

3.9 Tribunals

by Julie Care

Introduction: what is the Special Educational Needs and Disability Tribunal (SENDIST)?

It is an independent tribunal set up by an act of parliament. It hears and decides parents' appeals against the decisions of local authorities (LAs) about students special educational needs, where parents cannot reach agreement with the LA. The tribunal falls within the jurisdiction of the Council on Tribunals.

The Lord Chancellor appoints the president and the chairmen. The Secretary of State for Education and Skills and the National Assembly for Wales are responsible for appointing the other members. The government cannot influence decisions and the tribunal has no connection with any LA.

In its annual report 2003-04 the tribunal reported a total of 3,354 appeals registered in that year with 1,197 decisions issued. A high number of appeals are conceded by LAs or withdrawn by parents before they reach a hearing.

Who can appeal and what can they appeal about?

Parents or anyone with parental responsibility can appeal if they have not been able to come to an agreement with the LA about their child's special educational needs and provision. There is a two-month time limit for making an appeal, which starts when the LA sends parents its final written decision.

Parents can appeal to the tribunal:

- if the LA refuses to carry out a statutory assessment of the student's special educational needs
- if the LA refuses to reassess the student's special educational needs
- if the LA has not made a new assessment for at least six months
- if the LA refuses to issue a statement of special educational needs (statement) of the student's special educational needs following a statutory assessment
- if the LA decides not to maintain the statement
- if parents disagree with the parts of the student's statement that describe the student's special educational needs and the special educational provision the student should get
- if parents disagree with the school named in part 4 of the statement
- if the LA has not named a school in part 4
- if the LA refuses to change the school named in the statement, if that statement is at least a year old (but only an LA-maintained school can this be requested).

What cannot be appealed to the tribunal?

There are misconceptions about the grounds on which parents can appeal to the tribunal about. Most commonly, there is a misunderstanding that parents can appeal if special

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educational provision set out in part 3 of the statement is not arranged and delivered. If the governing body of a maintained school named in the statement fails to admit a student, the tribunal will not consider it. Neither can tribunals deal with disputes about the identification and provision for non-educational needs in parts 5 and 6 of the statement.

Such matters and others may be resolved through the LA's complaints procedures, reference to the local government ombudsman, reference to the secretary of state, or judicial review.

Appeals by need type

see Table 1,
'Nature of
SENDIST appeals -
2003-04', p363

Appeals for students with specific learning difficulties represented the highest number of appeals (20.2%) in the last reported year (2003-04), followed by autistic spectrum disorder (18.6%). Table 1 [see p363] gives a breakdown of the number of appeals by need type, with percentages of the total number of appeals nationally.

The appeal process

The legal framework

The tribunal will apply the relevant legislation and consider the appeal within the legal framework. The principal legislation is the Education Act 1996 (as amended), the Education (Special Educational Needs) (England) Regulations 2001 and also the 2001 *Code of Practice*, which is issued under the Education Act 1996 and requires LAs and others to 'have regard to the provisions of the Code'.

Appeals against placement

For appeals against the content of a statement and as a challenge to the school named in part 4 of the statement, the tribunal will consider the following legal framework.

If parents are requesting a maintained school, Schedule 27 of the Education Act 1996 applies and must be complied with. The LA must agree parental preference unless:

- the placement is unsuitable for the student's age, ability, aptitude or to his special educational needs
- the placement would be incompatible with the provision of efficient education for the students with whom he would be educated, or the efficient use of resources.

If parents are requesting a non-maintained school, schedule 27 does not apply, rather section 9 of the Act:

The LA must agree parental preference unless it is not:

Compatible with the efficient instruction and training of the student and the avoidance of unreasonable public expenditure.

Appeals relating to statutory assessment

For appeals against the LA's decision not to carry out statutory assessment, the tribunal will consider section 323 of the Education Act 1996. Statutory assessment should only be undertaken if the LA believes that the student probably has special educational needs and that the LA needs, or probably needs, to determine the special educational provision itself by making a statement.

The special educational needs of the great majority of students should be met effectively within mainstream settings through Early Years Action and Early Years Action Plus or School Action and School Action Plus, without the local education authority needing to make a statutory assessment. In a very small number of cases, the LA will need to make a statutory assessment of special educational needs and then consider whether or not to issue a statement (2001 *Code of Practice*).

