Decision

Date of Birth:	2006	
Appeal of:	The Parents	
Type of Appeal:	Contents of a Statement of SEN	
Against Decision of:	Local Authority	
Date of Hearing:	2010	
Persons Present:	The Parents	*Parents*
	Parents Representative	
	Parents Witness	*ABA Tutor*
	Parents Witness	*Educational Psychologist*
	LA Representative	
	LA Witness	*Head Teacher*
	LA Witness	*Educational Psychologist*

Appeal

The Parents appeal section 326 of the Education Act 1996 against the contents of a statement of special educational needs made by the Local Authority for their Child.

Preliminary Issues

The LA made no application for the admission of late evidence.

The Parents made an application for the admission of late evidence. The parents, under cover of a letter dated 25th June 2010, filed and served a psychological assessment dated June 2010, an occupational therapy report dated June 2010 and a report of an ABA assessment by Applied Behaviour Analysis Supervisor dated January 2010 being an updated version of a report contained in the case statement.

In addition on the same date a DVD recording of the Child was also served upon the tribunal and sent to the LA.

In September 2010 the parents served a speech and language therapy report dated September 2010. Thereafter in September 2010 a further report was submitted. At the hearing the Parent Representative produced a working document supported by details of the cost of the provision sought by the Parents.

The tribunal established that all the documents sent prior to the date of the hearing complied with the criteria for admission set out in regulation 33(2). In

addition the LA did not oppose the admission of this documentation and the DVD in evidence. Costs information was required in any event to update the figures contained in the bundle. It was pointed out to the Parent Representative that the submission of the working document did not comply with the practice direction issued by the President specifying that working documents should be documents worked on by both parties and submitted at least five working days before the hearing. The working document was retained by the tribunal however as an indication of the changes to the statement sought by the Parents.

A further issue addressed by the tribunal was an application by the Parents to change a witness on the morning of the hearing. The Psychologist report was accepted by way of late evidence who was originally listed to attend as a witness. They had however notified the Parents' Representative that they were indisposed and unable to attend the appeal hearing. As a result arrangements were made by the Parents Representative for the Child to be seen by a chartered Educational Psychologist and the application was that they should be allowed to attend as a replacement witness. The tribunal was concerned that the Educational Psychologist had not provided a written report and that the LA had not had an opportunity to consider the evidence prior to the hearing. The Parent Representative pointed out that none of the witnesses that were appearing before the tribunal had provided written reports and that both sides were in a similar position. The ABA Tutor was also a late replacement witness for someone who was also unable to attend.

The tribunal canvassed with the parties prior to the commencement of the hearing whether or not an adjournment could be of benefit in order to ensure that the best evidence was available to the tribunal. The Parents Representative considered that the tribunal should proceed to deal with the Appeal on the basis of the evidence before it. The LA, whilst complaining that their witness had not been allowed to observe the Child to complete an assessment, also indicated that it would prefer to continue with the tribunal hearing. On that basis the matter proceeded.

The LA Representative was concerned that the Educational Psychologist would be giving additional evidence of which the LA had not had any prior notice, but on the whole they did not object to their presence as a replacement witness. The Educational Psychologist had seen the Child the day before the hearing but had not had the opportunity to compile a written report. It was inevitable that they would give evidence based upon the meeting with the Child. However the tribunal did not consider that the LA would be prejudiced in that regard. The tribunal granted the application for a change of witness.

Facts

1. The Child was born in April 2006 and is now four years and five months of age. The appellants are the Child's Parents.

2. In June 2009 the Child was diagnosed with an autistic spectrum disorder.

3. Having attended Play Group in 2008 a referral was made to the Outreach Service in February 2009. In March 2009 a request was made for a statutory assessment although initially this request was refused. A further request was made in July 2009 which was accepted by the LA. This further request arose following a multi disciplinary meeting held at the Children's Centre in June 2009.

