Case No: CO/1386/2007

Neutral Citation No: [2007] EWHC 1634 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th July 2007

Before :

Andrew Nicol QC, sitting as a Deputy Judge of the High Court

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Between :

The Learning Trust **Appellant**
- and –

(1) MP
Special Educational Needs And Disability Tribunal **Respondent**

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Holly Stout (instructed by **Tom Brooke, The Learning Trust**) for the Appellant
Mary Hughes (instructed by **John Ford, solicitors)** for the 1st Respondent

Hearing dates : 12th and 13th June 2007

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JUDGMENT

Andrew Nicol QC :

1. The Learning Trust carries out most of the education functions of the London Borough of Hackney. It brings this appeal against the decision of the Special Educational Needs and Disciplinary Tribunal ('SENDIST') of 11th January 2007. A right of appeal against a decision of SENDIST is given by s.11 of Tribunals and Inquiries Act 1992 to a party who is dissatisfied in point of law with the decision.

2. This decision concerned a statement of special educational needs in respect of a boy who was then aged 11 and who, in consequence of an order of Walker J. on 16th March 2007, has been referred to as 'P'. Walker J.'s order under the Children and Young Persons Act 1933 and the inherent jurisdiction of the court in essence prohibited the identification of the child or his school (actual or intended). It also required P's mother, who was the Appellant before SENDIST, to be referred to as 'MP'. I heard this appeal at the same time as an application for judicial review which P has brought against the London Borough of Hackney in relation to various care assessments which the Council had made (CO/9262/2006). I will be giving a separate judgment in that matter. Although there is much in common with the factual background of the two cases, they raise distinct legal issues. Walker J.'s reporting restriction order applies equally to both.

3. P suffers from autism. As the Tribunal recorded, he has particular difficulties with social interaction and communication and concentration. His behaviour is sometimes aggressive and intimidating. He is highly motivated by food and is now significantly over-weight. MP cares for P as a single parent. There has been a statement of special educational needs in place for P since 1999 which was before P began attending primary school. P began his secondary education in September 2006. The appeal to SENDIST commenced a few months before that and, at its heart, was the question of whether the statement prepared by the Learning Trust should be amended so as to name a residential school for P. This was what his mother (the appropriate appellant before the Tribunal) wished. The Tribunal ordered that the statement should be so amended and it is the Learning Trust's argument that in doing so they erred in law. Ms Hughes, on behalf of MP, says that there was no such error. The Tribunal itself is only a nominal party to the proceedings. It has not appeared or been represented.

4. P's first primary school was BL. The school was new, its routines not established and there was a high turnover of staff. P was unsettled and there was concern that his needs were not being met.

5. MP was having difficulty in coping with P. In about 2002 she put P up for adoption. That did not happen, but during the week MP's mother (JP) allowed P to live with her and P's three uncles. He returned to MP at the weekends. In

2004 the family court made a residence order giving MP and JP joint residence responsibility for P.

6. P transferred to his second primary school (W) in September 2004. Within W school, P was placed in the Autistic Resource Base. He made good progress and settled well.

7. In September 2005 JP went abroad for some 6 weeks. P returned to live with MP. Unfortunately, by the time JP came back to the UK, her house had been re-possessed and she had to live in a room in a friend's flat. P's uncles moved elsewhere and he remained living with his mother. The Tribunal commented that P reacted very badly to these events. He had frequent aggressive outbursts, overate and put on substantial weight.

8. This was P's final year in primary school. In October 2005 Melissa Burleigh, the head of the Autistic Resource Base at W, contributed to the annual review of P. She reported on what she called P's 'social difficulties'. Her report began,

> '[P] would benefit from a place in a residential school for the following reasons. [P] has educational and social needs that could be met through a consistent and continuous placement that has set routines and a high level structure. [P] benefits from being around his peers and having access to the community but he needs support to be able to do this.'

She commented on P's aggressive behaviour both in school and the wider community. She noted that he found it very difficult to cope with changes in his routine which needed to be calm and consistent from all the adults around him. She thought that P would benefit from a residential school because it would provide this consistency.

9. Between December 2005 and March 2006 Hackney's Social Services Department carried out a Core Assessment of P's needs. This is a lengthy document. It records MP's wish that her son should be placed in a residential school 'so that a routine is established for him and according to her it will help him to settle and address the social difficulties that he has at present.' It also recorded the tensions over the role of JP in P's life. His grandmother still wanted to have a role, but his mother thought that JP should discontinue her role as P's carer. The assessment also referred to the strain that looking after P was having on MP's own life. Because of the demands he placed on her, she found it difficult to have a social life of her own and, while he was at home, she also found it difficult to find work and was slipping into financial difficulties in consequence. The social worker commented 'It is my view that [MP] feels that [P]'s disability has impacted on her ability to work, her ability to have a social life. She feels that she is a carer all the time. MP is pessimistic about the future and the only way that she perceives a difference in [P]'s and

her life is when he goes to residential school which will meet his needs, MP is of the view that [P]'s needs cannot be met adequately in the community that they live.' In summary the assessment concluded that while the Education Department would pursue MP's wish for P to be placed in a residential school, there was more potential for JP to provide support. In order to do so, JP's housing situation needed to be resolved and some help should be given to JP in this regard. MP would benefit from respite. P would benefit from Kids Adventure play group and needed to be supported out of the house when he needed adult supervision at all times.