Table 1: Nature of SENDIST appeals - 2003-04

Autistic spectrum disorder	623	18.6
Behaviour, emotional and social difficulty	467	13.9
Hearing impairment	89	2.7
Moderate learning difficulty	470	14.0
Multisensory impairment	1	0
Other	5	0.1
Physical disability	156	4.7
Profound and multiple	26	0.8
Severe learning difficulty	88	2.6
Specific learning difficulty	678	20.2
Speech, language and communication needs	392	11.7
Unknown	306	9.1
Visual impairment	53	1.6
Total appeals registered	3,354	

How to prepare

When an appeal is registered, it is likely that an LA education officer will contact you. Parents may also tell you that they have registered an appeal and ask for information. Special needs coordinators play a key role in the evidence gathering and at the actual hearing.

There will probably be a pre-hearing meeting to discuss the case with the LA representative and other professionals involved with the student.

The LA must write a statement of case, which addresses the key points raised in the appeal and provides supporting evidence for their case. Parents may also provide a case statement and may also commission additional reports to support their case. The LA representative will choose witnesses depending on the points to be proven. It is highly probable that the SENCO will be asked to be a witness at the hearing, as the tribunal needs to know detailed information about the student and their school provision. The SENCO is likely to know the student and have the necessary expertise in SEN.

In order to come to a view about your school's appropriateness in meeting the student's special educational needs, the tribunal will consider all evidence, including information provided by the school.

You may already have provided the LA with a lot of information about the student's special educational needs and the support that he or she is receiving. This will form part of the evidence but the school may be asked to provide additional information, which may vary from case to case. This will depend on the type of appeal and the points raised in the notice of appeal. Appeals fall into two broad categories from the point of the evidence base:

1. School evidence: Appeals against placement

Nature and extent of the student's needs

You will be asked to provide detailed and factual information about the student's attainment. This should include assessment data, such as teacher-assessed National Curriculum levels, SATs results at the end of each key stage, other school-based assessment, such as assessments of reading, comprehension and spelling, and termly school reports. You may also have reports from other professionals, such as specialist advisory teachers, an educational psychologist, a speech and language therapist, a physiotherapist, an occupational therapist, a psychiatrist or perhaps social services that further describe the student's needs.

Progress

A key test of whether your school is appropriate is whether or not the student is making appropriate progress. There is a very useful description of 'adequate progress' at paragraph 6:49 of the 2001 *Code of Practice*. You should have evidence that the student is making progress that:

- is closing the attainment gap between the student and their peers
- is preventing the attainment gap growing wider
- is similar to that of peers starting from the same attainment baseline, but less than the majority of peers
- matches or betters the student's previous rate of progress
- ensures access to the full curriculum
- demonstrates an improvement in self-help, social or personal skills
- demonstrates improvements in the student's behaviour
- is likely to lead to appropriate accreditation

- is likely to lead to participation in further education, training and/or employment.

(DfES, 2001)

As SENCO, you should track assessment results over time, including National Curriculum data and SATs results. You should also provide current and previous individual education plans (IEPs), including reviews of targets. All assessment data should include dates of tests, the chronological age of the student at the time of the review/assessment and centiles where appropriate and available.

Provision

Inclusive education

The statement in the National Curriculum provides statutory guidance in developing a more inclusive curriculum - one that is based on the principle of:

- setting suitable learning challenges
- responding to pupils' diverse learning needs
- overcoming potential barriers to learning.

You should provide evidence of school planning that shows that this has been addressed through appropriate targets and strategies to meet the diversity of learning needs in the class.

In addition to an inclusive approach, it will have been acknowledged that for this particular student to make adequate progress some additional or different action is needed.

The statement identifies the nature of that special educational need and the provision required.

The targets and strategies in the individual education plan (IEP) show how the support is delivered. You should specify whether the support is individual, in a small group or across the curriculum in class.

You should also provide details of support or advice from other professionals and evidence of how you liaise to provide an appropriate and coherent package of support for the student.

Your school's SEN policy describes how students with SEN are supported across the curriculum and you should make this available to the tribunal. The school's most recent Ofsted report will describe how well students with SEN are supported. Concerns have been raised however that the Ofsted *Framework for Inspection* (2004) provides less helpful information about SEN support than previous inspection documents.