4. In July 2009 the LA allocated ten hours of weekly support for the Child from the Early Years budget.

5. In September 2009 the Child commenced at a Nursery for two hours each afternoon with full time support for that period.

6. A consultant community paediatrician, reported in September 2009 that in the opinion of a multi disciplinary team the Child has complex and evolving needs, which have a significant impact on the Child's ability to access an educational placement. The Paediatrician summarises the Child's main difficulties as follows :

   (a) poor verbal and non-verbal communication skills
   (b) inconsistent responses to alternative visual forms of communication
   (c) poor play skills
   (d) repetitive and obsessive behaviour suggesting high levels of anxiety in certain environments and situations
   (e) co-existent high level of activity
   (f) poorly developed self help skills that will impact on the Child's access to an educational placement

7. In January 2010 the LA issued a statement of special educational needs specifying School A in part 4. Thereafter in March 2010 the Parents launched their appeal to this Tribunal.

8. In March 2010 the Child was introduced to Applied Behavioural Analysis at home for three hours a session. The Child continued to attend the nursery for two hours each afternoon.

9. This appeal was initially listed for hearing in July 2010, but was adjourned on application to the President shortly before the hearing.

10. The Child has not attended nursery school since July 2010 and now receives Applied Behavioural Analysis each day in the family home.

11. The Parents now appeal parts 2, 3 and 4 of the statement dated January 2010 and in relation to part 4 seek education otherwise than at school (section 319 Education Act 1996) – being an ABA home-based programme.

Tribunal's Decision with Reasons

We have carefully considered all the written evidence and submissions presented to the tribunal prior to the hearing and the oral evidence and submissions given at the hearing. The tribunal has also viewed the DVD evidence.

We have also considered the relevant provisions of the Code of Practice for Wales 2002.

We conclude as follows:

1. As recorded previously the tribunal raised the issue of whether or not an adjournment was appropriate to enable further evidence to be obtained. The LA expressed the view that it had been obstructed in obtaining additional evidence and that in particular their Educational Psychologist had been unable to complete the assessment and further that the LA's attempts to obtain a speech and language therapy assessment and an occupational therapy assessment had also been frustrated. However the LA, despite having an opportunity to do so, did not seek an adjournment and indicated that it preferred the tribunal to proceed. The tribunal did not explore in any detail the reasons why the authority may not have been able to obtain evidence.

2. The tribunal addressed the following issues and their implications for parts 2 3 and 4:

    i. Applied Behaviour Analysis (ABA)
    ii. Speech and language therapy
    iii. Occupational therapy
    iv. One-to-one support
    v. Costs

3. The tribunal heard evidence from the ABA Tutor who is one of the Child's tutors. The ABA Tutor holds a Psychology degree from the University College London and a Masters degree in Psychiatry from Cardiff University. They indicated that they had been an ABA tutor for a period of six years. They had met with the Child a few weeks into the programme and was now delivering three to four sessions a week to the Child. The Tutor confirmed that at one time the Child received tuition from five tutors and that at present three tutors are engaged with the Child. The Tutor undertakes the majority of the sessions and out of the one hundred and forty or so sessions that were delivered up to the end of September, they estimate that they conducted some eighty of those sessions. A session entails three hours of continuous working.

4. The Tutor explained that the information provided in the various charts appended to a report identifying all the tasks undertaken with the Child and provide a record of whether or not the Child has really mastered the skills

taught and whether or not the Child is able to generalise those skills. The Tutor explained how the tutors recorded all the work undertaken and that the worksheets were then presented to the supervisor to be transferred onto the tracking sheets. If the record reflects that the Child has displayed a particular skill in three consecutive sessions then the Child is considered to have mastered that skill. The Tutor reported that the mastered skills were practised in every session and that on average some 80% of the sessions were spent on mastered skills and generalisation of skills, whilst the remaining 20% was engaged in attempting to gain new skills. The tribunal was told that regular workshop meetings were convened involving all the tutors and the supervisor, and that the written records completed by each tutor achieved consistency and continuity of approach.

