

DECISION

Appeal No: 06-02487
Appeal By: Mr and Mrs F
Against Decision of: Hertfordshire County Council
Concerning: J (born on 2 January 1992)
Hearing Date: 12 December 2006
Tribunal panel: Margaret Richards (Chair)
Indrani Choudhury
Judith Wade

Appeal

Mr and Mrs F appeal under section 326 of the Education Act 1996 against the contents of a statement issued on 19 June 2006 by Hertfordshire County Council (the LEA) for their son, J.

Attendance

Mr D Silas, Solicitor, represented Mr and Mrs F, who both attended the hearing. Their witnesses were Ms B, Consultant Educational Psychologist, and Rabbi Z, Head of the DN Centre, MG School.

Mr G Read, Inclusion and Disability Manager, represented the LEA. There were no witnesses.

Preliminary matters

- (a) The parties submitted a joint working document which represented some progress on the issues between them. Further work was done, and further progress made, during the course of the hearing.
- (b) Mr Silas asked the Tribunal to accept by way of late written evidence:
- (i) A letter from Rabbi Z (undated)
 - (ii) A letter from Dr G , Consultant in Paediatric Metabolic Disease, dated 12 October 2006.
 - (iii) A letter from Dr M, Consultant Clinical Psychologist, dated 19 November 2006.

The LEA did not object to these documents being tendered in evidence and, as they satisfied the conditions in Regulation 33 (2) of The Special Educational Needs Tribunal Regulations 2001, we accepted them under Regulation 33 (1).

Facts

1. J is nearly 15, and is part of an Orthodox Jewish family. He has Maple Syrup Urine Disease (MSUD) a rare metabolic disorder. His body is unable to break down proteins and, because of this, he is unable to eat or swallow normally. He receives nutrition mainly through a gastrostomy tube. He spent much of his early life in hospital. Like other patients with MSUD J has learning and behavioural difficulties, and there has also been a recent diagnosis of atypical autism. J's medical condition is unpredictable, and requires constant management. It has significant effects on his quality of life and emotional wellbeing, and although he has always received a significant level of support in school, he has often been unable to attend. His first secondary placement was at H High School, where he was withdrawn for much of the time. From October 2004 he was barely in school at all until May this year, when he was placed in the DN Centre at MG School.

2. Cognitive testing has shown that J is functioning within the average range in terms of his verbal abilities, and in the low or below average range non-verbally. His word reading and comprehension are within the average range for his age, but his spelling is low average, as is his numeracy. In June 2005 Mr U, consultant Educational Psychologist, suggested that J presents with a specific and significant deficit in his non-verbal functioning.

3. The parties are now agreed as to the description of J's needs in part 2 of his statement. The amendments proposed by the parents, and accepted by the LEA, emphasise his difficulties with receptive and expressive language and with social communication, and his delayed fine and gross motor skills. Above all they emphasise the effects of MSUD not only on J's physical functioning, but on his emotional development, self esteem and independence skills. They are also in agreement as to the speech and language therapy provision to be specified in part 3 and, to a large extent, as to the necessary occupational therapy provision.

4. We are asked to determine the extent to which J requires specialist teaching, and whether a mainstream secondary school could provide an appropriate placement for him.

5. Mr U, considers that J will need a specialist setting with a high level of learning support if he is to be able to reintegrate into school. His emotional and psychological difficulties will make it very hard for him to deal with the challenges and pressures of a mainstream school setting. Mr L, the LEA's Educational Psychologist, observed that J has found it difficult to cope emotionally with the demands made on him in a mainstream setting, and has shown a strong preference towards learning in small settings. His literacy and numeracy levels should enable him to access a mainstream curriculum, but his emotional difficulties will have to be minimised and there will have to be significant differentiation of the curriculum to accommodate his non-verbal difficulties. He will require strong pastoral support.

6. Ms B, consultant Educational Psychologist, assessed J in August this year. She considers that, although J has previously attended mainstream schools, it would now be unrealistic to expect him to cope at Key Stage 4 in a large mainstream secondary school, even with a significant level of support. He needs to be taught in a small group, and to have the benefit of support from a specialist teacher to ensure that he derives maximum academic benefit from his time in school. His general ability to attend school is tenuous, and it is by no means certain that he will ever be able to return to school full time. Mainstream integration should be a goal, but it will need to be tentative, and managed with sensitivity.