10. An amended statement of Special Educational Needs was completed by the Learning Trust in February 2006. Part 2 of the Statement considered what P's special educational needs were. It included the following paragraph

> '[P] has recently had difficulty controlling his behaviour and anger. He is displaying much inappropriate behaviour at school, he has frequent aggressive outburst and appears to be angry and upset a lot of the time. [P] has had huge changes in his home environment and these appear to be the cause of his anxiety. Previously, [P] was cared for by his grandmother, but since July 2005 he has been cared for by his mother. [P] needs a clear, consistent and structured environment both at home and at school. He finds it hard to cope with changes to his routine. [P] reacts strongly to confrontation and quickly becomes very upset and volatile if spoken to harshly or shouted at. He also needs a very consistent, clear and firm approach to his behaviour. [P] needs to know what the boundaries are. If he understands the consequences of his actions and all adults around him use the same approach he can become cooperative.'

Part 2 of the Statement concluded by listing the areas in which P had special educational needs. They included 'social skills'.

11. Part 3 of the Statement turned to the special educational provision which was needed to meet P's special educational needs. They included an individual education plan whose elements were to include 'a behaviour modification programme to encourage and reward positive behaviour, drawn up in liaison with [P]'s mother to ensure consistency between home and nursery /school…a language and communication programme devised by a Speech and Language therapist, with regular opportunities to participate in structured language activities in small groups.' Part 3 also provided that there should be monitoring arrangements: 'The school should ensure there is close liaison with [P]'s parent and other professionals in order to promote continuity in his learning…'.

12. Part 4 of the Statement named W school until July 2006 and then the H School. The H school is a special school that is maintained by Hackney. It had accepted children with autism in the past. However, it had not previously

catered for children whose autism was as severe as P's. In January 2006 plans were started to set up an Autism Resource Base ('ARB') at the H School with effect from September 2006. Ms. Burleigh was closely involved with this project and it was intended that P should be placed in this ARB at H School together with about 5 other children.

13. In April 2006 MP lodged a notice of appeal to SENDIST. Her challenge was limited to the naming of the H School in Part 4 of the statement. The appeal was still pending in September 2006 and, in accordance with the statement as it then stood, P began to attend the ARB at H School where Ms Burleigh had worked closely with Ms Diane Dungate in setting up the Base.

14. On 11th October 2006, Jane Holmes, an Educational Psychologist, submitted a report on P. The report was part of the Learning Trust's reassessment of P's special educational needs in view of the appeal. It was carried out after P had only been at H School for 3 weeks. Ms Holmes noted that the Base was a new resource, its systems were not fully established, these factors and the fact that P had up to 6 different teachers a day may have added to P's difficulties in settling into the new school. Her conclusions included the comment that '[P] needs his social and learning environments to be structured so that they are predictable but also allow him to learn to tolerate change and the extending of his experience.'

15. Kathryn Dreschler, a speech and language therapist, prepared a report on 13th October 2006 in which she identified the assistance that P needed from a speech and language therapist.

16. A further report from Hackney Social Services Department was prepared by Stella Akinmusire on 8th November 2006. She thought (as had the earlier Social Services assessment in March 2006) that JP could usefully play a part in providing support for P. JP was willing and, although MP had concerns about her mother's health, JP did not share these, nor did they appear to have been borne out by a report from JP's General Practitioner. Ms. Akinmusire recommended that support also be provided in the form of 1 day after school club per week, 2 nights respite per month and 2 weeks holiday play scheme per year. These could be provided by direct payments. In addition, the social worker recommended that JP be given financial help to find private rented accommodation in the form of payment of the rent deposit. Importantly, the report recorded that MP had rejected the offer of support and respite as her wish was for P to be placed in a residential school.

17. The first hearing of the appeal took place on 9th November 2006. It was adjourned so that the Learning Trust could complete their re-assessment of P's special educational needs and so that MP could have the opportunity to amend her appeal by introducing, if she wished, a challenge to Part 2 and/or 3 of the Statement.

18. Ms Holmes, the educational psychologist, submitted a second report about P on 30th November 2006. She commented that her first report had been prepared very shortly after P began at H School and it had been impossible then to gain a true impression of his strengths. She reported improvements on this visit. Overall she considered that P was well placed in the resource base. The staff had recognised his potential and were providing him with appropriate work and this ought to continue.

19. The re-assessment of P's special educational needs was completed in draft form on 1st December 2006. No school was named in Part 4, but in correspondence the Learning Trust continued to maintain its view that H School was appropriate to P's needs. I will need to say a little more in due course about the content of this statement.

20. On 1st December 2006, The Learning Trust notified the Tribunal of various after-school activities which it was willing to make available to P, but added that MP had not made use of these facilities.

21. On 21st December 2006, MP amended her case statement for the appeal. It did take issue with certain aspects of Parts 2 and 3 of the Statement, but none that are material to the present proceedings.

22. The hearing of the appeal before SENDIST took place on 11th January 2007. As well as receiving the documentary reports and submissions, it heard oral evidence from Ms. Burleigh, Ms Anne Uhart, the head teacher of H School, and from MP. The Tribunal gave its decision on 23rd January 2007.

