Case No: CO/3199/04

Neutral Citation Number: [2004] EWHC 2513 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 09 November 2004

Before :

THE HONOURABLE MR. JUSTICE MCCOMBE

- -

Between :

W	**Appellant**
- and -	
(1) LEEDS CITY COUNCIL	**Respondents**
(2) THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY TRIBUNAL	

- -

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

- -

Mr John Friel (instructed by **Felix Moss**) for the **Appellant**
Mr Peter Oldham (instructed by **Leeds City Council**) for the **First Respondent**

- -

Judgment

Mr. Justice McCombe :

(A) Introduction

1. This is an appeal by the mother of a 9 year old boy (whom I shall call "C"). The appeal is from a decision of a Special Educational Needs and Disability Tribunal ("the Tribunal") of 11 June 2004. By its decision the Tribunal dismissed the mother's appeal under section 326 of the Education Act 1996 ("the Act") against the contents of a Statement of Special Educational Needs ("the Statement") made by the Leeds City Council ("the Council") on 15 July 2003.

(B) Introduction

2. It is convenient to set out the basic facts by a simple citation of Part 2 of the Statement. This part summarises the material facts relating to C. Further an important part of the argument centred upon the contents of Part 2. Its recitation here in full will facilitate consideration of that aspect of the case. (The following quotation is from the Statement in the form issued after the Appeal which excludes one sub-paragraph of paragraph 9 of Part 2. That exclusion also gives rise to an issue here, as it did before the Tribunal, to which I shall return. (The omitted sub-paragraph was as follows: " (b) Sleeping difficulties, which lead him (sic) becoming aggressive."))

> "PART 2: SPECIAL EDUCATIONAL NEEDS
>
> [Here set out the child's special educational needs, in terms of the child's learning difficulties which call for special educational provision, as assessed by the authority.]
>
> 1 [C] has a diagnosis of autism which is his primary condition and which should determine his educational management.
>
> 2 [C] is able to take himself to the toilet to urinate, but still soils himself. He can dress himself independently, but he needs some help with the laces and buttons. He has considerable trouble with food; unless fed, he will only eat a limited amount of food, if he is allowed to use his hands. He refuses to use cutlery. He communicates by gestures or by use of PECs.
>
> 3 [C] responds to some sounds and will turn to musical instruments. He shows some understanding of gestured (sic) and is able to communicate his needs by sounds or by pointing or leading. He is making good progress with motor skills, although he can be unsteady.
>
> 4 [C] needs to learn social interaction skills and appropriate behaviour.
>
> 5 [C] needs to learn to develop his attention and listening skills in order to apply himself to a particular task and to maintain concentration for increasingly longer periods.

> 6 Medical reports indicate that [C] is in good general health, although he suffers from respiratory infections. He has otitis media in winter months. There are no medical conditions which would have a bearing on his general educational development.
>
> 7 [C] bites people, and also bites and mouths objects which include electric cables.
>
> 8 [C] can be physically aggressive to his mother and those around him.
>
> 9 [C] needs constant supervision. He has no sense of danger. ABA therapy has modified the severity of [C's] behavioural difficulties. However, the following major issues remain:-
>
> (a) Self-stimulatory behaviours, which can rapidly develop into major incidents or regression unless controlled.
>
> (b) If left to himself, [C] can become both angry and/or isolated in his autism."

3. Part 3 of the Statement sets out (in its section A) objectives to be met by the provision for C and (in its section B) the actual provision proposed to be made. Importantly for present purposes section B specified that C should be placed in a school with facilities and resources that would enable C to be part of a small class group receiving provision in 13 separate areas, including "Constant adult supervision during school hours from staff experienced or trained in meeting the needs of autistic children", "A highly structured and consistent environment" and "Continued close liaison between home and school and any other agencies involved with C …". Part 4 of the Statement specified that C should be placed at a named special school, with the opportunity for sessions at another named primary school when these were judged appropriate for C.

(C) <u>Rival contentions before the Tribunal</u>

4. Before the Tribunal, Mr. Friel of Counsel, who appeared for the mother (as he did in the present appeal) argued that the following provisions should be added to section B of the Statement, as indicated in the following passage from the Tribunal's decision where the Council's requirements and Mr. Friel's counter proposals are set out.