General information about the school

The tribunal will not usually be familiar with your school, as panel members are drawn from a wide geographical area. You should therefore provide a school prospectus, the school's most recent Ofsted report, details of class sizes, the number of students on roll, the profile of the other students with whom the student will be educated, etc. In some cases it is necessary to provide information about the physical space the student is taught in, with room measurements and the space available per adult and student noted.

Skills and expertise of staff

The expertise of your teachers and support staff is particularly important when panels are deciding whether the school can meet the student's needs. You should therefore provide as much information as is possible about the training their staff members have received. This should include a description of such training, with dates attended and may include courses held externally or INSET training at school.

You should also provide a list of qualifications held by all staff.

Therapies

Many appeals are decided on the therapies available to students, as therapy needs are often an educational need in law. It is therefore crucial that you know the therapy provision available to your school and in the locality.

Partnership with parents

Schools are required to involve parents in target setting. You should explain your school's process for this and provide details of any meetings, consultations with parents and annual review meetings.

Student's views

The LA must (and the parents may) include the views of the student in relation to the appeal that has been registered. If the age or incapacity of the student makes it impractical for the LA to ascertain his or her views or the authority does not have access to the student, the case statement must explain why the student's view is not provided (Education (Special Educational Needs) (England) Regulations 2001).

2. School evidence: appeals relating to statutory assessment

Nature and extent of the child's needs

As with an appeal against the content of a statement, you should provide a summary of the student's needs. You should include results of recent assessments, whether by school, agency and independent, as well as educational attainments and SATs results. Where relevant, include details of the student's behaviour at home and school.

If the LA has decided that it is not necessary to carry out a statutory assessment, as it feels that it has a clear picture of the student's needs and that these can be met from the resources already available to the school, it will have considered paragraph 7:33-84 of the 2001 *Code of Practice*, which demands:

- evidence that the school has responded appropriately to the requirements of the National Curriculum, especially the section entitled 'Inclusion: providing effective learning opportunities for all students'
- evidence provided by the student's school, parents and other professionals, where they have been involved with the student, as to the nature, extent and cause of the student's learning difficulties
- evidence of action already taken by the student's school to meet and overcome those difficulties
- evidence of the rate and style of the student's progress.

(DfES, 2001)

Attainment

The tribunal will consider evidence of attainment in accordance with para. 7:40 of the 2001 *Code of Practice*:

Attainment is the essential starting point when considering the evidence. LAs should always be alert to indications that a child's learning difficulties may be particularly complex or intractable. They should be alert, therefore, to significant discrepancies between:

- a child's attainments in assessments and tests in core subjects of the National Curriculum and the attainment of the majority of children of their age
- a child's attainments in assessments and tests in core subjects of the National

Curriculum and the performance expected of the child as indicated by a consensus among those who have taught and observed the child, including their parents, and supported by such standardised tests as can reliably be administered

- a child's attainment within one of the core subjects of the National Curriculum or between one core subject and another
- a child's attainments in early learning goals in comparison with the attainments of the majority of their peers.

(DfES, 2001)

You should be able to demonstrate that the student is working on programmes of study relevant to the appropriate key stage for their age (or from an earlier key stage). You should provide evidence of National Curriculum levels, baseline teacher assessment and SATs results at the end of each key stage.

There should be no evidence that the student is falling progressively behind the majority of students of the same age in any of the National Curriculum core subjects. You should state the expected range for students at the appropriate key stage.

You should also consider the following and their impact on learning outcome (2001 *Code of Practice*, para. 7:43):

- Clear, recorded evidence of clumsiness; significant difficulties of sequencing or visual perception.
- Any evidence of impaired social interaction or communication or a significantly restricted repertoire of activities, interests and imaginative development.
- Evidence of significant emotional or behavioural difficulties, as indicated by clear recorded examples of withdrawn or disruptive behaviour; a marked and persistent inability to concentrate; signs that the child experiences considerable frustration or distress in relation to their learning difficulties; difficulties in establishing and maintaining balanced relationships with their fellow pupils or with adults; and any other evidence of a significant delay in the development of life and social skills.

(DfES, 2001)

Significant problems in the student's home or family circumstances or their school attendance record can contribute towards underattainment but may not always be indicators of special educational needs.

You may have evidence of other factors that, it is felt, have impacted on learning outcomes (2001 *Code of Practice* para. 7:44), such as evidence that the student's performance varies in different environments, evidence of contributory medical problems, evidence from assessments or interventions by health or social services.