5. The tribunal had viewed a DVD of the Child filmed during ABA sessions. The DVD showed more than one tutor at work and it was apparent that each tutor employed a different approach. The Tutor said that this was important in order to enable the Child to respond to different individuals with different styles. The tribunal noted with concern however that some of the tutors spoke in an extremely loud voice to the Child and in a manner described as aversive. In addition some of the language used was considered by the tribunal to be inappropriate e.g. the consistent use of the word 'awesome' by one tutor when praising the Child. The Tutor for their part indicated that they prefer to adopt a quieter more placid approach.

6. The Parents' case is that the Child has made progress as a result of the home based ABA programme. They go further and state that it is only through the ABA programme that the Child will continue to make progress. They believe that prior to the introduction of ABA the Child was making no progress and indeed was regressing. One difficulty is that no baseline assessment was undertaken when the ABA tuition commenced so that it is not possible to quantify such progress.

7. The LA through an Educational Psychologist accepts that the Child has recently made progress but the argument is that it is not possible to necessarily attribute such progress to the ABA programme. The Educational Psychologist presented written evidence to the tribunal in the form of a review of research literature of various behavioural interventions in which they conclude that ABA can be effective for some children for some of the time. This view is supported by the head teacher. The LA therefore adopts the Educational Psychologists position that there is no evidence to support the contention that the Child's progress is attributable solely to the ABA. The Educational Psychologist states that there is little research available on outcomes and that as such it is difficult to predict how much of the Child's progress is due to the developmental progress and how much is due to the ABA programme.

8. The LA Representative criticised the teaching techniques demonstrated on the DVD and stated that the delivery of a home based ABA programme occurred in a restricted environment that did not give the Child the breadth

of experiences that the Child required or provide access to a peer group and appropriate role models.

9. The Child appears to have made some progress over recent months. However the evidence does not show that such progress is attributable only to ABA. A number of other factors could account for the Child's progress. The Child may have been on a plateau previously, just ready to move forward. There are many imponderables and the only conclusion that can be drawn by the tribunal is that ABA could have been one of a numbers of factors that account for the Child's progress.

10. The burden of proof in establishing that only ABA works for the Child lies with the Parents and such an assertion must be established on the balance of probabilities. The Parents are not able to do so. There are a number of approaches and methodologies that are suitable for children on the autistic spectrum and on the available evidence it is not possible to say that similar or better results may not have been achieved with the Child using another programme.

11. The LA finds itself in a similar position in relation to the speech and language therapy evidence in that it has been unable to obtain any recent evidence. The LA wrote to the speech and language therapy service for an updated assessment. This has not been forthcoming as the speech and language therapy service has not been able to see the Child to undertake a further assessment. The tribunal did not consider it necessary to explore the reasons why this should be the case, although a lack of co-operation with statutory agencies in arranging assessments is unhelpful to the tribunal, and ultimately to the child.

12. The position in relation to speech and language therapy is that the LA accepts that this is an educational need for the Child, and that it will make such provision as the Local Health Board speech and language therapist deems appropriate. It seems that the Child received a service from the speech and language therapy service for a period and a report from a speech and language therapist, in August 2009 advocates that "the Child will require specialist speech and language therapy provided through a consultative and collaborative approach. It has been shown to be the most effective intervention for children with ASD due to their learning style. A consistent approach would be needed across home and school settings."

13. The most recent information with regard to the Child's speech and language therapy needs appears in the report admitted as late evidence. Although this report is dated September 2010 it is based upon an assessment undertaken in May 2010. The wording sought by the Parents for inclusion in part 3 is based upon the recommendations in this report. One of those recommendations is that the Child should receive direct speech and language therapy from a qualified therapist.