> "C requires:
>
> *LEA*: Constant adult supervision during school hours from staff experienced or trained in meeting the needs of autistic children. *Other:* constant adult supervision during his waking day from staff experienced or trained in meeting the needs of autistic children.
>
> *LEA*: A behaviour management programme designed to reduce self-stimulatory behaviours. *Other:* A behaviour management programme designed to reduce self-stimulatory behaviours, to occupy C's time. This could be achieved by a physical exercise programme similar to the Higashi methods.

LEA: A programme aimed to develop C's social skills to be contributed to a speech therapist and occupational therapist. Programmes of social interaction and the formation of peer groups. *Other;* A programme aimed to develop C's social skills to include therapist on site. Programmes in social interaction and the formation of peer groups.

LEA: A programme aimed to develop his self help skills, to train C in independence skills. The programmes to be contributed to by speech and language self-help skills, to train C in independence skills, specialist staff to be available throughout the waking day. The programmes to be contributed to by speech and language therapists who are on site.

LEA: C requires a highly structured and consistent environment in which all staff dealing with C has sufficient training and expertise in meeting the needs of autistic pupils. He requires a consistent approach at home and within school so that he can develop independence skills, become safe. *Other;* C requires a highly structured and consistent environment in which all staff dealing with C has sufficient training and expertise in meeting the needs of autistic pupils. He requires a consistent approach to his waking day within care and within school so that he can develop independence skills, become safe.

LEA: C requires a behavioural programme used both in school and home. *Other;* C requires a behavioural programme used both in school and care setting.

Add: Professional intervention to approach his problems with sleep and rest to include where appropriate access to a psychologist and if necessary appropriate service officials.

Amend paragraph 5 to:- The school should have on the staff both speech and language therapists full time available to work with the children both in class and within the care environment. The school also requires advice from an occupational therapist, and/or a clinical psychologist or behaviour specialist.

Delete Paragraphs (sic) 3

Add: He requires an autistic specific provision within a small community offering a range of activities to develop in a waking day his self-help and independence skills. He needs a safe environment where there is consistent monitoring of his potentially harmful behaviour and of the opportunities to harm himself."

Mr. Oldham of Counsel, who, as here, appeared for the Council, resisted these amendments.

5. These contentions gave rise to the two substantive issues, identified by the Tribunal in paragraph 6 of its decision: a) the need for "education" for C beyond the school day,

necessitating residential placement and, consequently, (b) the appropriate school placement for C. On this last point, the Council supported the placement specified in the Statement, whereas the mother argued for C's placement at an identified independent residential school in Staffordshire.

(D) The Tribunal's decision

6. The Tribunal decided essentially in favour of the Council's contentions. It determined that constant supervision at times outside school hours was not something which the Council (as education authority) should be required to provide. It decided that the mother's proposals for the statement of behaviour management programmes was unnecessarily specific and designed to achieve a placement at the school argued for by her. Mr. Friel's proposal for social skills development was again considered to be "placement specific". Further, the self-help skills would lead to a requirement of staff throughout the "waking day" and the Tribunal decided that this was not required.

7. In short, the Tribunal rejected the mother's argument for a full "waking day" curriculum and decided that C's special educational needs could properly be met within the normal school day.

8. The Tribunal also accepted the Council's contention that paragraph 9(b) of Part 2 of the old version of the statement should be deleted. While recognising C's sleep difficulties and the pressures that these exerted on C's family, the Tribunal did not consider that those problems constituted a special educational need. An issue arose on the present appeal as to whether the Tribunal should have allowed the Council to argue this point at all: this has been described before me as "the sleep issue".

(E) Procedure

9. C's case, as a whole, has a rather longer history before the Tribunal and the Courts than stated above. Some of that history is relevant to the arguments before me. C's original statement had been amended following a Tribunal decision relating to Part 2 of that statement. That Tribunal decision was the subject of an appeal to this Court on the basis that, having revised Part 2, the Tribunal had failed to make appropriate revision to Part 3. The appeal was adjourned by Mr. Justice Newman because, by that stage, an annual review of the Statement was pending. That review led to certain revisions being made in June 2003 and the Statement as a whole was re-promulgated on 15 July 2003. That reviewed statement became the subject of the appeal to the Tribunal against which this appeal is now brought.