You may believe that the evidence points to underattainment rather than special educational needs and may feel that there are more appropriate ways to support the student's access to learning, such as a referral to the attendance and behaviour service, health or social services.

Progress

Whatever the level of the student's difficulties, the key test of how far his or her learning needs are being met is whether he/she is making adequate progress.

DfES (2001), 5:42

The LA will have to evidence that the child's learning needs are being met as they have made progress which:

- is closing the attainment gap between the student and their peers
- is preventing the attainment gap growing wider
- is similar to that of peers starting from the same attainment baseline, but less than the majority of peers
- matches or betters the student's previous rate of progress
- ensures access to the full curriculum
- demonstrates an improvement in self-help, social or personal skills
- demonstrates improvements in the student's behaviour
- is likely to lead to appropriate accreditation
- is likely to lead to participation in further education, training and/or employment.

(DfES, 2001, 6:49)

It is likely that you will have been asked to provide much of this information for the LA's decision-making panel, but you may be asked for an update or additional information to address points raised in the appeal.

Provision

The LA will have to prove that the student's needs can be met at School Action Plus.

When a student is identified as having special educational needs, the class teacher provides interventions which are additional to or different from those provided as part of the school's usual differentiated curriculum (ie School Action).

School planning should show that the curriculum is differentiated. You may be asked for examples of lesson reading material and differentiated lesson planning.

Strategies should be recorded within the individual education plan (IEP) and should be submitted as evidence with evaluations. The IEP should show how support is delivered. A provision map is a clear and helpful way of showing exactly how the child is supported [see 2.3].

You should provide details about the specialists that the school has consulted on behalf of the student, and which specialists have advised teachers on IEP targets and strategies, provided specialist assessment to inform planning, given advice on the use of specialist strategies or materials and provided support for particular activities. You should include advice from visiting specialist teachers, specialist outreach services, speech and language, occupational therapy and educational psychology.

General information about the school

You should say when the student joined the school and which National Curriculum year he or she is in. You should provide details of the number of students on roll, the number of students at School Action, School Action Plus and the number of students with a statement of SEN. In addition, the tribunal will want to know how many students are in the student's class and how many of them have special educational needs. They will also want to know something about the SEN profile of the other students.

The school's most recent Ofsted report will provide useful background information about your school and the SEN policy will describe in general terms how students with SEN are supported.

See section 2.3, 'Monitoring and evaluating provision', for information about provision mapping

Funding arrangements

The LA will have to prove that the school can meet the student's special educational needs from its delegated budget. Budget information is therefore crucial to the argument if the tribunal is satisfied that the student's special educational needs are identified, but the tribunal needs to be sure that the school has sufficient resources to meet the identified needs.

Guidance in the 2001 *Code of Practice* gives consideration to the context of arrangements for funding schools in the area. Local authorities organise funding for SEN to schools in different ways. Any changes to the formula are submitted to the DfES for approval and the formula complies with regulations made under section 47 of the School Standards and Framework Act (1998). Each year school budget formulae are set out in the annual section 52 education budget statement, published by your county council.

The formula allocates funds to schools based on a number of factors. Most funding is based on the number and ages of pupils at the school, as recorded on the Annual Schools Census (ASC), an official government return completed by schools in January each year. A smaller proportion of funding is allocated to schools based on a number of proxy indicators of special educational need. The factors used include free schools meal entitlement and take-up, an average profile of prior attainment for the pupil population in each school (as measured by national SAT tests), the proportion of pupils for whom English is not their first language and the number of refugee pupils. The remainder of the school budget is allocated for various factors relating mainly to the school site and buildings.

The funding for in-school support for students with statements is delegated to schools. The funding delegated to schools is via the formula as described above. The amounts allocated to each school are not directly related to the number of students with statements or the level of support specified in those statements.

Late evidence

You may be asked to provide late evidence after the case statement has been submitted. If reports become available at this time, you should make sure that you send your LA representative a copy. This is usually a current IEP with reviews, annual review reports, assessment or test results or recent professional reports. Information should not be withheld from the tribunal.

There are, however, strict rules for the submission of late evidence, which are that:

- the admission of the late evidence would not be contrary to the interests of justice
- the evidence was not and could not reasonably have been available to that party before the end of the case statement period
- a copy of the evidence was sent or delivered to the tribunal secretary and to the other party at least five working days prior to the hearing
- the extent and form of evidence is such that it is not likely to impede the efficient conduct of the hearing.