7. J's parents emphasised that his whole experience of school has been challenging. His MSUD impacts upon everything he does; his intake of nutrients is subject to constant monitoring and his metabolism is affected by anxiety or changes in his environment. Metabolic changes affect his energy, speech and physical functioning. At present he is attending the DN Centre (DNC) every day until 1pm (or 1.45 pm on Thursdays). He has made friends, and is receiving specialist teaching support. He is more settled in school now than he has been for a long time. Mr and Mrs F have asked the LEA to name the DNC in J's statement.

8. The DNC operates within the framework of MG School, which is a small independent day school for boys from the Orthodox Jewish community. The DNC serves students who have complex difficulties and also provides a support base for able children. It is well resourced with specialist teachers and therapists, including speech and language therapists. Rabbi Z told us that J spends all his time in school within the DNC. Some limited integration into mainstream has been attempted, but J was unable to cope emotionally, and it was stopped. He is now taught in small groups of 1:2, 1:3 or 1:4. Larger groups have, so far, not worked for him, but the DNC is also mindful that he is unable to sustain one to one tuition. Current objectives are to extend J's time in school although it is not envisaged that this could be achieved before the end of the current academic year. It is also intended that he should work towards GCSE Foundation Level in core subjects. J receives three sessions of direct speech and language therapy during his time in school, of which two sessions are devoted to a communication skills programme, delivered in a group of three.

9. J is a member of an Orthodox Jewish family and has always attended Jewish schools. Mr F told us that J's insecurity is such that, without the religious and cultural support and shared values provided by a Jewish school he would be wholly adrift and unable to generalise between school and home. His Jewish identity is of absolute importance to him. Ms B and Rabbi Z also emphasised to us the importance for J, as an emotionally fragile young man, to have access to a Jewish studies curriculum and to develop his own personality and social contacts within a Jewish setting.

10. Ms B reminded us that J has lost more than three years of schooling because he has been unable to cope in a mainstream class, even with considerable learning support and some withdrawal. In October 2003 he

suffered a complete breakdown and showed signs of school phobia. At that time the SENCO at H High School expressed the opinion that a supported placement in mainstream would work for J, and his subsequent experience at MG School has borne this out. At the age of 15 J needs to catch up with his learning as far as is possible, and only small group teaching, delivered by experienced specialist teachers, is now likely to produce a good outcome for him.

11. The LEA has no concerns about the suitability of J's placement at the DNC; Mr Read told us that his needs are being well met. He contended, however, that the overall cost of the placement is excessive, since J's needs could be met in a mainstream secondary school, with additional support, or possibly in a specialist unit within such a school. Part 4 of the statement specifies "a LEA mainstream school. However parents have elected to place J at the M School at their own expense". The statement allocates 25 hours per week of additional teaching support, and the LEA does not accept that specialist teaching is required. The LEA also does not accept that a Jewish school is necessary in order to meet J's special educational needs.

12. We have heard much discussion on the subject of costs. The LEA's AWPU funding for a mainstream secondary school is approximately £2,500 a year. The equivalent baseline cost for a placement at MG School is £6,000. Therapies would be additional costs whatever the placement, as would learning support, or specialist teaching. Mr Silas assured us that, if the DNC were named in J's statement, then the LEA would be charged only the actual cost of a part time placement until such time as J were able to access full time schooling.

Tribunal's conclusions with reasons

We carefully considered the written evidence submitted to the Tribunal in advance and the evidence given to us at the hearing. We also took account of the Code of Practice and the relevant sections of the Education Act 1996 and the Special Educational Needs and Disability Act 2001. We had the benefit only of submissions from the LEA; no witnesses attended the hearing and its case statement did not rehearse in any detail its position in relation to the issues raised in the parental appeal.

Our conclusions are:

A. There is much evidence as to the profound effect of J's medical condition on all aspects of his life, and the evidence of his great difficulty in accessing education speaks for itself. It is accepted that his placement in the DNC since has been positive for him but, even so, his physical fragility is demonstrated by a recent setback in management of his MSUD, which has caused him to be off school. All his educational provision has to be considered from this perspective

B. We accept the evidence that J requires specialist teaching within a small group. The history of his placement at H High School demonstrates his

inability to access the mainstream curriculum, even when supported.