10. Part of Mr. Friel's submissions to me were that Part 2 of the Statement had been settled by the Tribunal's decision in 2002 and that the present matter was properly concerned with Part 3 only.

(F) The Arguments

11. Mr. Friel for the mother argues that the educational needs for C are to be found in Part 2 of the Statement as settled by the Tribunal decision in July 2002. Since that time the only argument left open was as to the appropriate provision in Part 3 and as to placement in Part 4. Two results follow: 1) Paragraph 9 specifies "constant supervision" as an educational need. Part 3 does not provide for it. Therefore, it is submitted, the statement is deficient: see section 324 of the Act. It is said also that the Tribunal further erred in law in not recognising that deficiency and the resultant need

for a "waking day" curriculum for C. 2) The Case Statements on the appeal to Tribunal did not raise the "sleep difficulties" issue because this had already been settled by the contents of Part 2, as determined by the Tribunal decision in 2002. No amendment to the Council's Case Statement was ever made and it was too late for the Council to apply at the hearing for the deletion of paragraph 9(b). Moreover, Mr. Friel submitted, the mother was prejudiced by the late raising of this issue.

12. Mr. Friel's first point is essentially a very short one addressed to the language of Part 2 of the Statement. He submits that "constant supervision" identified as a "need" in Part 2 is not limited to a "school day" and is, by definition, an educational need. Therefore, provision must be made for that "need" in Part 3. Indeed, Mr. Friel continues, the Council's desire to remove paragraph 9(b) from Part 2 shows that, if it was not removed, it would follow inexorably that it was indeed an "educational need" for which provision would have had to be made in Part 3.

13. In supprt of this argument, Mr. Friel cited L.B. Bromley v Special Educational Needs Tribunal & ors. [1999] ELR 260 which stresses that there is no "hard edge" between what is an "educational need" and what is a "care need"; there is much common ground. Educational need may have to be supplied outside the normal school day. It is material to note, in this context in the present case, that, while the Council argued before the Tribunal that there were no educational needs beyond the school day, as a "fall-back" it was willing to put in place support for C from a school staff member for ten hours per week outside normal school hours.

14. I was also referred to the decision of Mr. Justice Gibbs in Oxfordshire CC v Special Educational Needs Tribunal [2002] EWCH 2908 (Admin); [2003] ELR 718, 730 and 732-3. There the learned judge decided that a behaviour management programme identified in Part 2 of a Statement needed to be provided for in Part 3 of the Statement. He said:

> " It may be said that disruptive behaviour can in any normal situation always be an obstacle to education, but it is clear, in my judgment, from the context, that this case did not involve a normal situation. It is accepted that C's learning difficulties were severe. His education and development were intimately bound up with his behaviour. His progress depended, therefore, on the provision of a structured scheme to enable the necessary education to take place by, inter alia, managing C's behaviour. Whilst Part 2 recognised that need in the passage just cited, and recognised it as specifically applicable to all care givers, I accept Mr. Friel's submissions that Part 3, as originally drafted by the appellant, was deficient in that it did not make any explicit provision for such a programme outside school hours."

It is to be noted from paragraph 46 of that judgment, however, that in that case there was a specific finding by the Tribunal of a need for a 24 hour curriculum to enable the pupil to make significant educational progress. The Tribunal in the present case found quite the opposite to be true.

15. Reliance was also placed by Mr. Friel on the judgment of Stanley Burnton J in W v Bedfordshire CC [2004] EWHC 560 (Admin). In that case, the learned judge was considering the need for "out of school hours" provisions for a pupil. The judge said,

"9. The need for that provision appeared from the draft Statement of Educational Needs, and from the provisions in Part 2, which were agreed. For present purposes, it is sufficient to refer to the passages of that Statement at pages 55 and 56 of the bundle. The Statement summarised the position stating that:

"… H has difficulties with:

- Accessing the curriculum at an age-appropriate level

- Independent living skills

- Associated visual problems

- Associated co-ordination problems

- Concentration and organisation

10. It is obvious that all of those points, other than the first, are not necessarily confined to school hours. In any event, there was an issue clearly raised, according to the evidence before me, which has not been contested, as to the need for provision out of school hours. It was because of that need that there was an issue as to the school which H should attend, with his parents arguing for a continuation at SM, and the local education authority arguing for his attendance at a day school known as "R" which, it contended, could provide education for him at a significantly lower cost.