23. After setting out the facts and evidence in some detail (but, as I shall note later, in a way which the Learning Trust submits was not always accurate), the Tribunal turned to its conclusions. It admitted that it had found the appeal to be difficult and finely balanced. It thought that P had suffered from not having his special educational needs consistently met. It was accepted that he had made little academic progress at H School and it gave five reasons why it thought this to be so. I shall return to these because they are the subject of detailed challenge by the Learning Trust. It thought that there were too many uncertainties as to P's future at H School – potential changes to his routine, uncertainty as to whether he would start to make academic progress, and whether the ARB would continue to be viable. They said,

> 'E. In view of the deficits in the provision made for [P] to date we find that he needs to be educated in a school where provision for children with his degree of autism is well-established, where change and uncertainty in his daily routine is kept to a minimum and where there are opportunities for him to learn with children of similar ability and for his communication skills to be developed across the curriculum.

> F. We find that [P] also requires a clear and consistent approach throughout his waking day to ensure that he is able to access education in school and has opportunities to develop his communication, social and independence skills across all settings. We accept the evidence of Ms Burleigh in this regard and can find no evidence to support the LEA's actions in removing from the statement provision for close liaison with MP and other professionals to ensure a consistency of approach both in and out of school.'

24. The Tribunal did not consider that the need for a consistent approach could be provided within the LEA. Social Services were providing nothing for the family at the moment and were unlikely to do so in the future. There was little home school liaison. The proposed play groups would lead to more changes in P's routine, they were non-directive and not autism-specific. The Tribunal added at paragraph G of its decision 'For the reasons given by Ms Burleigh in the autumn of 2005 we find that in the absence of any consistent provision or support within the community, [P]'s special educational needs can only be met in a residential school providing a waking-day curriculum.'

25. The Tribunal did not consider that P's needs would be met if he lived with his grandmother. There was no evidence that MP was other than a competent and caring parent. JP was not in a position to look after P, and had not attempted in the 18 months since her home had been re-possessed to find other accommodation. She had taken no part in the appeal and had not responded to mediation (in the family court proceedings). She had not seen P for some considerable time and received higher level disability living allowance.

26. The Tribunal agreed that amendments to Part 3 should be made relating to Speech and Language in line with MP's proposals. They then commented that 'We note that [MP]'s legal representatives have not sought amendments to Parts 2 and 3 to reflect [P]'s needs for a consistent approach throughout his waking day. We hope it will be possible to agree some amendments with the LEA to reflect our decision that [P] should be place in a residential school.'

27. On 29th March 2007 Keith J. granted the Learning Trust a stay on the amendment to Part 4 of the statement and ordered that the appeal be listed at the same time as a judicial review application by P of various decisions of Hackney's Social Services Department.

28. At the hearing of this appeal, both parties wished to adduce evidence that had not been before the Tribunal. As a general proposition, such evidence is not admissible because it can serve no purpose. The Court's task is to investigate whether the Tribunal erred in point of law. Generally, legal challenges of this kind can only be resolved by looking at the Tribunal's decision and the material which was before it. In her skeleton argument, Ms Hughes on behalf

of MP made reference to an Annual Review of P which was conducted after the Tribunal had given its decision. I ruled that this was inadmissible. It could not help MP to resist any of the legal challenges that were being mounted by the Learning Trust. For the same reasons, I did not consider that the Fourth statement of MP (dated 6th March 2007) in the judicial review proceedings was relevant or admissible in deciding this appeal.

29. However, there can be situations where evidence which was not before a Tribunal is properly admissible. In this case, for instance, the Learning Trust alleged that the Tribunal had erroneously recorded part of the oral evidence of Ms. Burleigh. If that submission was correct, it would mean (or might mean, depending on the materiality of the error) that the Tribunal had taken into account an irrelevant matter (i.e. an erroneous record of the evidence) or failed to take into account a relevant matter (the correct evidence). An alternative analysis would be that the Tribunal had acted on the basis of a mistaken view as to the facts (the facts being the evidence which had been given orally). These are all, potentially, grounds for challenging the decision of a Tribunal as being wrong in law. In order to be made good, it would be necessary to demonstrate that the Tribunal had indeed made an error in its record of the oral evidence. In the first place this Court will look for assistance from the Tribunal itself. Quite properly in this case, the Chair of the Tribunal was asked for any notes that the Tribunal had made of the evidence in issue (see *R (London Borough of Hammersmith and Fulham) v Pivcevic and Goh and the Special Educational Needs and Disability Tribunal* [2006] EWHC 1709 (Admin) at para [48] – [50]). Very helpfully, the Tribunal in this case provided the Chair's handwritten notes with parts of them transcribed. However, as the Tribunal emphasised, such notes had been made as an *aide memoire* for the assistance of the particular Tribunal member who had taken them. They do not purport to be a verbatim record. In these circumstances, Ms Hughes did not dispute that the witness statement of Ms Burleigh was admissible as to the evidence which she had given to the Tribunal. Furthermore, MP and her representative at the Tribunal have had an opportunity to consider Ms Burleigh's witness statement. They did not suggest that there was anything inaccurate in her account of the evidence which she had given to the Tribunal.