14. The evidence was not challenged by the LA. The tribunal in the circumstances accepts those recommendations to the extent that they are

not inconsistent with the findings made above. In particular and in light of the finding made in relation to ABA, the tribunal does not accept the inference drawn by the Speech and Language Therapist that the Child's progress is due to the ABA programme. This assertion is not based on any evidence and no cogent reasons are given for drawing such a conclusion.

15. It is also accepted by the parties that occupational therapy is an educational need for the Child. The most recent evidence before the tribunal is an occupational therapy report dated May 2010. The recommendations contained in that report are largely accepted by the LA. The stance adopted by the LA is that such provision could possibly be made from resources available within its preferred school but if not then arrangements will be made to buy in the relevant provision. Having considered this evidence the tribunal accepts the recommendations contained in the report as being appropriate provision for the Child.

16. The tribunal also addressed the issue of whether or not the Child requires one to one support for the whole of the school day. When the Child started at the nursery school the Child was provided with one to one support for two hours each afternoon. The reports provided from the school all emphasise that the Child can only be kept on task if the Child has one to one support in place to direct them. The Parents contend that the position remains the same and that such support is essential in any educational establishment.

17. The LA's position in this regard is that a high staff to pupil ratio in a small class with trained staff is appropriate. In other words it advocates the model that is employed at its preferred school.

18. The tribunal concludes from the available evidence and in particular the reports for the nursery school and the Outreach service that has given the Child general developmental delay one to one support is essential to direct the Child and to keep them on track and to manage behaviour.

19. What therefore is the appropriate placement for the Child? The parents seek education otherwise than at school through an ABA programme delivered at home. The LA consider that a placement at a Special School is appropriate to meet the Child's needs

20. The Special School is a maintained community day special school for pupils with special educational needs aged three to eleven years. The majority of the pupils at the school are diagnosed as having learning difficulties within the autistic spectrum. If placed in the School the Child will be a member of class 1, containing ten pupils including the Child. The class has one full time teacher, one teacher for three days and four full time teaching assistants. All the children have statements of special educational needs and have a range of autistic spectrum disorders. Both class teachers are trained in teaching children with autism and are very experienced. All the children work to an Individual Education Plan and

have individual behaviour plans. Although there is no withdrawal room there is a quiet area with sensory lights. No child at present has dedicated one to one support within the classroom.

21. The School cannot offer ABA in the form currently provided to the Child. The school can offer a delivery structure which will include elements of applied behavioural analysis and draws on from a number of relevant and well tried and tested approaches. The school also has one or two intensive interaction groups. The children in the Child's class also have access to the forest school experience. The head teacher states that the children thrive on this outdoor experience.

22. The tribunal was informed by the head teacher that a base line is obtained for all children upon entry through Instep that serves to identify specific areas of need. All children are P scaled with the tests being repeated during the following summer term. None of the children are disapplied from the national curriculum.

23. The School has a Speech and Language therapist on site assigned to the younger children. There is also a 1.5 full time equivalent occupational therapist on site. Although the therapists generally adopt the consultative approach the tribunal was told by the LA that the school can provide the therapies in such manner as may be prescribed by the tribunal. If necessary the LA will incur additional cost in order to buy in additional therapy time to make the necessary provision.

24. The LA argues that if the Child is placed at the Special School then the Child should not receive one to one support as the high staff pupil ratio in the class provides the support required. However the tribunal has already found that individual one to one support is necessary for the Child in order to keep them on task and as such the LA will be required to make additional arrangements in this regard. The LA Representative argues that only 0.5 of an additional teaching assistant will be required in addition to the support already available in order to make up the full time support. The issue of cost is considered later in the decision. The School say the LA is in a position to provide the intensive interaction required by the Child. The LA Representative also argues that the School are able to provide suitable role models and a peer group for the Child to assist in the development of social and communication skills.

25. The tribunal is satisfied on the evidence and the information provided that the Special School can make the provision that is required by the Child on the basis that the Child receives one to one support. Speech and language therapy and occupational therapy we are told was available to be purchased in the event of the on site team not being in a position to deliver the provision specified in this decision.

