]

- FINALISING THE STATEMENT - When a final statement is issued the parents will be given a right to appeal to the SEND Tribunal in relation to any disputed contents of parts 2, 3 and 4 and must do this within two months of being sent the statement and a covering letter giving them notice of their right to appeal.[22]

APPEALING TO THE SEND TRIBUNAL

SEND Tribunal appeal rules and procedures are governed by *The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008* and a Practice Direction for the Health, Education and Social Care Chamber Special Educational Needs or Disability Discrimination in Schools cases. You should take a good look at the Rules again even if you think you know them as we often get set in our ways by the way we conduct procedure (this goes for Tribunal Judges too!). The current appeal process can be summarised as follows:

- RIGHTS TO APPEAL - Parents can appeal against a refusal to conduct a statutory assessment/reassessment; refusal to make a statement after an assessment/reassessment or against the contents of parts 2 and/or 3 and/or 4 of any finalised/amended statement.[23] There is also a right of appeal against a refusal by an LA to change the name of a school on a statement (provided the statement is at least one year old and the parents are appealing for the same type of school)[24] or a decision to cease to maintain a statement.[25] There is also now since 1 September 2010 a new right to appeal against the contents of parts 2 and/or 3 and/or 4 of a statement by parents following a refusal to amend the

[21] *Para 8:134 CoP; Reg. 17(3) SEN Regulations*
[22] *s.326 EA; Para 8:108 CoP*
[23] *s.325, s.326 & s.329 EA*
[24] *Schedule 27 EA, Para 8*
[25] *Schedule 27 EA, Para 11*

statement after an Annual Review, again within two months of being sent the decision.[26]

- DEADLINES FOR APPEALS - Appeals should be lodged within two months of parents being sent the statement. Peculiarly, the SEND Tribunal considers two months to be on the same date in the month two months later (i.e. by 15 April for statements issued on 15 February) rather than the day before the two months elapses, which most lawyers are used to.

  There is also an issue as to what happens if the LA has issued the statement on one day but has not sent it to the parents until a few days later – which the parents know about because of the date of the postmark on the envelope – or where the parents have not received it until some time later – because of problems with the postal service or because they have been on holiday and have not received it until they get back. (In at least one case I have dealt with, the LA has even failed to put enough postage on the envelope so that the final statement never arrived!)

- CONTENT OF APPEAL - An appeal should usually be set out on a standard Tribunal appeal form which asks questions about the type of appeal and requests the reasons for appeal. Parents are asked to provide as much documentation and information as possible within the appeal. Curiously, the reasons for an appeal on the appeal form are requested to be set out in a very small box so parents (or their representative) will usually set out the appeal separately in a covering letter or document attached to the appeal form. Where the appeal is against the contents of a statement the Tribunal requires the parents to also send a copy of the statement together with all 'appendices', as well as the letter from the LA which gives the parents their right of appeal. The Tribunal can order the LA to provide these with their reply if the parents do not have them all/put them all in. There is a lot of information available from the Tribunal about what to do when appealing so I am not going to go into detail here.

[26] *s.328A EA (inserted by s.2 Children, Schools and Families Act 2010) which came into force on 1 September 2010*

Ideally parents should lodge the appeal with all/most of the information/documentation that they wish the Tribunal to consider. However, this is often unrealistic as sometimes they are seeking independent expert reports from experts who have waiting lists or awaiting other reports/information which will not become available until after the appeal deadline. This means that they will need to lodge this information later after the appeal has been registered as '*Further Evidence*'. This is often a point of contention for LAs who feel that they do not know all of the parents' case/evidence before issuing a reply to the appeal.

- APPEALING OUT OF TIME - The Tribunal will refuse to register an appeal unless they receive all the documentation they have asked for and may return the appeal, in which case it has to be lodged again with everything (unless it is not available in which case the LA will be ordered to provide it). This can sometimes mean the appeal has to re-lodged but this time out of time (i.e. after the two month deadline). In cases like these there will need to be an application to register the appeal out of time.

- REGISTERING THE APPEAL - The Tribunal aims to register an appeal within 10 working days of receiving it and will send a letter to the parents (or their representative) confirming that they have registered the appeal and telling them what happens next. The letter will now enclose automatic 'cas*e directions*' setting out a timetable for the appeal (see below). At the same time the Tribunal will send a copy of the appeal to the LA (also with 'case directions'). In appeals against refusals to assess/reassess or against the contents of a statement the Tribunal's automatic case directions stipulate other documentation that needs to be provided.

- PROVISION OF PLACE FORM - Where parents are appealing for an independent or non-maintained school to be named in part 4 of a statement, the Tribunal usually sends them (or their representative) a second letter along with the registration letter, enclosing a 'provision of place form' that must be signed by the school being appealed for to confirm that there is a place

available for the child if the appeal is successful. Without confirmation that there is a place available for the child the Tribunal has no power to order a place for the child at the school.

- TIMESCALES/TIMETABLE FOR APPEAL - The case directions give a provisional date for the hearing and will set out a (usually) 20 week timetable for both parties to provide information and documents to the Tribunal. The Tribunal say they will only change this provisional hearing date for very good reasons. The normal timetable is as follows:

    - 6 weeks for the LA response to the appeal/Attendance Form (i.e. details of the representative and who will be attending as a witness)
    - 9 for the parents to send a completed Attendance Form
    - 16 weeks for both parties to send in any new written information ('Further Evidence')
    - 18 weeks (or two weeks before the hearing) for both parties to agree and send to the Tribunal an agreed 'working document' of the statement (if relevant – i.e. where the appeal is against the contents of the statement)

    Although the appeal process should take 20 weeks from registration to hearing, the Tribunal also has a 2 week 'target' duty in which to issue its decision afterwards. Sometimes the Tribunal may issue a 'provisional conclusion' earlier than this (or even on the day of the hearing itself, say as to the school to be named in part 4) but this is rare and the decision will not be formally made until it is in writing. Moreover, it is still not unheard of, unfortunately, for a Tribunal to not issue its decision until well over a month after the hearing, especially if they have had to reconvene to deliberate after the hearing.