30. The witness statement of Ms Burleigh to some extent goes beyond providing an account of her evidence to the Tribunal and, to that extent, I have not thought it admissible or had regard to it.

31. The Learning Trust's primary case before the Tribunal was that P's special educational needs were capable of being met by day schooling, they could be met at H School and it was not necessary to provide a residential school placement. The Tribunal rejected this case and found that P needed a 'waking-day' curriculum. On this appeal, the Trust submitted that the Tribunal erred in law because there was no evidence for this conclusion; because it failed

properly to direct itself as to the distinction between educational needs and social needs which were not also educational needs of P; and because the Tribunal failed to give adequate reasons for its decision. I will consider these in turn.

Flawed finding that P needed a waking-day curriculum

32. The Tribunal's conclusion that P needed a waking-day curriculum was contained in paragraphs F and G of its decision. In both the Tribunal expressly relied on the evidence of Ms. Burleigh. In paragraph 7 of the determination, the Tribunal had referred to the October 2005 report prepared by Ms Burleigh concerning P's 'Social Difficulties'. The Tribunal said

> '[Ms Burleigh] stated that [P]'s educational needs could only be met in a consistent and continuous placement offering set routines and a high level of structure throughout his daily life.'

The Tribunal was not purporting to quote the precise words which Ms Burleigh had used in her report but, Ms. Stout, on behalf of the Learning Trust, rightly in my view, observes that this précis has introduced two important changes.

33. First, Ms. Burleigh's report was directed at P's educational *and social* needs. This is obvious both from its title and its content. Some needs can, of course, be both social and educational. This is illustrated by the proposed amended Statement which the Trust prepared in December 2006 and which, as I have set out above, recorded that P's special educational needs included 'social skills'. Nonetheless, there will be some social needs which are distinct from the child's educational needs. On its face, Ms. Burleigh's October 2005 report was addressing both educational and social needs. That became blurred in the Tribunal's summary in paragraph 7.

34. Secondly, Ms. Burleigh's October 2005 report did not say that P's educational needs could *only* be met in a consistent and continuous placement offering set routines and a high level of structure throughout his daily life. The word 'only' was added by the Tribunal. In October 2005 the ARB in H School was not in existence or even being planned. In those circumstances, it may have been, as Ms Hughes comments, that Ms Burleigh did indeed see a residential placement as the only alternative for P. But even so, that is not the same thing as attributing to Ms Burleigh the opinion even in 2005 that the 'only' way of meeting P's needs was a waking day curriculum.

35. The Tribunal was aware that, by the time she gave evidence in January 2007, Ms Burleigh thought that P's needs could be met at the H School with its new ARB. The Tribunal said in paragraph 10,

> 'Ms Burleigh was asked whether it remained her opinion that [P] required residential schooling. She told us that she believed [P]'s educational needs could be met at [H] School but there also needed to be a 'whole package' of support to provide opportunities for learning within the community. Without such opportunity it was not fair to expect [MP] to manage [P] on her own.'

36. Ms. Burleigh's witness statement says of this section of her oral evidence

> 'I also thought the latter option (i.e. play facilities) would also enable [P] to stay with [MP] (as she wanted) because [MP] would then have time during the day to take up employment and would be less tired and more able to build a relationship with [P] in the time she would have with him. Even so, I thought that [MP] would still benefit from some respite care even in this scenario. It was in this context that I used the phrase 'whole package of support' that the Tribunal has quoted at paragraph 10 of the decision. I most certainly did not say that the 'whole package of support' was required to provide [P] with 'opportunities for learning with the community.' I am absolutely clear in my mind that I did not use that phrase, because I do not believe it to be true or correct.'

37. The Chair's typed transcript of her notes of this section of the evidence says '[H] is meeting his educational needs but there does need to be a whole package. Mum needs support and respite. Not ideal for [P] to be away from home. He could cope if he had those other opportunities. W/o opps not fair on mum…'. It can be seen that the phrase 'opportunities for learning within the community' does not appear here, nor does that phrase appear in the handwritten notes.

38. The phrase in dispute is important. If the Tribunal's account of Ms. Burleigh's evidence had been correct, it would have been some evidence that P did have educational needs which extended beyond the normal school day. However, if, as I find on the evidence, that phrase was not used by Ms Burleigh, it cannot provide that support and, by taking account of its mistaken view of the evidence, the Tribunal erred in law.

39. In important respects, therefore, the Tribunal appears to have misunderstood the evidence of Ms Burleigh. It thereby erred in law by taking into account immaterial matter (its erroneous understanding of her evidence). Since the Tribunal relied heavily on the evidence of Ms Burleigh, this error means that there was a material flaw in the Tribunal's finding that P needed a waking day curriculum.