11. The local education authority accepted before the tribunal that provision was needed outside of school hours. Their argument was that provision could and should be made by the local authority's Social Services department. What provision would be made by the Social Services department, however, was not specified in evidence from the local authority, nor was it addressed by the Tribunal.

12. The Tribunal's decision is effectively confined to the question: which school was appropriate for H? The Tribunal decided that his educational needs could appropriately be provided at R. In doing so, however, they did not address the issues that had been raised as to the need for provision outside of school hours. As I have already indicated, the local authority accepted in evidence that such provision was required. Indeed, the headmaster of R accepted that his school would be unable to make the kind of provision which H was receiving at SM; a provision which part 2 of the statement, in so far as it was agreed, indicated was necessary.

13. In these circumstances, it is clear to me that the Tribunal failed in its decision a central and important issue raised by the present appellants."

It is to be noted from paragraph 11 (quoted above) that in that case there was no argument from the authority that educational provision was not required outside school hours. The argument was confined to the question of placement of the pupil at the appropriate school.

16. Mr. Oldham for the Council submitted that Part 2 of the Statement was descriptive of C and not a statement that he needed constant "educational" provision. He submitted that the situation was similar to the case of R (Tottman) v Hertfordshire CC [2003] EWHC 1725 (Admin); [2003] ELR 763 (Moses J) and [2004] EWCA Civ. 927 (CA). There special educational need had been found to include a requirement for consistency of programmes and approach throughout the working day. There was no dispute but that support and care was needed throughout the waking day and that the school proposed by the Council could not provide it. The dispute was whether special educational need had to be provided throughout the working day. The Tribunal found that it did not. In so finding, the judge decided that no error of law had been made and in the Court of Appeal, Lord Justice Clarke (with whom the other members of the Court agreed) said,

> "50. In the present case, all the programmes set out in the statement dated 14 May 2002 could properly be regarded as programmes of special education. As I read conclusion f, and the expression "consistency of approach throughout the day and across all settings in home/school/respite care/social activities with regard to programmes", the Tribunal was accepting that there should be consistency of approach both when O was at school and when he was at home receiving respite care, so that as far as possible when not at school he would be treated in a way which was consistent with the programmes developed at school, so that, as one witness put it, all key adults handled O in a similar way, providing the same response to inappropriate behaviour and the same prompting of appropriate behaviour.
>
> 51. The emphasis throughout was on consistency of approach, but the Tribunal was not saying that the LEA must provide programmes for O other than at school. For the reasons already given, it seems to me that, if it had been, it would have had to reach a different conclusion on the suitability of St Luke's and to hold that a residential placement was required, as to my mind the Tribunal was well aware. Thus, the Tribunal was not saying that the LEA must provide programmes at home pursuant to its duty under section 324. The judge expressed his conclusions in this regard in paragraphs 10 and 11 of his judgment thus:
>
> > "10. the decision of the Tribunal has been challenged by Mr. Friel, on behalf of the parents, for its failure to specify what should be done outside the school working day. The Tribunal had no obligation to do so once it had found that the special educational needs of [O], as opposed to his other needs, could be met at St Luke's school. There is a distinction between special educational needs and other needs. It is inherent in the

> statute, but it is not always easy to draw. There will often be considerable overlap." "

The Court of Appeal accordingly dismissed the appeal in that case.

17. In conclusion, noting relevant provisions of the Statement, one must also recall that the standard format of Statements of Special Educational Needs contain a section (Part 5) for identification of "Non-Educational Needs". (In this case, the needs so identified were, "Speech and language needs. Transport".) Thus, one might say, as a lawyer, that this reinforces the view that Part 2 of the Statement (and all of it), is specifying by definition educational needs properly so called, which must, therefore, be provided for in Part 3 of the relevant Statement. Mr. Oldham for the Council, however, went so far as to submit that the reference to "constant supervision" in Part 2 of the Statement had to be read as if the words "during school hours" were included in the phrase.