- ALTERING TIMETABLES - The Tribunal is able to alter a timetable on request from one of the parties (or of its own initiative) in certain circumstances - such as the need for an expedited hearing for '*phase transfer*' appeals. Otherwise the case directions are followed automatically by the Tribunal which means that appeals are not individually 'case managed' as had originally been envisaged.

- CASE MANAGEMENT HEARINGS - For most cases automatic case direction provide a good framework and make things more efficient. However, for more complex cases which need a level of case management, there is the option of applying to the Tribunal for a case management hearing which will normally be by telephone (known as a TCMH – telephone case management hearing). Here a Tribunal Judge (a legally qualified '*Chair'*) will hear directly from the parties involved or their representatives before issuing any directions. Sometimes an application can be made for a specific direction such as disclosure of a document, alteration of a deadline, etc., where the Tribunal Judge will consider the case on the papers. (Theoretically, there can also be case management hearings in person but I have never been asked to attend one and would be interested to hear from anybody that has.)

- ATTENDANCE FORM - The Attendance Form is mainly for each party to provide details of witnesses it wishes to bring. It has very good explanatory notes which accompany it pointing out that the Tribunal needs to hear evidence from people who know the child and are able to give information that is relevant to the areas of dispute. Whilst there is no theoretical limit on the number of witnesses parties can now bring along (parties used to be limited to two or three in exceptional circumstances) the Tribunal states that from experience three from each side is probably the maximum number that they will need to hear from. Cases should theoretically take no longer than a day and to have to hear from many witnesses can often lead to the hearing being adjourned to a second day, which only lengthens the process.

- THE LA REPLY - The LA must send a copy of its response to the appeal and any accompanying documents to the Tribunal and the parents (or their representative) by the given deadline stating whether or not they oppose the appeal and, if so, on what grounds. The reply should also include the views of the child (or the reasons why the LA has not ascertained these views) and, where the appeal is against the contents of a statement, a copy of an amended final statement which it agrees to make (if not opposing the appeal) or, if opposing the appeal, detailed grounds setting out what parts of the appeal are

admitted, what grounds of the appeal are resisted, and any legal grounds to be relied on at a final hearing.

- AMENDMENTS SOUGHT - Where the appeal is about the contents of a statement, this is usually easier to do by way of a '*working document*' which is like another draft of the statement. This makes it easier for parents to know in response what parts of the appeal the LA are opposing (as opposed to opposing everything generally). Unfortunately, some LAs do not detail anywhere what amendments they are agreeing or opposing but, to be fair, some LAs say that some parents do not set out all the amendments that they are seeking at the start (and supplement/change these after the LA response, especially where if they are seeking further evidence). Accusations can be made by both parties that the other one is trying to gain a competitive advantage.

- REQUEST FOR CHANGES - There is a Request for Changes Form which enables parties to request various changes to the appeal process or the appeal itself. One concern expressed now is that whereas the old Request Form/SO4 set out 21 check boxes which parties could tick to request directions/changes, the new Request for Changes Form only asks parties to say what they would like to apply for (with their reasons). The competed form also needs to be sent to the other party as to well as the Tribunal. A Request for Changes form can also be used to request a witness summonses for someone to attend the hearing if they refuse to do so or cannot do so for a credible reason.

- FURTHER EVIDENCE - The Further Evidence deadline of 16 weeks is usually about a month before the hearing. Although most parties will try and put all their further evidence in by this time, sometimes reports cannot be obtained beforehand. It is helpful to try and disclose these reports early to the other party but I know that this is not often done because the disclosing party is worried that early disclosure may give the other side the opportunity to comment on the report in their further evidence and then any response by them to this may not be allowed because it will then be late Further Evidence.

- LATE EVIDENCE - It is possible to send in Late Evidence after a Further Evidence deadline but there needs to be an application to admit it on a Request for Changes form. My experience is that a Tribunal Judge may decide on the application it if it is at least a week before the hearing or before the bundles have been produced but, if it is after this, it will usually be sent back to the applying party and asked to be presented as an application on the day of the hearing.

  Sometimes late evidence will not be contentious and unopposed by the other party but because the Tribunal has not passed them onto the Tribunal Panel an application for admission of the documents will still need to be made at the start of the hearing which, if agreed to admit, may then lead to there being an adjournment to allow for the Tribunal Panel to read them on the day or, exceptionally, for there to be an adjournment of the whole hearing to another day with cost consequences for the applying party (which can seem overkill). Ultimately it is for a Tribunal Panel to decide whether or not to allow late evidence and they will consider, amongst other things, whether the evidence could have been obtained or made available earlier, how late the evidence is being sent, how central the evidence is to the issues in the case and any possible unfairness or prejudice to the other side.

- BUNDLES - Bundles will be produced by the Tribunal some time after the further evidence deadline. Although there appears to be no clear pattern as to when it will ultimately arrive (although it is hoped to be produced by week 18 at least a fortnight before the hearing). I am afraid that even though bundles are now double sided, they are still extremely bulky and sometimes still have pages missing, duplication or wrong/missing numbering.

- WORKING DOCUMENTS - For appeals against the contents of a statement the Tribunal also requires both parties to agree and finalise between them a working document of the statement clearly setting out the amendments to the statement which are still in dispute. The LA is primarily charged with sending the working document to the Tribunal and other party by email at least two weeks before the hearing. However, amendments are still often only agreed

between the parties right up to the last minute before a hearing or during an adjournment at the beginning of the hearing itself. My view is that this only wastes valuable time and seems to be more of a last minute negotiating exercise for both parties rather than trying to clearly identify issues in dispute. The Tribunal has produced some guidance setting good practice on working documents and gives some advice on drafting working documents such as making sure amendments are clearly marked using bold, italic or underlined text, and to include page references to where amendments are taken from written evidence (e.g. expert reports).

- HEARINGS - Hearings are usually listed for one (or a half) day to start at 10am or 2pm. I have recently been successful in getting a number of appeals listed for two consecutive days (especially where there are going to be four witnesses on either side or the issues are very complex). This request may be resisted by the LA and/or Tribunal because of overall costs but, in my view, it often saves costs as it usually allows most (if not all) of the oral evidence to be heard on the first day and the second day is then left for any remaining oral evidence and submission about costs, the law and/or closing arguments. This also then leaves time for the panel to consider their decision afterwards on the day, rather than the hearing having to be adjourned for everybody to come back, sometimes not for a couple of months (especially if there are 13 to 15 people who need to get their diaries together to see if there is a mutually convenient date) or for the panel to have to reconvene in the next week or two. This only adds to the anxiety (and expense) for the parents (and also the LA).