Failure to address the distinction between educational and social needs of P

40. The Tribunal considered that P needed 'a clear and consistent approach throughout his waking day to ensure that he was able to access education in school and has opportunities to develop his communication, social and independence skills across all settings.' However, the need for consistency of approach is not the same as a need for an educational programme beyond the normal school day. This can be illustrated by *R (Tottman) v Hertfordshire County Council* [2003] EWHC 1725 (Admin) [2003] ELR 763 where the Statement of Special Educational Needs had been determined by the Tribunal in the case of another autistic child whose parents had wished him to attend a residential school. The Tribunal had rejected the parents' case on the basis that their son did not need programmes of special education throughout the working day. It had agreed (and stated in Part 3) that the child needed a 'consistency of approach throughout the day and across all settings i.e. home/school/respite care/social activities with regard to programmes.' It was agreed that there needed to be consistency of approach and liaison between school and home. Moses J. in the High Court and the Court of Appeal (*T v Hertfordshire County Council* [2004] EWCA Civ 927 [2005] LGR 262 rejected the argument that the Statement was deficient because it did not spell out in more detail what was to happen outside school.

41. Of course the factual circumstances of cases vary, but *Tottman* illustrates that a need for consistency is not to be equated with a need for educational provision outside of normal school hours. Part of the criticism of the Tribunal's decision which is made by Ms Stout is that the Tribunal nowhere explained what educational provision it considered that P needed outside of the normal school day. No amendment in this respect had been sought by MP to Parts 2 or 3 of the Statement, and the Tribunal did not spell out what it had in mind. All that it said was 'We note that MP's legal representatives have not sought amendments to Parts 2 and 3 to reflect [P]'s needs for a consistent approach throughout the waking day. We hope it will be possible to agree some amendments with the LEA to reflect our decision that [P] should be placed in a residential school.'

42. I consider that there is force in Ms Stout's comment that this is a classic case of putting the cart before the horse. By Education Act 1996 s.324(3)(a) the Statement must give details of the authority's assessment of the child's special educational needs, and these are set out in Part 2 of the Statement. By s.324(3)(b) the Statement must then specify the special educational provision to be made for the purpose of meeting those needs. These are set out in Part 3 of the Statement. Finally, by s.324(4) the Statement must (in cases such as the present) specify the type of school or other institution which the local authority consider would be appropriate for the child. This is done in Part 4 of the Statement. Parts 2 and 3 have been likened to a medical diagnosis and prescription *R v Secretary of State for Education and Science ex parte E* [1992] 1 FLR 377, 388-389. It is important then to identify or diagnose the need before going on to prescribe the educational provision to which that need

gives rise, and only once the necessary educational provision has been identified can one specify the institution or type of institution which is appropriate to provide it. Instead, in this case, the Tribunal seems to have settled on the view that a residential school was necessary and expressed the hope that the parties would agree an amendment to the diagnosis for which this was the prescription. I bear in mind that one cannot be over-prescriptive in this regard. If it is clear, for instance, that a residential school is necessary to meet an identified educational need, the precise form of the provision can be influenced by what is available at a particular school – see *S v City and Council of Swansea* [1999] ELR 315, at 323. However, in the present case, the Tribunal did not, in my view, identify the educational need which required a placement in a residential school.

43. It is axiomatic that a Statement of Special Educational Needs must be directed at the child's *educational* needs. It is not the function of the Special Educational Needs provision to provide for a child's social needs (at least not those which are not also educational needs). As Wall LJ said in *W v Leeds City Council* [2005] EWCA Civ 988 [2005] ELR 617 at [51] 'In a case such as the present, the tribunal in my judgment, had to tread a delicate line between properly informing itself of the 'full picture' relating to C, and limiting its decision to a careful assessment of C's special educational needs within that full picture.' In *London Borough of Bromley v Special Educational Needs Tribunal* [1999] ELR 260 at 295, Sedley LJ said,

> 'Special educational provision is, in principle, whatever is called for by a child's learning difficulty. A learning difficulty is anything inherent in the child which makes learning significantly harder for him than for most others or which hinders him from making use of ordinary school facilities. ….It is when it comes to the statement under s.324 that the LEA is required to distinguish between educational provision and non-educational provision; and the prescribed form is divided up accordingly. Two possibilities arise here: either the two categories share a common frontier, so that where the one stops the other begins; or there is between the unequivocally educational and the unequivocally non-educational a shared territory of provision which can be intelligibly allocated to either. It seems to me that to adopt the first approach would be to read into the legislation a sharp dichotomy for which Parliament could have made express provision had it wished to do so, but which finds no expression or reflection where one would expect to find it, namely in s.312. Moreover, to impose a hard edge or common frontier does not get rid of definitional problems: it simply makes them more acute. And this is one of the reasons why, in my judgment, the second approach is then to be attributed to Parliament. The potentially large intermediate area of provision which is capable of ranking as educational or non-educational is not made the subject of any statutory prescription precisely because it is for the local education authority, and, if necessary, the SENT, to exercise a case by

> case judgment which no prescriptive legislation could ever hope to anticipate. ‘

44. The Tribunal here recorded the submission by counsel for the Learning Trust that P ‘did not require any educational provision outside school or support at home for his educational needs to be fully met. All that he required was a stable home life.’ The Tribunal considered that P had suffered from the absence of a consistent approach and that this was unlikely to be remedied through any assistance from Social Services. However, I agree with Ms Stout that they failed to address her argument in that they did not identify what educational provision outside school they considered that P needed.