C. As regards placement, the position taken by the LEA does it no credit. It has put forward no specific alternatives to DNC as a placement for J, and has provided us with no clear evidence as to the actual unit provision available in its mainstream schools, or as to the accessibility of speech and language therapy of occupational therapy in such settings. At the hearing no evidence was put forward to challenge the widely held view that J requires specialist teaching, and it was never made clear precisely how much more expensive DN C would be as compared with a hypothetical mainstream school, or why expenditure on DN C would be 'unreasonable', given the lack of evidence about alternative placements.

D. Section 9 of the Education Act 1996 requires us to have regard to the wishes of J's parents regarding his placement and to be satisfied that the parental wishes are compatible both with efficient education for him and the avoidance of unreasonable public expenditure. The lack of evidence of any credible alternative to DN C and MG School dictates the outcome of this appeal. The LEA is not permitted to call upon parents to pay independent school fees when it has not been able to demonstrate that it could meet a young person's needs in any other setting.

E. The LEA is bound by the decision in *A v SENDIST and Barnet (2003)*, which requires it to take into account J's Jewishness and its impact on his special educational needs as a factor which is distinct from parental preference. We have heard Mr F's evidence as to the importance for J of his Jewish identity, and we have heard that J has always attended a Jewish school. However there is no evidence that the LEA has actively considered these issues or that any other school would be appropriate for him.

F. Given our conclusions so far it is unnecessary for us to consider "unreasonable public expenditure", and the absence of evidence as to actual costs in an actual alternative school is fatal to the LEA's case. In fact, as far as we are able to judge, given the large measure of agreement as to provision, plus our finding as to specialist teaching, the difference in cost between DN C/MG School is likely to be the difference between the AWPU of £2,500 and the M basic fee of £6,000. Given the weight of positive evidence about J's present placement as compared with a completely unknown quantity, we do not consider that this difference would represent unreasonable public expenditure.

Order

Hertfordshire County Council is to amend J's statement as follows:

- To incorporate all the agreed amendments to parts 2 and 3 which are identified in the working document which forms the Appendix to this decision, and initialled by both parties. Subject to that:
- To specify in part 3 that J must have access to a specialist teacher who can appreciate his profile of strengths and weaknesses and, more importantly,

can provide the security that J needs and, at the same time, ensure that he is stretched academically and fulfilled emotionally.

- To specify in part 3 that J will need a small school environment;
- To specify in part 3 one hour a week of occupational therapy and to delete from page 9 of the Appendix the words “It is important that this programme be monitored weekly.....to.....a total of one hour each month needs to be allotted for the occupational therapist to manage J’s occupational therapy programme”
- To specify in part 3 the following maximum additional provision for J: *“13.5 hours per week specialist qualified teacher time and 10 hours from a learning support assistant, once J is attending school full time. Prior to that such provision to be made in proportion to the time spent in school.”*
- To specify in part 4, without condition or reservation, *“a specialist unit within a mainstream school. This is to be the DN Centre of the MG School”.*

Signed:

Chair: Margaret Richards

Costs

Mr Silas made an application for costs on behalf of Mr and Mrs F. Regulation 40 of the Special Educational Needs Tribunal Regulations 2001 states that the tribunal shall not normally make an order for costs, but that it may do so:

- If it considers that a party has acted frivolously or vexatiously or that its conduct in making, pursuing or resisting an appeal was wholly unreasonable;
- Where a LEA has not delivered a statement of its case under regulation 13; or
- Where it considers that the disputed decision was wholly unreasonable.

Mr Silas submitted that, notwithstanding clear evidence from the LEA’s own educational psychologist, and others, of J’s extreme difficulties in accessing mainstream education, the LEA persistently refused to consider funding a placement in the DN C, whilst making no effort to identify a suitable alternative placement for J. Mr and Mrs F should not have been forced to bring this appeal and to incur costs in doing so. The LEA’s conduct in resisting the appeal has been wholly unreasonable, and an order for costs should be made. Accepting that the extent of the costs incurred has been, to some extent, a matter of choice, a contribution of £1,500 by the LEA would be appropriate.

Having considered all the evidence, and, in the light of our comments in para above, we are minded to make the order sought. However Mr Read is given leave to seek advice. The LEA may make representations, which must be

received by the Tribunal on or before 17 January 2006, following which we will come to a final conclusion.