26. The position therefore is that the tribunal finds that the provision proposed by both parties could meet the needs of the child. The LA in its case

statement argues that as it has identified a school that can meet the Child's needs then the conditions laid down within section 319 have not been met and as such it is not required to make provision otherwise than in a school.

27. The relevant section reads as follows :

319. Special Educational provision otherwise than in schools

i. Where a local education authority are satisfied that it would be inappropriate for :
   (a) the special educational provision which a learning difficulty of a child in their area calls for, or
   (b) any part of any such provision,

   To be made in a school, they may arrange for the provision (or, as the case may be, for that part of it) to be made otherwise than in a school

ii. Before making an arrangement under this section, a local education authority shall consult the child's parent.

The Parents Representative in their case statement and in their submissions refers the tribunal to the decision of Lord Justice Aikens in TM v London Borough of Hounslow [2009] EWCA Civ 859 which they argues renders the LA's interpretation of section 319 incorrect.

28. In this case His Lordship undertakes a review of the relevant sections of the Education Act 1996 and at paragraph 26 of his judgement considers how the LA should address section 319:

"The question that the local authority has to address is, therefore, is it satisfied that it would be "inappropriate" for the special educational provisions of a particular child to be made in school or not? In answering that question, it seems to me that it is not enough for the local education authority to ask simply "can" the school meet this statement of needs set out in part 3 of the section 324 statement as Mr Oldham submitted. To confine the question asked does not, in my view, give proper scope to the words in section 319 (1), in particular the words "are satisfied that it would be inappropriate for …….. the special educational provision which a child calls for ….. or any part of [it]….. to be made in a school". It seems to me that in conducting that exercise, or answering that question, if a local education authority is to give full effect to the word "inappropriate", it has to see if a school would "not be suitable" or "would not be proper". To do that, in my view, the local education authority has to take into account all the circumstances of the case in hand. These circumstances might include, without giving any exhaustive list, (which must depend on the facts of the case) consideration of the following matters : the child's background and medical history; the particular educational needs; the services that can be provided by a school; the facilities that can be provided by a school;

the facilities that can be provided other than in a school; the comparative cost of the possible alternatives to the child's educational provisions; the child's reaction to education provisions, either at school or elsewhere; the parents' wishes; and any other particular circumstances that apply to a particular child."

29. His Lordship emphasises that this exercise includes a consideration of the parents' wishes as set out in the decision of Laws J in Catchpole v Buckinghamshire CC and the Special Educational Needs Tribunal [1998] ELR 463 at page 471F to 472C. To quote "Those cases make clear that parental wishes cannot be determinative except in the very rare case where there are other equally balanced alternatives for the child's special educational needs. Then as Laws J put it at page 437A of the Catchpole case "At most, section 9 [of the Act] creates a bias in favour of parental choice where more than one school is under consideration and where, to put it in very crude terms, everything else is equal".

30. Lord Justice Aikens in conclusion at paragraph 28 states "It follows from this, in my view that it is insufficient for a local education authority simply to ask the question: can the school in question meet M's statement of needs; then if it finds that the answer to that question is 'yes', treating the effect of section 319 as requiring that the school be named in part IV of the section 324 statement".

31 The tribunal accepts that the submissions of the Parents Representative in relation to the interpretation of the Hounslow case. The LA has adopted a narrow approach found to be incorrect by Lord Justice Aikens and has failed to take into account all the circumstances of the case in hand.

32 It is therefore necessary for the tribunal to take into account the wider circumstances of the case in light of the findings made in this decision. Given that the Child is still very young the Child's reaction to educational provision cannot be gauged. The Child has in the past attended nursery provision but not since July 2010. It is accepted that the progress in the nursery was limited but the LA are now proposing a specialist provision and there is no evidence to suggest that the Child could not cope at school. Indeed the parents indicated during the hearing that as an alternative they would seek a mainstream placement with full time individual support. It is true that the School do not offer ABA but as set out above there are other approaches that may prove equally if not more effective.