45. Ms Hughes relied on *A v Hertfordshire County Council* [2006] EWHC 3428 (Admin) [2007] ELR 95 where HHJ Gilbart QC said at paragraph [27],

> ‘In my view, the best judgment of what is needed in a particular case is that of the specialist tribunal whose members must take into account, but are not bound to accept, the evidence before them. It is for the tribunal to determine whether what would occur outside school hours is best to be described as education or care. It is also for it to determine whether the achievement of the defined objectives in Part 3 of the statement of educational needs reasonably requires educational provision outside school hours. It is for it also to determine whether a residential school, or a particular school, would have harmful or positive effects on the child in question. It is not bound to accept any particular witness’s evidence or any particular report. In this case, it had expert evidence on both sides and it was entitled to form its own view.’

46. Ms Stout responded that she did not disagree with the principles there set out. It was notable in that case that there had been expert views on either side of the issue. In the present case, the only evidence in favour of a residential placement had been Ms Burleigh’s 2005 report. Ms Burleigh’s views had since changed and so there was no expert presently supporting the case that P had educational needs outside the normal school day. The Tribunal’s treatment of Ms Burleigh’s evidence has the flaws which I have already identified. Furthermore, Judge Gilbart had said earlier in his judgment at paragraph [24] ‘the court will not interfere with the expert judgment of the tribunal if it has reached a properly reasoned decision.’ One criticism which I find to be valid in the present case is that the Tribunal’s decision was not properly reasoned.

47. This amounts to an error of law. Ms Hughes argued that, as a challenge to the sufficiency of the Tribunal’s reasoning, the argument failed to take account of the limited nature of the Tribunal’s duty. She reminds me that, by virtue of the Special Educational Needs Tribunal Regulations 2001 SI 2001 No. 600, the Tribunal is only required to set out its reasons in ‘summary form’. The limited

character of this duty was emphasised in relation to the predecessor regulations by Elias J. in *E v Oxfordshire County Council* [2001] EWHC 816 (Admin) [2002] ELR 256 at [33] – [36]. But, even taking account of these regulations, the Tribunal must deal with the substantial points that have been raised so that the parties can understand why a decision has been reached – see *R (L) v London Borough of Waltham Forest* [2003] EWHC 2907 (Admin) [2004] ELR 161 at [14] which contains a very useful distillation of the prior case law on the nature of the duty of SENDIST to give reasons.

48. There is a further aspect to the educational / social dichotomy in this case. It was also the Learning Trust's case, as recorded by the Tribunal, that MP was seeking a residential school for P to make life less difficult for herself and not for educational reasons. The Tribunal expressed this as the 'LEA view', but Ms Stout's submission to the Tribunal was not just based on speculation or assertion. There was support for it in the remarks that MP had made to the social worker carrying out the core assessment in the early months of 2006 (see paragraph [9] above). No one would wish to belittle the strain that can be placed on a single mother by the task of bringing up a child who is suffering from autism, but the Learning Trust's argument was that any need this generated was a need for social assistance on the part of MP rather than an educational need on the part of P. The Tribunal was not, of course, obliged to accept the Learning Trust's case in this regard but in my view they were obliged to explain why they rejected it. They did not do so.

49. I reach my conclusion on this point without regard to MP's 4th witness statement (of 6th March 2007) which Ms Stout submitted showed that the views expressed to the social worker in early 2006 were still held by MP a year later. For the reasons that I have already given, I do not think that such *ex post facto* evidence helps me to decide whether or not the Tribunal erred in law in making its decision.

50. The Learning Trust advanced a further series of grounds of appeal concerning the Tribunal's treatment of the advice and recommendations from Social Services. To some extent I have already considered these, but I will now turn to the remainder.

51. The Tribunal was required to have regard to the Special Educational Needs Code of Practice – see Education Act 1996 s.313. The paragraph of the Code on which Ms Stout relied is 8:74 and it says,

> 'In general LEAs are likely to consider that there is a need for residential provision where there is multi-agency agreement that:
> - the child has severe or multiple special educational needs that cannot be met in local day provision
> - the child has sever or multiple special educational needs that require a consistent programme both during and after school hours

> that cannot be provided by parents with support from other agencies…'

52. Ms Stout argues that the Tribunal, while not bound by the Code, was obliged to explain why it was providing for a residential school although there was no multi-agency agreement that this was needed. She also submits that this part of the Code implicitly sees the views of the Social Services Department as important. In this case, the March 2006 assessment considered that it would be harmful for P to have his relationship with his grandmother and uncles disrupted and, Ms Stout submitted, this would be the inevitable result of placement in a residential school.

53. I do not accept these arguments. The Code says that a residential placement will be appropriate where there is multi-agency agreement as to one of the listed circumstances. It does not say that a residential placement would only be appropriate in those circumstances. There was not in this respect a departure from the Code which the Tribunal was obliged to justify. As for the second point, the Tribunal did consider the position of JP (see paragraph H of its decision). It clearly placed less importance on the relationship between P and his grandmother than had the Social Services Department. In any case, the parent's proposal was that P should be a weekly border. The Tribunal may well have thought that this would not necessarily prevent him from seeing his grandmother and uncles at weekends if the family did wish this to happen.