The tribunal may admit late evidence on the day if:

- the case is wholly exceptional
- unless the evidence is admitted, there is serious risk of prejudice to the interests of the student.

You should therefore be aware of the timescales and ensure that your representative has evidence in sufficient time to get it to the tribunal and the other side five days before the hearing. The tribunal has the power to direct either party to make available any information or documents.

Preparing for the hearing

You will receive a complete bundle from the tribunal, which will include all the papers sent by the parents and the LA. You will probably already be familiar with most of the reports, but you should ensure that you read everything to be well prepared for the hearing. As you can refer to your papers and notes it is helpful to highlight and mark the points you feel are important and wish to emphasise in the hearing.

You should be prepared to answer questions from the panel, your representative and the parents or their representative, if they have one.

It is likely that you will be invited to a meeting to discuss the case with the representative and other professionals involved with the student. You should use this meeting to ask any questions you may have or to seek clarification about anything of which you may be unsure.

If you are not willing to go as a witness, you should explain your reasons to the representative. If the representative still wishes you to attend, they can ask the president to send a witness summons requiring you to attend. You must then come as a witness, unless there are strong reasons why you cannot. If you fail to attend, you can be liable to a personal fine of up to £1,000.

NB: You can of course be asked to attend the hearing by either party.

The hearing

The hearing will normally be held in London but may be held nearer the parents' home if there are exceptional reasons, and are usually held within normal working hours. The hearing is set for a specific time and will normally last half a day to a full day. Most hearings start at either 10am or 2pm. You will be able to tell your representative of any dates to avoid, but once the hearing date is set it is not possible to change it.

A tribunal panel made up of three people will hear the appeal. A lawyer, either a solicitor or barrister, will chair the hearing and the other two members will have knowledge and experience of special educational needs. Hearings are normally held in private but either party can ask for the appeal to be heard in public.

Both parties can be represented at the hearing. An education officer or a legally qualified person usually represents LAs. A solicitor or a barrister can represent parents but they cannot get public funding for this. The student may also attend the hearing and give evidence. However, it is unlikely that he or she will stay for the whole hearing and if you feel that it is inappropriate to give some evidence with the student present, you should make your representative aware of this.

Both parties may bring up to two witnesses to the hearing. In very rare circumstances, the president may give parents and/or the LA permission to bring more than two witnesses.

Parents may also bring two other people with them for support but they are not allowed to take part in the hearing. The LA is not allowed to have additional people at the hearing for support or to observe the proceedings.

The following people may be at the hearing:

- the parents and possibly the student
- the parents' representative, if they have one
- the parents' witnesses
- up to two parental supporters, who will not take part in the hearing
- the LA's representative
- the LA's witnesses

- the three members of the tribunal
- the tribunal clerk
- any interpreters or signers, if these are necessary
- there may also be someone who is being trained by the tribunal or an appraiser of tribunal members.

You should aim to get to the hearing in good time, as there is often a pre-hearing meeting to consider any late evidence and to review the case. The clerk will meet you and show you where to wait. There are separate waiting rooms for each party.

The clerk will show you into the hearing room and all those taking part will sit at two sides of a table. The chairman will explain the procedure before the hearing begins.

Although tribunal aims to be consistent in its approach, procedure on the day is determined by the tribunal chair.

The tribunal claims to be informal, but that is within the context of the court system. Witnesses usually find that it is a more formal forum than they are used to within the context of their work in education. The tribunal should adopt an inquisitorial rather than an adversarial approach, but witnesses should be prepared to answer detailed and often challenging questions. Witnesses can find themselves being cross-examined by experienced and specialist lawyers.

The panel members will have read all the papers beforehand and identified the main issues as they see them. They should address all the points raised in the parents' appeal and each side will usually have the opportunity to question each other.

The hearing will proceed on an issue-by-issue basis. The LA is usually asked to give evidence on each issue first, followed by the parents. The panel may ask you questions directly or address questions through the representatives. Chairs will often say that those of us attending the hearing are there to persuade the panel, not each other. It is therefore helpful to address your answers to the panel rather than the person who asks the question. Such an approach also avoids confrontation and defensiveness. After all, when the hearing finishes teachers, parents and other professionals have to continue working together to support the student and it is important to maintain good relationships throughout.