- DECISIONS - The Tribunal Panel will deliberate as soon as possible after the hearing and subsequently issue a written summary of the decision (with a 'target' duty of 10 working days). Most people will have noticed that decisions by Tribunal Judges (previously Chairs) are still of varying quality and the Upper Tribunal has pointed out now in a number of cases that decisions do not always follow the right format, which needs to be improved (unfortunately Upper Tribunal decisions are now not circulated as easily or quickly or in the same way as used to be with the High Court decisions so that practitioners can keep abreast of changes in the law).

2. DIFFERENCES BETWEEN WHAT SHOULD HAPPEN IN THEORY AND WHAT DOES HAPPEN IN PRACTICE

That is the theory. Unfortunately, there are a number of differences between what should happen in theory and what does happen in practice. The '*statementing*' process and the Tribunal appeal process unfortunately sometimes seems to drive parties further apart rather than bringing them closer together. There is often inevitably going to be a conflict – parents may be thinking of only their child's needs but the LA has to think about other children with SEN and how to use their limited resources fairly in the face of extensive statutory duties. Here are a few things that I have noticed:

- REQUESTING STATUTORY ASSESSMENTS - Although most children with SEN have their needs met in maintained mainstream school without the need for as statement, schools vary greatly as to their own ability to provide appropriate support. The scheme of delegated SEN funding is sometimes a '*postcode lottery*' and many parents feel that only by obtaining a statement for their child will they be able to guarantee their legal rights because otherwise the school only has a '*best endeavours*' duty to provide for them.

  This can result in some parents requesting assessments (with or without the support of the school) and then appealing against LA refusals to assess. This costs time and money for both parents and LAs which could be better spent on support addressing the child's needs. Whilst only some of these appeals are successful, some are unopposed and about 97% or so of assessments carried out lead to the making of statements. Many opposed appeals against refusals to make statements are also successful.[27]

- SEN-PANEL DECISIONS/PROVIDING EVIDENCE - Although most LAs refer to an SEN panel having made the decision to refuse an assessment, many parents view the use of a panel as just a '*rubber-stamping*' exercise. They also become more entrenched if they feel that the SEN officer involved appears to

[27] *The success rate of appeals do not seem to be given by the SEND*

have somehow held back relevant documentation (as they see it). This sometimes requires a child's case to be put back before another later panel which may or may not agree with the previous panel. This again delays the whole process and costs everyone more time and money. Parents become irritated with LAs who they see as overly bureaucratic and against them and LAs become irritated with parents who they feel are oblivious to real-world considerations and just want their *'day in court'*. It starts to become a *'fight'* between *'them'* and *'us'*.

- PUTTING PARENTS OFF/MEETINGS TO DISCUSS DECISIONS - Parents often say they feel that they are just being appeased, strung along or put off from appealing. They may be told that it is too early to assess or that there is not enough information available yet on the child and that they should try again later. This may happen a few times. They may even request a meeting but then not get one until an appeal deadline has already passed. To be told that the only way of challenging the decision is to appeal but then find that the appeal deadline has already passed obviously infuriates them. They say that they naively believed that the LA was trying to help them not take advantage of them.

  Parents are sometimes professionals themselves or very clued-up and articulate. They say that they feel that they are being patronised and consciously or unconsciously misled by LA officers who are giving them information about their own LA's policy rather than what the law/Code of Practice says. Parents say that they feel they have to turn into detectives or lawyers to get to the truth (please remember there are usually two conflicting truths rather than one person telling the truth and the other lying).

- NOT STICKING TO LEGAL TIMESCALES - LAs also sometimes do not stick to timescales for conducting statutory assessments, making a statement or finalising amended statements. Parties often blame each other (or other parties such as medical professionals or therapists) for any delays with assessments. Parents also sometimes provide reports to an LA <u>after</u> the statutory assessment period has already been completed and are then upset when the LA does not

agree to consider these reports when refusing to make a statement or, more likely, when dealing with their representations on a proposed statement, resulting in the final statement being exactly the same as the proposed statement. This sometimes devalues the parental right to make representations as it is seen as nothing more than a tick-boxing exercise, especially if the parent has spent time making detailed representations. By the same token, an LA sometimes credibly complains that parents appeal to the Tribunal about a statement using new reports which they have not seen before.

All this can sometimes be avoided if an LA takes on board reports and representations when finalising a statement. It does not make common sense for to refuse outright to consider reports before a statement is finalised if later on an LA is willing to amend the statement significantly from the reports after an appeal has been lodged, albeit only shortly before a hearing. Likewise it does not make sense for a parent to argue for alternative or additional but unnecessary wording where they are just being pedantic and are likely to withdraw or lose the appeal for those amendments later. Both sides seem to be focused sometimes on arguing that their wording is better than the other's, even when there is little difference substantively, rather than trying to work with each other to avoid the need for an appeal.

- NOT AGREEING TO FINALISE STATEMENTS UNTIL PARENTS ARE HAPPY - LAs sometimes say that they do not want to finalise statements until parents are happy with them. This can be a '*Catch 22*' situation as it seems to parents that LAs are just covering their own backs so that if a parent later appeals the LA can try and argue that the parents had already agreed to it. Sometimes LAs and parents just have to agree to disagree, admit that there is a dispute and finalise the statement. This allows the parents to appeal as soon as possible so that a Tribunal can resolve the issues.

- SEN PANEL MEETINGS - Decisions are usually said to be made by LA SEN panels. Parents want to be allowed to attend SEN panel meetings – if not to speak, then at least to observe what is being said about their child. They cannot understand why they are not allowed to do this and think that there is

something to hide. If allowed to attend, they would hopefully see a fair and understandable decision being considered and reached. They may then think twice about appealing.

- MEETINGS TO DISCUSS DECISIONS/STATEMENTS - Parents often do not feel there is enough transparency in the decision-making process. They may be offered a meeting to discuss a decision. They say that they do not want to meet with somebody whose role is just to explain the already taken decision to them but rather someone who has the power to make another a decision one way or another. Coming to a meeting which is not able to achieve anything is seen as a waste of valuable working/domestic time and just delaying the inevitable. A meeting like this may only strengthen a parental resolve to appeal and the feeling that no one is listening to them or taking them seriously.