18. In my view, the extreme submissions by each side on this point went too far, including the submission by Mr. Oldham mentioned immediately above. I think, however, Mr. Oldham was right to say that one must be cautious of reading the Statement as if it were a document drafted by lawyers for lawyers. Clearly, it is a document of important legal significance, but I think Mr. Oldham is right to stress that lawyers must remember that the document serves an educational purpose and is designed to direct educationalists to a pupil's needs. However, I cannot think that the extra words "during school hours" can properly be read into paragraph 9(b) of Part 2. It is clear from the Council's alternative argument before the Tribunal (that C might receive additional educational support at home outside school hours) that the Council recognised that the issue was not simply what provision C ought to receive within the normal school day.

19. In my view, the Statement points the reader to the objectives and provisions that need to be made in Part 3 by reference to a pen picture of the child that needs educating. For example, paragraph 1 of Part 2 states that C, " … has a diagnosis of autism which is his primary condition and which should determine his educational management". That is a description of C's condition that has to be addressed in determining the content of the education needed and the manner of its delivery. However, none of the nine heads of "need" identified in Part 2 can be read in isolation. The education authority and the Court must address the whole document in a purposive, common sense way. Paragraph 9 tells us that C is a boy who needs constant supervision and that it is a boy with that characteristic (among others) that needs educating. From all of Part 2 it is then necessary to derive the educational objectives and provision that are required to educate C to the best of his potential. That may or may not be an education within normal school hours.

20. In my view, the Tribunal correctly understood the purpose of Part 2 of the Statement as I have endeavoured to describe it. From the document, it was well able to comprehend and decide the issues before it, namely to determine the need for a "waking day" curriculum and the question of whether placement of C should be at the school proposed by the Council or that contended for by his mother. The Tribunal decided these issues adversely to the mother. The remaining questions argued before me (subject to what was called "the sleep issue") were directed to whether the Tribunal was wrong in its assessment of these issues on the evidence before it or in its reasoning leading to its conclusions. To these matters I now turn.

21. Mr. Friel's next submission was another short point arising out of one sentence of the Tribunal's decision. He argued that the statement of the Tribunal's conclusions under Head A,e.1 ("constant supervision at other times it (sic) not something which the LEA should be required to provide") was an impermissible statement of policy and was, therefore, contrary to law.

22. I do not think that Mr. Friel's submission is correct when one takes the sentence in its context. The submission is, in my view, a corollary of the first submission. The Tribunal clearly understood that the issue was whether a "waking day" curriculum was required or not. The disputed sentence should be read as a part of the Tribunal's decision that educational need did not call for constant supervision outside school hours and, therefore, the Council (as education authority) was not required to provide it in order to meet C's educational needs specified in the Statement as a whole. The Tribunal was not ignoring C's need for constant supervision generally. It was merely deciding that such need for supervision did not require to be met by educational provision other than in school hours. Subject to the evidence before it, the Tribunal was entitled so to decide.

23. That leads naturally to Mr. Friel's next point which was that, " … Mrs. Shaffer, Educational Psychologist for [the mother], Mr. Dewhirst the Headmaster [of C's school], and Mr. Yeadon and Mr. Wilson, both giving evidence from the Social Services perspective and to a lesser extent Dr. Mackenzie [the Council's Educational Psychologist], all accepted in [C's] case he did need a "waking day curriculum" ". Mr. Friel's submission was that no reasons were given by the Tribunal for the rejection of this evidence which was common ground.

24. To provide the material to support the submission, there was placed before me a witness statement by the mother, summarising the evidence as she recalled it. The mother said that the evidence was that all the witnesses considered that a "waking day" curriculum was required. I was also shown a transcript of some sketchy notes made by Counsel which, it was argued, were to similar effect. To meet this evidence I was also given short witness statements of Dr. Mackenzie and Mr. Dewhirst, both made on 11th October 2004, in which each witness stated that her/his evidence before the Tribunal was not to the effect that C needed a "waking day" curriculum. I was very surprised to be told that there was no official transcript or tape recording by means of which this dispute could be resolved. In the circumstances, I consider that it is quite impossible to disturb the factual findings and assessments made by the Tribunal on the basis of a disputed recollection of the evidence. The Tribunal heard the evidence; I did not and I did not have the proper record that I would have expected from any Tribunal of such importance. I cannot, therefore, accede to Mr. Friel's argument in such circumstances.