33 One of the other factors that must be considered is cost and it is therefore appropriate to make a cost comparison between both provisions

34 The Parents Representative produced an updated costs calculation for a home ABA programme running for 50 weeks per year. The figures quoted were not disputed by the LA. The total annual cost of the home based ABA programme, which was apportioned in the schedule, is £32,054.00. In addition there are the additional therapy costs as prescribed by the

tribunal amounting to £4,550.00. The total annual cost is therefore £36,604.00.

35 The LA argues that as the placement in the School will be in a maintained special school then no additional cost for the placement is incurred as it is already available. The Parents argue that this is not the proper method to address the issue. The Parents Representative cited the case of Slough Borough Council and Special Educational Needs & Disability Tribunal and others [2010] EWCA Civ 668. Lord Justice Sedgley at paragraph 13 when considering the contention of the LA in that case that admission to a maintained school with space for the child is cost free apart from any special requirements that a child brings with him or her states "*The contention is not in my judgement sustainable. Every element of a maintained school carries a cost in public funds. The current exercise of the tribunal is to calculate what it is, because it is ordinarily only with such a calculation that the protection of public money to which the condition in section 9 is directed becomes possible. If it were not so a like for like comparison between public and private provision could never be made. But here, because of the unusual facts, it was legitimate for the tribunal to take a short cut and to find, as it did, that whatever the notional per captia cost of the maintained school was, it must exceed the £10,000 with which it fell to be compared*."

36 The tribunal concludes however that the decision in the Slough case addresses a narrow issue in relation to the interpretation of s348 Education Act 1996 and the comments of Lord Justice Sedgley were made obiter and and are not a statement of law that overturns the decision in the case of Oxfordshire County Council v GB and others [2001] EWCA Civ 1358. One of the principles arising from the Oxford case is that if places are funded by the LA then there is no additional cost to that authority in placing a child there as it has already been taken into account. That is the position in this case in relation to the School and the tribunal accepts the argument of the LA in that regard. What therefore is the cost of a placement at the School taking into account the additional therapies?

37. The LA argues that given the level of support already in the classroom only an additional 0.5 of teaching assistant support will be required in order to provide one to one support for the Child. The tribunal does not follow this argument, given that the current staffing levels provide for the children currently in the class. If the Child joins the class then the provision of one to one support for them means that the recruitment of a full time teaching assistant will be required. The cost was established at £17,530.00.

38. The LA accepted that it may be appropriate to buy in therapy provision for the Child and it is accordingly appropriate to adopt a similar figure to that of the parents for the provision of the therapies, being £4,550.00

39. A similar argument was made by the LA in relation to the transport costs given that a taxi is already going along the relevant route each morning to

the School. This argument adopts the principle established in the Oxford case which means that it is a nil cost to the authority. The Parents Representative sought to persuade the tribunal that half the transport costs should be taken into account at least. The calculation of the transport was made on the basis of the cost of a taxi being £46.72 per day, making a total of £8,876.80 per annum. If this is halved then the cost is £4,438.40. The tribunal considers that the approach laid down in the Oxford case remains the correct approach and as such no additional cost for transport will be incurred by the LA.

40. The comparison therefore is a total of £36,604 for the parental preference and a total of £22,080.00 for a placement at the Special School.

41. The cost differential is significant and the tribunal therefore concludes that the provision of a home based ABA programme will amount to unreasonable public expenditure. Given this finding in relation to the costs we return to s319 and having considered all the circumstances of the case find that it would not be inappropriate for the special educational provision which the Child requires to be made in a school, that school being the Special School

42. In those circumstances this appeal is allowed to the extent explained in this decision above and as set out below in the amendments made to Parts 2 3 and 4.

ORDER:

Parts 2, 3 and 4 of the statement of special educational needs will be amended to read as set out below

Dated November 2010