- MAKING SURE THAT PARENTS FEEL LISTENED TO - At the end of the day, parents often just want to feel they are being listened to and know that what they are saying is being considered. If they feel this has not happened they are more likely to appeal, especially if the child's school is supportive to them. Whilst a Tribunal Panel may eventually refuse an appeal, it is my experience that the parents will normally feel that they have at least been listened to and had a fair hearing.

- DECIDING CASES ON EVIDENCE NOT TECHNICALITIES - Where the reason for an LA refusal to assess is that there is insufficient evidence that the school has taken relevant and purposeful measures and/or approached external specialists, a refusal can sometimes look like a technicality rather than a considered decision of the child's ability to manage in a mainstream environment, no matter how much support is given. A statutory assessment is meant to be a multi-disciplinary assessment which could inform the process. This could theoretically lead to more assessments but fewer statements being made. I know that there is currently talk about trying to abolish statements altogether but I do not think this is going to happen. However, I can see a time in a few years where there are fewer statements needed because needs are

identified earlier and schools are better equipped and funded to provide for SEN.

Let's turn to SEND Tribunal appeal procedures:

- DEADLINES FOR APPEALS - I feel that the two month deadline for appealing is still reasonable (it gives enough time for parents to lodge an appeal and is not too much time for the LA to find out that the parents are appealing) but I am concerned that the two months now runs from the date of the decision being issued, rather than being sent, especially if the decision does not go out until a few days later or is not received by the parents until after that. Parents can sometimes find that they have effectively less time in which to appeal. I have even witnessed LAs not sending out final statements properly either by still leaving Part 4 blank (and not even naming a 'type of school') or not making amendments that were already agreed. Often parents want to put their appeal in as soon as possible to start the process and see innocent mistakes like this sometimes as being cynical ploys to undermine them.

- PHASE TRANSFER - Even though there was clear legislation about this for many years it is only since April 2009 that the courts clarified that LAs were mandatorily required to amend statements by 15 February of the academic year before phase transfer to allow parents to appeal to the Tribunal if they so wished.[28] The same case clarified that Part 4 of a statement need to name a type of school as well as a name (e.g. primary/secondary/mainstream/special etc).

- EARLY YEARS TO PRIMARY/SECONDARY TO POST-16 - Unfortunately other arguably phase transfer appeals such as early years to primary and secondary to post-16 are not covered by the phase transfer regulations. This sometimes requires parents to threaten or take legal proceedings against LAs for failing to amend and/or give them a right of appeal. This is perhaps not so much of an issue now with the new right to appeal following a refusal to

[28] *M v East Sussex [2009] EWHC 1651 (Admin)*

amend after an annual review of a statement but this is still a less than perfect solution.

- NOT PROVIDING SUFFICIENT INFORMATION AT THE START OF AN APPEAL - LAs are often concerned that parents do not lodge all of the information they require with their appeal in order that they can then properly respond but, by the same token, parents argue that they did not know they would need to appeal or seek extra reports until after the statement was finalised. I do not think that there is a right answer for anyone in a situation like this. There is always the Further Evidence deadline for both parties to submit further evidence but I can understand why neither party wants to put in new reports before the further evidence deadline (so as not to give the other side a chance to respond to it). I do not believe that there should be a game of '*ping-pong*' though where each party wants to have the last word and I actually think that, tough as it seems sometimes, we probably now have the best process.

- NOT COMPLYING WITH RULES/DIRECTIONS - A major problem is parties not complying with the rules already set or directions given to them. This can be as a result of many people involved doing the same thing for so many years and never being challenged. I also do not like the fact that, in my experience, panels seem to be reluctant to be firm about applying the rules sometimes and often let parties get away with things on the grounds that it has happened in the past and is no longer relevant – for example, lodging evidence late but then saying that it has been seen already so late service does not matter anymore. Fair play and consistency is the key.

- ALLOWING ASSESSMENTS/SCHOOL VISITS - I was one of those people who was very happy to see the new rules give a right to parents to seek a direction that an LA/school allows their expert into the school to assess a child or give a view about its capability to meet the child's needs and to the LA to seek a direction that their relevant professional can have access to assess the child. I had hoped that this would reduce issues and would be seen as being fair to both parties (i.e. the law applied to them both). However, I am still

seeing a number of situations where both parties are trying to get around these rules, which I think is not right. For example, I have heard parents say that they are not objecting to the assessment taking place but it is the child themselves who is objecting to being assessed, even when the child may be considered non-verbal. I have also seen schools still refuse to allow entry to a parent's expert (especially if they have been into the school before and have been critical) and when ordered to allow them in have had the LA send in their own expert or representative to accompany them and even to take photos! We need to get away from this cynicism in order to properly ascertain the right provision for the child.

- AMBUSHING - I also do not like either party trying to '*ambush*' the other. Of course there are situations where further evidence cannot reasonably be obtained before a Further Evidence deadline, or evidence only comes into being late. But it is, in my opinion, both unreasonable not to admit relevant evidence which is only obtained late because a medical or other professional (often working for the state) has not produced it beforehand, in the same way as holding back disclosure of evidence till the last minute which has been available for some time. I wonder whether there should be a duty on the parties as to 'full and frank disclosure' like in Judicial Review proceedings? Appeals should succeed or fail on evidence not technicalities and no party should be allowed to '*play*' the system.

- APPLYING FOR POSTPONEMENTS AT THE LAST MINUTE - There would seem to be sufficient time for evidence to be obtained by both parties in an appeal. I am also concerned by both parties only applying for postponements shortly before a hearing. This can be seen as just trying to buy time by the other party. Even if there are cost consequences, I know that parents see LA attempts like this to just be a cynical way of saving money as there is no retrospective funding in a decision and LAs see parents as time wasting to try and come up with more evidence that may support them.

- BUNDLES - Bundles should be produced by the Tribunal with more care, proper pagination, less duplication, no missing pages and sent out at least a

week before the hearing, preferably two. Parties should also sometimes agree a list of documents for a bundle. I understand that the Tribunal is actively looking to address this.