25. Mr. Friel went on to criticise the Tribunal's findings as to the care services available to C and the mother. These findings are in paragraphs J and K of the decision where the following is stated:

> " J. We note that a joint placement in residential placement has not been viewed as appropriate by the SSD. We accept that the SSD can, and will, make the range of provision outlined by Mr Wilson in some detail. We conclude it would be wrong for us to increase the financial burden on the LEA to provide for [C] simply because of an alleged delay in SSD meeting its statutory

> obligation to [C] of SSD. Having said this, we are concerned at the fact that [C's] head teacher had not been informed of the contents of the SSD's current care plan. We endorse the opinion of Mr Clive Yeadon, independent social worker, who emphasised the need for effective dialogue.
>
> K. However, we accept that the SSD can and will make the provision to support [C] and his mother as outlined by Mr Wilson in some detail."

Immediately before this the Tribunal criticised the Social Services department to defer its decision making concerning C's care until after the Tribunal's decision.

26. Mr. Friel's argument was that the evidence of the social services experts, Mr. Yeadon for the mother and Mr. Wilson for the Council, was that the current social services care was below standard and inadequate. Mr. Friel argued that the decision of the Tribunal on the "constant supervision" issue was irrational in the face of this evidence, particularly as it recognised correctly, at paragraph F, that there could be no clear demarcation between educational and non-educational support needs. It was also argued, that in the face of the social services evidence, the Tribunal could not properly find that the social services authority could and would make the provision to support C and his mother as outlined by Mr. Wilson. Mr. Friel pointed to the then recently revised social services care plan which indicated the current gaps in delivery of the provision prescribed in that plan.

27. It seems to me that the Tribunal were well aware of the deficiency in the social services provision and indeed criticised it. While recognising the hazy line between social and educational support, the Tribunal had to decide what <u>educational</u> provision was required. It made that decision on the evidence as to C's educational needs and, in my view, rightly decided that, having reached its conclusion as to what was required for this purpose, it was not its function to throw upon the education authority the burden of providing what was properly social, rather than educational, support.

28. Mr. Friel's final "rationality" arguments were directed to the Tribunal's handling of its own finding that C would indeed benefit from an extended day. Mr. Friel criticises the Tribunal's statement therefore that, " … there was nothing in the evidence presented by the LEA to indicate that he [h]as a need for such an extended day". The criticism is of the apparently total reliance upon the evidence from the LEA, since it indicates a failure to consider the evidence adduced by the mother. I agree that the Tribunal expressed itself unfortunately in referring to the Council's evidence only. However, it is clear from other passages of the decision that the Tribunal did have regard to the evidence on both sides. I have referred to some of the relevant passages already. The Tribunal's clear conclusion was that C's educational needs could be met at the school proposed by the Council and that his care needs should be provided by the social services arm of the public service. It criticised the failure by social services to act in advance of the Tribunal proceedings and accepted the need for an inter-agency approach. That does not, however, invalidate the reasoning of the Tribunal as to what were C's true educational needs and the manner in which they should be met.

29. I turn finally to the "sleep issue". Mr. Friel's points here were : 1) that Part 2 of the Statement had been settled by the previous Tribunal decision; 2) that there was no amendment to the Council's Case Statement to raise the issue; 3) there was no issue on the mother's appeal which gave rise to the sleep issue and that an amendment to

raise it was impermissible; and 4) in any event, it was unjust to permit the issue to be raised so late.

30. I do not accept Mr. Friel's first point. As already indicated, following the first Tribunal decision, there was apparently an annual review and amendments were made to the Statement. Following those amendments the present appeal was launched. The making of the amendments gave rise to the right of appeal, see section 236(1)(b) of the Act. While no doubt the Tribunal would be reluctant to countenance arguments on points decided previously by it, in the absence of relevant change in circumstances, I do not consider that the earlier decision deprived the present Tribunal of jurisdiction to consider the contents of Part 2 of the Statement, if raised appropriately under the appeal procedures.

31. It is right that there was never any formal amendment to the Council's Case Statement to raise the issue. It is clear, however, from Regulation 13(3) of the Special Educational Needs Tribunal Regulations 2001 that the Tribunal does have power to permit the authority to amend its Case Statement at a hearing in exceptional circumstances. Mr. Oldham submits that that is what the Tribunal implicitly allowed in this case.

32. Mr. Friel took me to the decisions of Mr. Justice Turner and Mr. Justice Owen respectively in R v Kirklees Metropolitan Council & anor, ex parte Ali, 23 May 2000 (unreported) and M v Essex CC & anor, [2001] EWHC Admin 956.