As a witness you are there to assist the tribunal with their professional view. Any expert's duty is to the tribunal first and you should give an impartial opinion. Expert evidence that appears biased can lose credibility.

It is not necessary to have 'professional witness' skills, but it is helpful to remember the core skills when presenting your evidence. You should be heard, be expressive, preface your responses and structure your answers using a point-by-point approach.

The representatives or the parents, if they do not have a representative, are usually invited to sum up their case at the end of the hearing.

The decision

The panels make decisions by majority and do not normally give their decisions on the day. They consider all the evidence, including the documents that the parents and the LA have sent before the hearing and also what is said in evidence at the hearing. The tribunal aims to post its decision and the reasons for that decision to parents and to the LA within 10 working days of the hearing. The tribunal must give sufficient reasons for its decisions.

High Court appeals and review

The decision is final but either party can ask for a review of the decision if it thinks there is a technical problem with the decision or the way it was made. A request for a review of

the decision must be received within 10 working days.

Any party may ask the president to review the decision on the grounds that:

- the decision was wrongly made, as a result of an error on the part of the tribunal staff
- a party, who was entitled to be heard at a hearing but failed to appear or to be represented, had good and sufficient reasons for failing to appear
- there was an obvious error in the decision of the tribunal that decided the case
- the interests of justice require it.

A review is not an opportunity to have a decision overturned if either party does not agree with it.

A review does not replace an appeal to the High Court.

Either party can appeal to the High Court against the tribunal decision, but only on points of law, and has 28 days from the date that the decision was issued to appeal to the High Court.

Case studies

Appeal against refusal to assess

Parents appealed to the tribunal against the LA's decision not to carry out statutory assessment. The tribunal applied the following test:

In deciding whether to make a statutory assessment the crucial question for the tribunal is whether there is convincing evidence that despite the actions of the school working with the help of external specialists and the school itself taking relevant and purposeful action to meet a student's needs there remains a need for the LA to make an assessment pursuant to s329 EA 1996.

In practice, the LA is required to pay particular attention to evidence of:

- the nature, extent, and cause of the student's learning difficulty
- the action already taken by the student's school
- if some progress has been made, has it only been made as a result of much additional help and instruction at a sustained level that is not usually made available through School Action Plus (SAP)?

We are satisfied that C school has a good understanding of the nature extent and cause of C's learning difficulties...

...we give great weight to the evidence of Mrs N... we found her to be a powerful witness... we were not convinced that any further evidence of significance would emerge if a SA were to be undertaken

...we note the action that has been taken to date by Mrs N and her staff to support C. We heard nothing to suggest that the support had been inappropriate or inadequate. We believe that the action has been relevant and purposeful...

...we accept the evidence of Mr C that additional support... can be provided within the school at School Action or School Action Plus...

...we conclude that there is no real likelihood of the LA being required to determine C's special educational needs... at the present time.

By comparison, and in another decision, the Tribunal considered the 2001 Code of Practice:

In an appeal of this nature we are guided by paragraph 7:34 of the Code of Practice...

...a wide range of evidence should be considered, including that of educational psychologists and specialist support teachers, together with the action the school has

taken to meet the pupil's needs...

...In a later paragraph, namely 7:52, the Code mentions four areas of need which should be considered where relevant...

...Applying this guidance to O's case we do consider that relevant and purposeful measures are being carried out for him at school... however we think the relevance and purposefulness of this support is impaired by the fact that there is not available a recent assessment of O by qualified professionals to ascertain whether or not he may be autistic to some degree..

LAs and schools have a duty to comply with the 1996 Education Act and have regard to the *SEN Code of Practice*.

Not only must the evidence be clear about the support available at School Action and School Action Plus but the school must be satisfied that it has appropriately identified the student's special educational needs.

Appeal against a refusal to issue a statement

Parents appealed to the tribunal against a LA's decision to refuse to issue a statement of SEN. The tribunal found that:

The issue in dispute was whether his needs could be met appropriately in the school. We concluded... F's special educational needs are being appropriately provided for under the School Action Plus programme...

The school has prepared a comprehensive programme of provision and support for F, well documented in the 'Provision Map', the minutes of the meeting and the IEP. ...we did not agree that additional 1:1 tuition was required. F is of average ability in both these areas and on assessment his scores were age appropriate... we concluded that the school staff were experienced qualified teachers... receiving the necessary training, guidance and resources... The SENCO was well qualified.