- SERVICE BY EMAIL - Yes, email is quick and easy but it is not always reliable. Worse, there is usually no indication of whether an emailed document has arrived or not unlike with a fax machine (although fax machines are also not perfect). I send most important documents by special delivery and track through the Royal Mail website, but a simple telephone call to see if something has arrived or not does the same. Email is also sometimes used as a device for only doing something at the last minute. Where parties are unrepresented or finding things difficult financially it is wrong to expect them to have to print out what can amount to hundreds of pages (which often also requires time to collate properly especially if it is sent as a number of attachments or emails).

  My pet-hate is 'spam'. I am talking here about being sent something by email which is automatically picked up by a spam filter and not seen until much later, either because the attachments are too large, there are a number of recipients or for a number of other technical reasons. I do not mind receiving an email if I have already been faxed something or sent something by post and I am certainly not a reactionary to utilising IT wherever possible to make things easier. I am also not speaking on behalf of the Tribunal or others who may be happy to accept service this way. I am sensitive to funding cuts and the need to cut corners wherever possible. I just don't think email is always an appropriate and reliable method of service and sometimes causes more hassle than it saves.

- WITNESSES - I never managed to get a third '*exceptional*' witness under the old rules and am as guilty as the rest for now asking for three or even four witnesses almost routinely. But are all these witnesses really necessary to hear from orally to ensure a fair hearing? I am not sure. Sometimes less is more. Represented parties may be able to provide formal witness statements. Even unrepresented parties can provide a letter or a report from someone. Of course, everyone should be entitled to present their case as they want and as

strongly as possible but there also needs to be a balance. Parents can feel very threatened to be faced by three witnesses on the LA side when they do not have anybody or only one. They are also understandably very upset and angry when a school witness brought by the LA tells the Tribunal something which is totally contradictory to what they said beforehand. Another good reason for everyone taking oaths.

- LEGAL REPRESENTATION - We are often reminded that it is a specialist expert Tribunal with an inquisitorial function but I am sure that some of you, like me, come out of hearings sometimes exhausted and wondering how on earth a parent could have coped without proper representation. Some people say that representation leads to one-upmanship so if a parent brings a representative or a lawyer the LA will also bring one and a vicious circle is then drawn. Some say that having legally qualified representatives only makes things worse. I disagree as I think lawyers help refine and focus the issues and evidence.

- DECISIONS / FAIR HEARINGS - Not only do Tribunal Panels need to ensure that their decision is issued swiftly in writing but I think they should feel more empowered to give a provisional conclusion on school placements as soon as possible after the hearing. There is also sometimes an inconsistency in the Tribunal Panel/Judge's approach as some see themselves as inquisitorial and some see themselves are purely arbitrational in adversarial proceedings. This is a tricky situation. I know it is not easy for a Tribunal Panel sometimes but whilst they may be right to try and assist an unrepresented party (in order to try and level the playing field) they can sometimes go too far in the LA's opinion. If they do not, then the parent often feels that they are biased towards the LA whose representative is usually experienced in these kinds of hearings. Overall though, we seem to have got to a situation where the procedures seem to be fair to both parties (or unfair to both parties as the case may be!)

- SCHOOLS - Too often I have seen cases won and lost on the basis of what Headteachers say that a maintained school will provide. Too often I hear the

argument that '*if it is in the statement, we will provide it because that is the LA's duty*' - this seems to be missing the point. And before you take me to task for seemingly only criticising maintained schools, I have a similar complaint to make about independent or non-maintained schools. My view is that whilst independent or non-maintained schools may generally offer something different to the maintained sector (usually because they are specific schools for types of needs rather than more generic special schools) I think that some of them have rested on their laurels over the past few years and are now not always making provision that is so different from maintained schools. Given the funding cuts over the past year it is extremely difficult, in my opinion, to justify the additional expense if similar provision (even if not as good) can be provided (perhaps with additional provision made out in Part 3).

One other concern is that a number of schools who would routinely send representatives to a hearing are no longer doing so. I have always had a problem with some independent schools which want to charge a high amount of money for a child to attend, conducting a (usually paid-for) assessment and then simply writing a two line letter saying they can offer the child a place without providing any assessment report. I am not saying that those assessment reports should necessarily be considered '*independent*' but I do feel that they need to take a clearer view about what they can and cannot provide.

I have sometimes seen schools try to 'fudge' things especially if they may not be able to make all the provision in the statement without additional costs. I have known one hearing where the school did not send somebody as a representative and the panel assumed there to be additional costs which there were not. This could have been avoided if there was simply someone there from the school to state this. I understand that having a representative go to a hearing is not just losing them for a day but probably two days because they also have to prepare for a hearing and the bundle usually takes a day to read. However, bluntly speaking, an appeal can sometimes be won or lost for a child to go to a school if a representative had attended the hearing.

I also appreciate that there is a dilemma for independent/non-maintained schools in that they want to try and retain as much neutrality as possible because they may have an ongoing relationships with the LA concerned or LAs generally and do not want to be seen to be taking sides. Frankly this is a tough one but I have always tried to ensure that a panel knows that no matter what side of the table the witness is sitting on they are there to present evidence about the child in their professional opinion or about what their school provides.

- OATH TAKING - I have not yet been at a hearing, despite my many years of practice, where witnesses have taken an oath before giving evidence. To be honest, asking the Tribunal for a witness to take an oath is tantamount to saying '*this witness is about to lie so please put them on oath!*' I have been told of one hearing where the parent had asked for everybody to take oaths to make it fairer. We are constantly reminded that a Tribunal is not a '*court of law*' and so the same rules and procedures do not apply. But parents are often astonished when I tell them that witness evidence is not given under oath. Credibility of evidence is a very important thing. You will often read Tribunal decisions where they say that they were impressed by the evidence of so and so. Sometimes I think it is about how the person comes across rather than what they are saying and we all know that there are '*seasoned*' Tribunal witnesses for both parties. However, taking a minute to swear or affirm is no real problem especially if it helps justice to be '*seen to be done*'.