33. In the Kirklees case, the Tribunal had had to decide an issue as to the school placement of a child. Shortly before the hearing a further medical report was produced. As in this case, there was a dispute as to whether or not application had been made to amend the notice of appeal (under the old 1995 Regulations) to raise issues on Paragraphs 2 and 3 of the child's statement. Mr. Justice Turner felt unable to resolve the factual question as to what had happened before the Tribunal. He held that the parents were confined to the issues raised by the notice of appeal and the Tribunal did not have any general power under s.326(3)(b) of the Act to direct amendments to a statement outside the issue properly raised by the parties on the appeal.

34. In the Essex case, the Tribunal directed an amendment to the statement of its own volition. Mr. Justice Owen held that it had been wrong to do so. It should have confined its decision to the issues raised by the parent's appeal: "… it was not open to the Tribunal to range freely over the entire contents of parts 2, 3 and 4 of the statement … [The] power to amend in section 326(3)(b) of the Act is limited in its application. It will only arise where amendment is necessary as a consequence of the resolution of an issue specifically raised before the SENT." (See paragraph 20 of the judgment.)

35. It was not argued before me that, having itself made a Statement of Special Educational Needs, it was not open to the Council to invite the Tribunal to amend any part of it, thus circumventing a need for a formal amendment giving rise to a new right of appeal under section 326. I can see a possible argument to the effect that, having made its statement of needs, an education authority is "stuck with it" and cannot use the Tribunal as a mechanism to implement its second thoughts as to what should have been in the Statement in the first place. It could then be argued that a parents' appeal is confined to the issues raised by the parents to which, of course, the authority can respond in its case statement under Regulation 13 of the procedure

regulations. No such argument was raised before me. Both Counsel (very experienced in this field) confined the argument to the questions whether an informal "de facto" amendment had been made and whether the Tribunal had been right to permit it. Accordingly, I shall confine this judgment to those questions.

36. There is no doubt in my mind that it would clearly have been better for the Tribunal to direct a suitable amendment to the Council's Case Statement so that the new issue could be properly defined. However, I do not consider it to have been a fatal irregularity for it not to have done so. Regulation 32(2) of the procedure regulations gives the Tribunal great flexibility in these matters and directs an avoidance of formality so far as possible. In the end, in my view, the only real question on this part of the case is whether the Tribunal erred in exercising its discretion to allow this matter to be raised at that late stage.

37. On this point, the mother argues that the late amendment prevented her consulting and/or calling as a witness C's new paediatric doctor, Dr. Cundal. Moreover, it is submitted that the Tribunal, in the end, decided this point because of the absence of medical evidence. The Tribunal stated (in paragraph D of the decision) that, " … in the absence of authoritative medical evidence to the contrary, sleep difficulties do not appear to constitute a special educational need for [C] at the present time, although difficulties may impact upon family life". However, as the Tribunal indicated, it reached that conclusion on the basis of its reasoning in paragraph C of the Decision where they said the following:

> " We note two interlinked strands of evidence. Firstly, we heard no evidence to indicate that it would be possible to teach [C] (or any other child) behaviours related to sleep. We heard that medication is currently being provided and that further support from the medical services could be offered. We do not consider that a need for supervision at night for reasons associated with safety constitutes a special educational need. Secondly, we heard that [C's] class teacher does not consider that a poor sleep pattern to be a barrier to learning for [C]. We accept this. We note that [C's] school attendance is good and he is very rarely late for school. Whilst we accept that [C] can become aggressive, there was no evidence to indicate that this was directly nor solely as a result of a lack of sleep."

Those reasons seem to be an entirely sound basis for the decision reached. Moreover, no material has been advanced by the mother to suggest that other medical material evidence would in fact have pointed in a different direction. In the end, therefore, I find that there was no material prejudice to the mother by this issue being raised as it was.

38. For these reasons, I dismiss this appeal.

MR JUSTICE MCCOMBE: For the reasons given in the judgment which I now hand down in writing this appeal is dismissed. In the order that has been drawn up by agreement between counsel provision is made for the costs of the appeal and for Legal Aid assessment and the like, and includes an order by agreement that the time for applying

to the Court of Appeal for permission to appeal be extended to 28 days from today. Those are the material terms of the order, no more needs to be said.