54. The Tribunal was very critical of Social Services for failing to provide support for P and MP. There is, in my judgment, merit in the following complaints of that aspect of the decision:

    a. The Tribunal commented that the March 2006 core assessment had recommended that P be assessed by a clinical psychologist, that MP be referred to a parent's support group, that P attend an adventure play group and JP receive assistance with her housing but 'none of these recommendations were implemented.' This in turn contributed to the Tribunal's conclusion that the Social Services Department was providing nothing at the present. These observations did not address the evidence which was before the Tribunal that MP had refused respite support and direct payment because of her wish that P should attend a residential school (see above). Similarly, MP had not responded to offers of after-school clubs in November and December 2006. The Tribunal observed that it was only during the course of the hearing that the Learning Trust had offered to provide 1:1 supervision. It failed, however, to note that MP had not explained her unwillingness to accept the offers because of the lack of 1:1 supervision until the hearing itself. These were relevant matters which the Tribunal ought to have taken into account. Its failure to refer to them indicates that either it did not do so, or that it has failed to explain its response to them.

b. Even if Social Services had been deficient in the discharge of their duties, MP or P's remedies lay elsewhere. They could, for instance, seek judicial review of the Council, as P has in fact done. A failure (if that is what it was) by the Social Services Department would not translate into an 'educational need' of P and it was only P's educational needs with which the Tribunal could be concerned.

55. The Learning Trust argued that since a joint residence order in respect of P named both MP and JP, both women were to be regarded as 'parents' for the purposes of the Education Act 1996 and, accordingly, the Tribunal was obliged to take account of JP's views that P should not be placed in a residential school - see Education Act 1996 s.9. This is an interesting argument but one which has been rendered academic by subsequent events, namely the discharge of the former joint residence order. If the complaint had been a good one, but the only good one, there would have been no purpose in setting aside the Tribunal's decision since, on remittal, JP would unarguably no longer come within the statutory definition of a 'parent.'

56. There were a number of other complaints made by the Learning Trust of the Tribunal's approach to the advice and recommendations of Social Services (i.e. the remaining complaints under Ground 2 of the grounds of appeal). I have considered each of them, but in my judgement they do not, on their own, amount to errors of law, rather than disagreement with the Tribunal in relation to its findings or judgment.

Errors in respect of finding that H School was unsuitable for P

57. The Tribunal found for a number of reasons that H School was unsuitable. The Learning Trust argues that it did so by reference to matters not identified as 'needs' in Parts 2 or 3 of the Statement and / reached a perverse conclusion on the facts or failed to take account of relevant matters. Although I do not agree with each of their complaints, I consider that some do have merit and these are sufficiently material to impugn the conclusion that H School was not suitable for P. I will consider first the challenges in turn.

58. At paragraph 14, the Tribunal referred to the first report of Ms Holmes, the Educational Psychologist, that had been critical of H School. Nowhere did it refer to her second report. This had cautioned that her first report had been written after P had been at H School for only a few weeks. The second report was much more positive. Of course, the Tribunal is not obliged to set out every piece of evidence. Nor was it obliged to accept what Ms Holmes said in her second report. However, since the second report qualified the first and presented a very different picture to the first, it was unsatisfactory for the Tribunal not to make any mention of it. It leads to the conclusion that the

Tribunal either erred in law by not taking account of the second report or did not explain why it preferred the first over the second.

59. The Tribunal considered that there had been a significant diminution in the provision for speech and language programme between the February 2006 Statement of Educational Needs and the December 2006 proposed amended statement. Its amendments to Part 3 of the Statement tracked the recommendations of the speech therapist, Ms Dreschler. However, it is difficult to see how the provisions of the December proposal differed in substance from these recommendations.

    a. The Tribunal required that Part 3 specify that P needed (a) small group work to develop social skills appropriate to formal and informal settings. The December statement said 'Continuing advice from a speech and language therapist about how to continue developing [P]'s language, particularly in helping him develop language for social settings. He may benefit from the introduction of a small language group (initially with just one other pupil) where social situations can be set up and used for this purpose. This could be used for both language and social skill development.'
    b. The Tribunal required the Statement to refer to (b) the implementation of strategies to support P in the classroom such as visual timetables. The December proposal already said 'This may also include further developing the use of his visual timetable so that he understands more fully its purpose and how it can be used to indicate change, choice and the timing of rewards.'
    c. Thirdly, the Tribunal amended the statement to say that P required a highly differentiated curriculum that takes into account his language and learning needs. But it is difficult to see a significant difference between this and the comment in the December proposal that P should have 'Access to a broad and balanced curriculum, including the National Curriculum, at a level that is appropriate to P's ability and which is differentiated to meet the objectives set out above.'

    Ms Burleigh's witness statement records the evidence which she gave to the Tribunal of the work which had been done with the children in the ARB by a speech therapist. Overall, it is difficult to see how the Speech and Therapy aspect could lawfully lead the Tribunal to decide that the H School was unsuitable.