- HEARING PROCEDURES - There should be no reason why there cannot be a standard procedure for appeal hearings – i.e. that after introductions and preliminaries, the issues are decided, the parents then asked to give a pen portrait of the child to help conceptualise the appeal and then for one party or the other to present their case. Although the appeal is by the parents I actually think that the LA needs to first prove its case for the decision it has made. In any event, whoever is deemed to go first it should be the same format for all appeals and each witness should be potentially given a finite amount of time to present their evidence through questioning by their party, the other party

and the Tribunal panel. There are sometmes witnesses who have a lot of experience of being at hearings and who are willing to speak up (such as independent experts or Headteachers) but at the same time there can be people who have never been in a Tribunal hearing before who do not (such as SENCOs, teaching assistants, etc). The process has to be suitable for everyone.

- COSTS OF NON-EDUCATIONAL PROVISION - We mainly think of cost considerations in respect of transport costs but costs of non-educational provision can also be taken into account when conducting an evaluation of whether there is '*unreasonable public expenditure*' when balanced with '*parental preference*' if conducting a comparative costs exercise under Section 9 of the Education Act 1996. Usually, a parent who is appealing for an independent/non-maintained special school placement may lose the appeal on account of the comparative costs of the LA school placement being a lot cheaper and their preferred provision then being found to be '*unreasonable public expenditure*'. However, the cost of the placement may have been increased by non-educational costs such as transport and, provided that parents are then willing to agree to have Part 4 amended in such a way as to ensure that if they do not pay for transport costs, the LA school will be named, many Tribunals will allow parents to take responsibility for transport costs in order to defeat any Section 9 argument brought by an LA.

  I know that David Wolfe is going to refer to case law about this later and also point out that we now also have to take into account the costs of social care (and arguably healthcare) which can also make a comparative costs argument viable for parents (i.e. that their preferred special school placement is not unreasonable public expenditure when the additional costs of social care when paying for the child to go to the LA special school is taken into account). Sometimes parties have to turn into accountants!

- TURNING THE SEND TRIBUNAL INTO THE HESC TRIBUNAL - One of the concerns that both parties encounter from time to time is regarding the Tribunal's limited jurisdiction to only deal with educational needs. This is always apparent in respect of appeals seeking a residential placement.

Parents argue that the child has social care and/or medical needs which are intertwined with their educational needs and so they should be looked at 'holistically'. LAs argue that the Tribunal's remit is purely about educational needs and they should not stray outside of this remit by considering social care and/or medical needs/provision which, they say, has been adequately provided for by social services and/or the local health authority.

There is much case law regarding whether non-educational needs can be considered by the Tribunal. Despite there being a number of cases saying that the Tribunal has the power to look at needs holistically, I am afraid that some Tribunal Panels do not because they feel that they are limited by their jurisdiction whereas others do. Either way, both parents and LAs are often not happy. Please note that Tribunals do <u>not</u> have the power to order an amount of social care provision or health provision into Part 3 of a statement.

3. PRESENTING EVIDENCE: PARENTAL VERSUS EXPERTS – WHOSE 'SIDE' ARE YOU ON ANYWAY?

Some of you will recall that when the original Tribunal amended rules were being consulted on there was a suggestion that there should be an opportunity for opposing experts to meet/discuss their reports to see if they could reach areas of agreement. This was dropped when the rules were finalised.

I think this is a great shame and I would strongly suggest reconsideration of this. I know that it is very difficult for experts to find additional time to meet or speak. However, a simple discussion or written response to questions posed for them by the other party's representative will clearly identify what they do or do not believe. I am always concerned that in hearings either party's experts try to fumble their way around their evidence and then, in my perspective, find that experts try to reinterpret their reports so that what they have said is not what they are saying now or find experts agreeing with one another as to the fact the child needs more support or does not need everything they were suggesting before in writing (which is sometimes a shock and disappointment to parents). All this could have been

avoided before (or at least the issues narrowed) if experts had had a chance to speak before the hearing.

I know that many LAs will try and argue that '*independent*' experts instructed by the parents are not really '*independent*' but are simply saying things because they have been paid to say them or that their evidence isn't credible because they have only seen a '*snapshot*' of the child. However, allegations can also be made about LA '*experts*' who are, in fact, employed by the LA and who may have pressure applied to them to '*toe the party line*'. Experts sometimes feel that they are supposed to say what the LA/parents wants them to say rather than what they either genuinely believe or would ascertain if they were properly objective and following the guidance of their professional body. But I feel that some of them have been trained by people who have been steeped in a culture and have not even learnt to question whether something may or may not be correct, it is just what is done.

For example, is there is an evidential basis for providing a child with a block of six week sessions of therapy rather than it really being just a practical way to manage a large caseload? A private therapist may say a child needs direct individual therapy without questioning whether the same benefit can be achieved with small group or indirect therapy (i.e. a daily programme from a Teaching Assistant set up by a therapist). I am not going to say that one is better than the other as it will depend on the facts of the individual case but I am just asking everyone to be cautious when entering this area.

Tribunal Panels are also guilty of sometimes making assumptions about both types of experts. There is a lot to be said for the fact that a less experienced '*expert*' from an LA/PCT's views are as credible if they are working with the child on a regular basis as is an independent expert who does a detailed assessment (albeit a '*snapshot*') but is able to reach a view objectively because of their years of experience. Panels only see independent experts coming for parents in appeals where they have advised that the child needs more provision; they do not see them in the other cases where they have seen the child but advise that the provision is satisfactory.

Understandably LAs would like to call witnesses who they believe are going to be strong for them but it can sometimes lead to situations where the LA wants to call the Headteacher from a named maintained school but that Headteacher says that he/she cannot attend on that day because of other commitments at school, are on holiday or do not want to be away from the school during the last week of the school year (especially in phase transfer appeals). Whilst I have suggested that the LA can call another representative from the school (especially if the Headteacher has not even met the child concerned before) there is usually resistance to this which ends up requiring a telephone case management hearing (TCMH). I have heard Tribunal Judges getting quite irritated about this issue and ordering the hearing to go ahead but, by the same token, where there are claims by parents' representatives that a witness they want cannot attend (or their preferred representative is not available) the Tribunal can also give short thrift.