This contrasts with another decision which says:

R has severe specific learning difficulties...

The model of provision described by the LA as available for R in a mainstream school without a statement was similar to that which had been provided and failed at C school (independent). We noted the LA's criticisms of provision at C school but it did seem to us that the provision made to R at C was at least as focused as that described to us as available at A. We could see no reason why the provision ...available at SA Plus was any more likely to succeed in enabling R to make progress than had the provision at C.

...if R is to establish literacy skills which will enable him to take advantage of his academic potential he requires daily intensive specialist tuition and support, which a specialist school or specialist provision within a mainstream school can provide.. We were not persuaded that (it) would be available at in his local maintained school.

The appeal was upheld.

Appeals against placement

Parents appealed against part 4 (placement) of the statement of SEN. The tribunal said:

We must balance the educational advantages of a placement at the school H's parents wish him to attend and the additional cost to the LA of placing him at the school rather than a maintained school...

we were impressed by the evidence of Ms S and believe that she was realistic in her assessment of H's particular needs... we are confident that the school has the expertise to meet his specific needs..

The LA is ordered to make the amendments to the SSEN (See attached ...working document.) In all other aspects the appeal is dismissed.

The tribunal found that the maintained school was appropriate and could meet the student's needs.

In contrast, when hearing another appeal against placement the tribunal said:

We considered it necessary that therapy was followed up in class by a speech and language therapist because of the very limited progress J had made in language... we accepted the evidence that the model of therapy received to date had not had sufficient and consistent follow up in the classroom.

...we were not reasonably satisfied that L school could at present offer seamless provision in view of its staffing difficulties with speech and language therapists.

The appeal was upheld and the LA ordered to pay the independent school fees. Lack of speech therapy is a difficulty when evidencing appropriate provision, as speech and language needs are usually considered an educational need in law. Prime responsibility for the provision of speech and language therapy services to students rests with the NHS. This applies generally also to any specification of such services in a statement, whether in part 3 as education provision or in part 6 as non-education provision. However, where the health authority does not provide speech and language therapy for a student whose statement specifies such therapy as educational provision, ultimate responsibility for ensuring that the provision is made rests with the LA.

Appeal against a refusal to change the name of the school

Parents requested that the LA change the name of the school in the statement of SEN. Mr and Mrs C wanted T to move from a maintained day special school to a maintained residential special school.

Under schedule 27 of the EA 1996 Mr and Mrs C's choice of X School being a maintained school is determinative unless the school is unsuitable ... or incompatible with ...efficient education to... other pupils or the efficient use of resources...

we do not accept that X school represents over provision or that it is in some other way unsuitable...

Placement at X school is neither incompatible with the efficient education of the other students nor an inefficient use of resources...

It goes on:

we would add that M school is not in fact meeting T's needs... no doubt (it) has been a successful placement in many respects. We accept Mr H's evidence that different provision is now required if T is ever to learn to translate social and life skills out of the classroom and into the home environment... Mr H is a specialist of long-standing in relation to home-based intervention programmes for autistic children. He considers that no more can realistically be done at home in this respect and that a waking hours curriculum ...is now essential. We agree.

The tribunal must have regard to para. 8:74 of the 2001 *Code of Practice* when considering residential education:

In general, LAs are likely to consider that there is a need for residential provision where there is multi-agency agreement that:

- The student has severe or multiple special educational needs that cannot be met in local day provision.
- The student has severe 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.
- The student is looked after by the local authority and has complex social and learning needs, and a placement is joint-funded with the social services department.
- The student has complex medical needs as well as learning needs that cannot be managed in the local day provision and the placement is joint-funded with the health authority.

If these conditions apply, a multi-agency plan should be put into place that enables tri-partite funding.

The law requires LAs to meet educational need, but given the legal test under schedule 27 of the Education Act 1996 it is not usually the case that the residential school is unsuitable if the student's presenting needs matches the school's designation and the placement would not be to the detriment of other students or the efficient use of resources where there is a vacancy.

It is extremely difficult to separate that which is an educational need from that which is a social need for students with severe learning difficulties and severe autism. This creates a tension where professionals are mindful of their duty and responsibility to support students in their own homes. Professionals working in the field are hopeful that the new combined Children's Services will assist in appeals such as these.