60. Three of the further reasons given by the Tribunal as to why H School was unsuitable were that (i) P had little or no opportunity to develop his language skills with other children; (ii) a lack of stability and consistency in his education; and (iii) he was not being educated with children of similar ability. Ms Stout points out that neither the February Statement nor the December proposal contained in Parts 2 or 3, educational needs or provision for those

needs which matched these alleged deficiencies of the H School. The nearest was a statement that P required social and learning environments to be structured so that they were predictable. However, this was qualified so as to add that they should also 'allow him to learn to tolerate change and the extending of his experience.' I see force in the complaint that in deciding whether the H school was or was not meeting P's educational needs, the Tribunal should have looked to Parts 2 and 3 of the Statement to see what those needs were or have first identified in what ways those parts of the Statement were deficient. This follows from the guidance in the cases to which I have referred above, that Parts 2, 3 and 4 of the Statement should be considered in sequence so that there is a sensible progression from diagnosis to prescription. In this case, the Tribunal neither matched its criticisms of H School to the existing statement, nor identified relevant deficiencies in Parts 2 and 3 which needed to be made good.

61. It may be said that it should be inferred from the criticisms of H School that the Tribunal did consider Parts 2 and 3 to be deficient in these respects. However, that is not satisfactory. Firstly, the Tribunal did spell out certain alterations which it was directing to be made to Parts 2 and 3, but it did not do so in relation to the matters considered in the previous paragraph of this judgment. Secondly, there is an issue of fairness. The Learning Trust was entitled to be told if the Tribunal considered that Parts 2 and 3 might need to be amended in ways that had not been identified in MP's case statement. Thirdly, the proper approach analysed in the cases to which I have referred does provide a sensible structure and discipline to the decision-making process.

62. Ms Stout also took issue with the comment that P had had outbursts of anger due to 'unknown' factors. She says that the instances relied upon before the Tribunal did all have identifiable causes. I do not think that this criticism is valid. It was, apparently, agreed between the parties at the Tribunal that certain amendments were appropriate and these included a reference to P's 'unpredictable' behaviour. This is reflected in paragraph 1(i) of the Tribunal's Order.

Erroneous rejection of after-school facilities

63. As an alternative to its primary argument (that P's educational needs could be adequately met by day school provision) the Learning Trust submitted that any further provision could be adequately met by its offer of after-school play facilities. The Tribunal rejected this alternative saying,

> 'We find that playgroups after school would result in further changes to [P]'s routine and as they are non-directive and not autism-specific, are unlikely to develop his communication and social skills.'

64. Ms Stout says that the Tribunal erred in this conclusion for two reasons: it failed to recognise that starting at a residential school would itself involve a major change in P's routine and there was therefore no material difference between the Trust's proposal and Tribunal's preference in this respect. Secondly, the Tribunal did not acknowledge that the Trust had offered to provide an LSA (I assume a learning support assistant) who had particular experience in dealing with children with autism and who would accompany P on a 1:1 basis to the after school activities.

65. Since I have found that the Tribunal erred in law in its rejection of the Trust's primary argument, it is not strictly necessary for me to deal with this part of the case. But, for completeness, I would say that I found the first of Ms Stout's reasons unpersuasive. It was obvious that a move to a residential placement would cause some disruption to P's routine. I would not be ready to assume that the Tribunal had overlooked that. It appears to have thought that the changes involved in the Trust's proposal would be more disturbing for P. Others may have a different view, but I would not characterise the Tribunal's decision as perverse on this ground.

66. Ms Stout's second criticism has more force. The Tribunal recorded that 'At a very late stage in the hearing Ms Stoat [sic] told us that the LEA would agree to fund one to one support at these facilities if the tribunal's decision was that [P] required some provision out of school hours.' Ms Burleigh's statement says 'I can confirm that what was offered by Miss Stout (counsel for the Learning Trust) at the Tribunal was for an LSA to accompany [P] to those after-school clubs and that she said the LSA would have particular experience in dealing with children with autism, if the Tribunal thought this was necessary.' This was a material part of the proposal. It may be that the Tribunal considered that even this did not go far enough, but if that was so, it is troubling that they did not explain why. The alternative is that this aspect of the offer was over-looked and, accordingly, that a material matter was not taken into account.

67. The final ground of challenge concerned the Tribunal's criticism of the change in the Statement regarding monitoring arrangements and liaison with MP. Ms Stout submitted that this aspect had not been put to the Trust at the hearing and so they did not have an opportunity to deal with it. Had it been, they would have explained that the change was made in line with new standard paragraphs to do with this issue. In view of my conclusions on the other matters, I do not need to resolve this which, as Ms Stout recognised, would not on its own be enough to have the decision of the Tribunal set aside.

68. Ms Hughes in her submission argued that I should be particularly cautious about overturning the decision of the Tribunal since they had found it a difficult and finely balanced matter. Of course the decision of the Tribunal required judgment and the expertise of a well-qualified Tribunal. The

authorities are clear that the Court should respect that judgment and expertise and always remember that the Court's own jurisdiction is confined to errors of law. However, I have found that in this case the Tribunal did make a number of errors of law. The fact that the Tribunal found the decision to be finely-balanced has a different effect to that contended for by Ms Hughes. It means that if aspects of its decision-making are affected by errors of law, it is very much more difficult to argue that the decision as a whole would nonetheless have been the same even in the absence of those errors. In other words, errors of law are the more likely to be material. However, the grounds of appeal which I have found to be justified singly and cumulatively mean that this is not a marginal case. In my judgment they mean that the decision of the Tribunal must be set aside and the appeal of MP against the Statement of Special Educational Needs will be remitted to be heard by a differently constituted Tribunal.