It is not a perfect world and, as I have suggested above, if we can have things like witness statements, expert meetings, limited time in which to speak and a better focus on issues, it may well be that hearings will not need to go on as long. It would be wonderful if hearings only needed to last for half a day and witnesses could come in and give their evidence specifically without having to be present for the whole hearing. I need to remind you that in many court cases a witness is brought in to give their evidence but then asked to leave. The SEND Tribunal appears to want to bend over backwards too much which I think may be counterproductive.

4. ARE CASES GETTING MORE COMPLICATED – OR IS IT JUST ME?

I would like to think that I have got better at what I do over time but I have noticed that cases are getting more complicated in recent years. There is more case law to have regard to, more difficult issues to resolve and more potential consequences to consider when reaching decisions. You will hear from David Wolfe after the coffee break with '*A review of recent case law and other legal developments you must know about*' but, if you think about it, we have already spent the best part of two decades developing SEN law which we now need to have regard to. Whenever I come out of an appeal hearing I am very concerned that parents or LA officers are expected to present cases without the assistance of a legally qualified representative. I specialise

exclusively in this area of SEN and even I find it hard to keep up with what is going on sometimes. I know that many LA officers also struggle and may explain why LAs do not get it right all of the time. But leaving it up to a Tribunal Panel/Judge to always know clearly what the law is not always the answer. The law can be interpreted many ways.

We also need to remember the current socio-economic climate to place things in context. Last year's change of political direction has led to the austerity cuts which has affected us all either directly or indirectly. This is even more so for children or young people with SEN as there are not only budgetary cuts but also now talk about potential major reforms of many of the SEN procedures which we have come to know (but not necessarily love). This may include the removal of the some of the legal protections that so many of us have fought long and hard to obtain for children over many years.

After lunch you are also going to hear from Brian Lamb regarding '*Changes to the SEN framework and the Lamb Inquiry one year on*'. The main issue that Brian was charged with in looking at in his Inquiry was how to improve parental confidence in the SEN system. One issue was whether we need to split the LA's duty to both assess need and fund provision as this was seen as a potential conflict. He also looked at the appeals system.

I am happy that before the general election last year the then Government did manage to push through the *Children, Schools & Families Act 2010* which provided, in particular, the right to Ofsted inspections regarding SEN/SEP in mainstream schools and the new right for parents to appeal to the SEN Tribunal following an annual review where an LA refuses to amend the statement. But there are now concerns about the implications of the Academies Act, the SEN Green Paper, the Ofsted Review on SEN (in September 2010 entitled '*The Special Educational Needs & Disability Review – a Statement is not enough)*' and the proposed legal aid cuts in relation to education. It's a bit of a mess isn't it?

Statementing is a very emotive subject all round with everybody saying that the difficulties are always someone else's fault. Everything that is currently being

mooted is going to have an impact on SEN provision and ultimately the SEN appeals system. My view about this time a couple of years ago was that we would probably be seeing more appeals to the Tribunal in relation to phase transfers; then about this time last year I thought that we would be seeing more appeals against refusals to amend statements after an annual review; now I think that we may be seeing more appeals because there will be tighter budgetary concerns. However, maybe we will not see an increase in appeals to the Tribunal at all, just that the present number of appeals are going to change in nature.

Pursuing what they believe to be the right provision for their child is not only time consuming for parents but can also be a very expensive thing for them. They do not enter the appeal process lightly. No parent wants to appeal if they can help it. Ask many of them and they will tell you that it is hard enough trying to cope with a child who has SEN issues. However, some feel that they have no other choice but to seek additional provision or a different placement for them and therefore have no other option but to go through the appeal process. But LAs do not want to be dragged into an appeal which is unnecessary. Granted there are some parents who are determined to have their '*day in court*' and are unwilling to listen to reasonable advice (even if they are paying for it). Some parents even seem to be able to force an LA's hand by sheer persistence but I still feel that you win or lose appeals on evidence.

Cases are becoming more complicated. Even independent experts seem to recently be becoming more reluctant to commit themselves as to what will or will not happen if a child gets or does or does not get this or that or goes here or there. We also need to think about the '*knock on*' effects to the provision of SEN services from the comprehensive spending review including the freezing of recruitment for trainee educational psychologists and the removal of funds to LAs for their initial training. But none of us have got a crystal ball to gaze into to determine the future.

I am all for making the SEN system less complicated, whether that be in the '*statementing*' or Tribunal appeal process but I think we also have to be very careful about how we go about things and not in one fell swoop get rid of all the legal rights and protections that we have all (both LA and parents) struggled to have legislated

for and brought about by case law during the past 30 years. Sometimes we need to remember the adage '*if it ain't broke don't fix it*'.

I would also like to say here that an LA representative has reminded me that he believes that one serious flaw in the SEN system is that the Tribunal has no duty to have regard to an LA's resources or spending priorities and, at the end of the day, there is a finite amount of money available.

5. WHAT WE ALWAYS NEED TO REMEMBER – ESPECIALLY THE CHILD/YOUNG PERSON

What I want to say here is comparatively short - we always need to remember is the child/young person at the heart of the process. It seems obvious doesn't it, but sometimes with all the focus on policies, rights, funding and the law, the child is very easy to forget.

SEN provision should not just be about ideology but also based on practicalities. There is no point only making a decision in the short term. Parents often ask LAs/Tribunals to consider that if the child receives more of their requested provision now, that this may enable them to be more independent later on. But LAs often see parents as unrealistic or themselves only focusing on the here and now and not realising that there is no guarantee that their appealed for provision/placement will be any better than what the LA is proposing. And just having more of the same (i.e. hours of support) or direct therapy instead of indirect therapy may not mean a comparative increase in progress. Even hard won school placements have a honeymoon period.

Quite rightly LAs should argue as strongly as possible for a child to remain in maintained provision if that can be done much more cheaply and adequately than placing them in a far more expensive independent or non-maintained school. But, by the same token, a decision to place a child in that parentally preferred school for a few years may cost a lot more now but may mean that they are then more capable of

independent living and contributing to society in the future meaning that they are less cost to the state if their needs can be addressed now.

6. SOME SUGGESTIONS FOR THE FUTURE

I am not attempting to rewrite the whole SEN system. As I have said I think it is pretty good on the whole but perhaps it could do with a bit of tweaking. I have set out my suggestions as rhetorical questions:

STATEMENTING

- DELEGATED FUNDING – Why can't there be national guidance on the scheme of delegated funding and what support schools can be expected to provide at the school based stages to try and reduce the '*postcode lottery*'?