Conclusion

The tribunal process undoubtedly requires SENCOs and teachers to spend a great deal of time in terms of preparation and attendance at the hearing.

They also find themselves in a situation that is totally unfamiliar and in many ways in direct contrast to the way they are used to working. Educationalists are used to working in a collaborative and cooperative way, whereas lawyers are there to 'win the point'.

The culture of the legal profession is diametrically opposed to that of the education profession and this can create difficulties.

The language in itself can be alien to SENCOs/teachers. To talk about 'sides', 'winning and losing' is an enigma, whereas lawyers openly admit to 'scoring points' and 'dissing the other side'.

To be fair, the tribunal distances itself from such an approach, but SENCOs/teachers should be aware of the world they are entering.

SENCOs/teachers should be well prepared, clear, honest, stick to their point of view and not interpret challenging questions or cross-examination as criticisms or that they have in some way got the 'wrong' answer.

Tribunals can provide a valuable opportunity to reflect on systems, practices and procedures. Many find it helpful to gain a greater understanding of the legal framework within which they work in special education and are able to take back to schools valuable knowledge to further improve their practice and support of students with SEN.

Summary

On what grounds can parents appeal?

Parents can appeal if the LA:

- will not carry out a formal assessment or reassessment of their child's special educational needs
- refuses to issue a statement of their child's special educational needs
- ceases to maintain such a statement.

Parents can also appeal against parts 2, 3 and 4 of the statement of educational need, ie the description of need, the description of provision and the student's placement.

The law

If parents are requesting a non-maintained school, then section 9, Education Act 1996 applies:

- The LA must have regard to the parent's wishes, so far as that is compatible with the efficient instruction and training of the child and the avoidance of unreasonable public expenditure.

If parents are requesting a maintained school, then Schedule 27, Education Act 1996 applies - LAs must comply with a parental preference unless:

- the school is unsuitable to the student's age, ability, aptitude or special educational needs
- the placement would be incompatible with the efficient education of the other students with whom the student would be educated.

If parents are requesting statutory assessment

Section 323 of the Education Act 1996 applies. Statutory assessment should only be undertaken if the LA believes that the student probably has special educational needs and that the LA needs or probably needs to determine the special educational provision itself by making a statement.

The LA/school must have a clear picture of the student's needs. Evidence of progress that:

- is closing the attainment gap between the student and other students
- is preventing the attainment gap growing wider
- is similar to that of peers starting from the same attainment baseline, but less than the majority of peers
- matches or betters the student's previous rate of progress
- ensures access to the full curriculum
- demonstrates an improvement in self-help, social or personal skills
- demonstrates improvements in the student's behaviour
- is likely to lead to appropriate accreditation
- is likely to lead to participation in further education, training and/or employment.

Evidence of attainment

- Details of resources already available to schools.
- Clarity about the way in which the delegated budget is used.

Sheet 52**Checklist: SENDIST evidence****Evidence checklist**

Individual student information:

- chronology
- details of meetings with parents
- assessment data and review eg reading, comprehension and spelling ages, National Curriculum levels, SATs at end of each key stage
- individual education plans (IEPs) with reviews (current and two previous)
- school reports
- speech and language, occupational and physiotherapy reports with programmes
- individual pupil timetable with details of levels of support, ie whether student has access to a general class teaching assistant or individual or small group targeted support
- is student following the class programme with teaching assistant help or undertaking any specific programme, eg literacy or individual language programmes devised in consultation with SALT, etc?
- details of therapy input
- annual review/transition review
- any available information on the student's views/self-esteem.

Background information:

- school's most recent Ofsted report
- school prospectus
- number of students with SEN at School Action, School Action Plus, number of children with a statement of SEN
- any SEN information that schools give to parents
- evidence of whole-school approach (ie differentiated curriculum, literacy hour planning)
- evidence of staff training and qualifications
- class sizes
- therapy input (speech and language, physio, occupational) available in locality
- specialist support available via cluster.

Attending as a witness

- You can be asked to attend for the LA or parents.
- You can be witness summonsed.
- You can be directed to release reports and documents.
- You are there to assist the tribunal with their professional view.
- You should have an impartial opinion.
- Expert evidence that appears biased can lose credibility.
- A witness's first duty is to the tribunal.

References

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- TSO (1998) *School Standards and Framework Act*. Norwich: TSO
- TSO Education Act (2005) London: TSO.

Sheet 53

Tribunal timetable