- STRENGTHENING LEGAL DUTIES ON SCHOOLS TO PROVIDE FOR SEN - Why can't there be a stricter legal responsibility on schools to provide for a child's SEN; perhaps by drawing up a legal document stating what provision that they consider the child requires and which they can provide from within their SEN budget. If not then provided, it can found a right for the parent to appeal to a Governing Body panel about (with an LA SEN officer in attendance to advise)? If the appeal is unsuccessful the parents can then still apply for a statutory assessment to the LA in the normal way.

- SEN-PANEL DECISIONS – Why can't SEN Panel meetings be conducted in public and parents be given the opportunity to attend and address the panel in person for no longer than about five minutes before a decision is made?

- MEETINGS TO DISCUSS PROPOSED STATEMENTS - Why can't meetings between LAs and parents be attended by an LA officer who has authority to offer or agree something rather than someone who can only get back to them? And why do some LAs give the impression to parents that they must attend a

meeting to discuss a proposed statement when it is actually supposed to be an LA '*offer*' to meet following a parental request?

- REPRESENTATIONS - Why are parents only given 15 days to consider a proposed statement but LAs get eight weeks (including the 15 days) to finalise it?; Why is it not clarified whether the clock stops the 8 weeks outright when a parent requests a meeting to discuss a statement, carries on ticking away still or begins again from the date of the meeting? Clarification/redrafting would help everyone as there are different views all around!

- LATE PARENTAL ADVICE/REPORTS - Why do many LAs say they will not consider evidence provided after the 29 days that parents are given to submit their advice or the 10 week assessment period but then are willing to make amendments based on that evidence during a subsequent appeal?

- FINALISING STATEMENTS - Why do some LAs keep issuing amended proposed statements (and argue that the eight weeks runs from the date of the new amended proposed statement) but others finalise the statement within the legal timescale but then agree to make some amendments in any appeal that is subsequently lodged?

<u>SEND TRIBUNAL APPEALS</u>

- DEADLINES - Why are appeal deadlines not calculated from the date the parent is actually sent the decision/final statement (which can be proved from the date of the postmark) rather than the date which it was issued (as this may be a number of days earlier)?

- TIMESCALES - Why are appeals against refusals to assess/make a statement or to cease to maintain a statement appeals given the same 20 week timescales as appeals to do with the contents of a statement?

- CONTENT OF APPEAL - Why are parents given the impression by the Tribunal appeal form that their reasons for appeal can/should be set out in a

little box? (And then told by the Tribunal or LA that there is not enough information in the appeal to allow them to properly deal with it!) - why can't we simply add an extra page to the appeal form?

- TIME ESTIMATES - Why can't legally represented parties be asked for time estimates when lodging/serving attendance forms and why can't appeals anyway be listed more realistically by the Tribunal (e.g. not having half-day hearings starting at 2pm or 10am but where the panel is expected to hear another half-day case at 2pm)? Why can't the Tribunal be willing to consider 1½ day/two day consecutive hearings more easily, rather than having to adjourn a hearing part-heard (sometimes to months later because of difficulties getting diaries together or a panel having to reconvene to make a decision)?

- AGREED AGENDA/TIMETABLE – Why can't there be an agreed agenda before a Tribunal hearing starts with not only a list of issues to discuss but also a timetable for hearing evidence/submissions on the day? Can there be specific training for Tribunal members (in their regular annual training) on consistent time control of hearings?

- WITNESSES - Why can't we revert to the rule that only two witnesses are allowed on either side but allow three in exceptional circumstances but then be more lenient than before as to what an exceptional circumstance is? Why are witnesses required to be present for the whole hearing rather than called to give their evidence and then leave (they can stay in the room to observe after they have given evidence or be asked to clarify something later on by a panel)?

- STATEMENTS - Why can't both parties be required to submit witness statements (either formal or informal) from witnesses who will/will not be coming to the hearing setting out what they would like to tell the Tribunal in advance and allowing them to be questioned about?

- OATHS - Why can't evidence be given under oath instead of having a system where one party feels that the other parties' witnesses can get away with not

telling the truth? Why can't all witness statements signed with a statement of truth?

- EXPERTS – Why can't opposing experts be directed to discuss the case by phone at least a week prior to the hearing to see if they can narrow down the areas of dispute? Why can't they also consider questions posed to them by the other party in writing about their report and have to provide a written response? (This may then mean that they do not always need to attend hearings to give oral evidence.)

- WORKING DOCUMENTS – Why can't there be an explicit timetable for the production of working documents? For example, saying the LA has to produce the first version in their response to the appeal; the parents required to respond to it with their further evidence and the LA to produce a final '*agreed*' version at least 2 weeks before the hearing. Footnotes can also be used to provide information on where the amendment comes from an why the amendments/deletion is sought or resisted.

- PROVISIONAL CONCLUSIONS/DECISIONS – Why can't Tribunals be more willing to issue provisional conclusions following a hearing in relation to the school to be named before a written decision is issued, so as to allow both parties to contemplate any transition that is needed? Can there also be specific training for Tribunal Judges on consistent decision making and writing?

And…

Why, rather than wasting time and money trying to come up with a new SEN framework, do we not just try and improve on the one we have already got?

AND FINALLY…

Common sense and the law do not always go together! We do not have the perfect statementing system. We do not have the perfect Tribunal appeals system. Parents will always want what is best for their individual child whereas LAs will have to only consider what is '*adequate*' to meet their needs. Therein lies the tension.

March 2011 *Douglas Silas*

Although there is a potential dispute, as I have said, at the end of the day, parents often just want to feel they are being listened to. If they feel they have not been they are more likely to appeal. Whilst a Tribunal Panel may eventually refuse an appeal, my experience is that parents will often feel at least that they have had a fair hearing.

Despite some of the things that I have said, our SEN system is still probably the best system that anybody has come up with so far! I am constantly reminding my children to see what they have got, not what they have not, and I think that we should also be prepared to do the same.

Remember these are only my thoughts – they may not have been considered fully or looked at from all perspectives. There is still room for improvement and I would welcome your suggestions.