Decision

Date of Birth:	1997
Appeal of:	The Parents
Type of Appeal:	Part 4 of a Statement of SEN
Against Decision of:	The Local Authority
Date of hearing:	2011
Persons Present:	The Parents Parent Representative Parent Witness LA Representative LA Witness LA Witness

Appeal

The Parents appeal under paragraph 8 of Schedule 27 of the Education Act 1996 against the name and type of school named in Part 4 of a Statement of Educational Needs written by the Local Authority in respect of their Child.

Facts

1. The Child was born in September 1997 and is 13 years of age. The Child has previously been diagnosed with epilepsy and also has learning difficulties and problems with attention/concentration and speech and language delay. In 2001 the Child was diagnosed as being on the Autistic Spectrum. (ASD) The Child has been educated previously in the Autistic Spectrum Unit at School A and in the Autistic Disorder class.

2. At the end of year 6 further evaluation of the Child by an Educational Psychologist concluded that the Child's ASD was secondary to their attention and learning difficulties, and after consultation with the Parents the Child was placed at School B in September 2009. School B is a special school which provides principally for children with severe learning difficulties.

3. In January 2010 the Parents asked that the Child be placed at their local mainstream school, School C, in the Communication Disorder Unit. This would require a shorter journey to school, will be the school attended by the Child's sibling from September 2011, and, the parents argue, would enable the Child to develop local friendships, which would benefit social functioning. The LA does not consider this school could meet the Child's needs as the pupils in the unit are expected to

integrate substantially into the mainstream and are cognitively far more able than the Child. The Child has been assessed as having a very low cognitive ability (in the range 34 to 47) and has been within the mid/low ability group at School B.

4. As the LA decision was not to change the name and type of school placement in Part 4 of the Child's Statement the Parents have appealed under paragraph 8 of Schedule 27.

Tribunal's Findings with Reasons

A. In deciding this appeal we have taken account of all of the evidence we have heard and read, the Special Educational Needs Code of Practice for Wales, the relevant case law as set out below, and Section 316 and Schedule 27 paragraph 8(2) of the Education Act 1996.

B. To begin we set out the relevant statutory law. Section 316 of the Education Act1996 states:

"316(1) This section applies to a child with special educational needs who should be educated in a school.

(2) If no statement is maintained under section 324 for the child, he must be educated in a mainstream school.

(3) If a statement is maintained under section 324 for the child, he must be educated in a mainstream school unless that is incompatible with—

(a) the wishes of his parent, or

(b) the provision of efficient education for other children.

(4) In this section and section 316A "mainstream school" means any school other than–

(a) a special school,

(3) Section 316 does not affect the operation of—

(a) Section 348, or

(b) Paragraph 3 of Schedule 27.

(4) If a local education authority decide—

(a) to make a statement for a child under section 324, but

(b) not to name in the statement the school for which a parent has expressed a preference under paragraph 3 of Schedule 27, they shall, in

making the statement, comply with section 316(3).

(5) A local education authority may, in relation to their mainstream schools taken as a whole, rely on the exception in section 316(3)(b) only if they show that there are no reasonable steps that they could take to prevent the incompatibility.

(6) An authority in relation to a particular mainstream school may rely on the exception in section 316(3)(b) only if it shows that there are no reasonable steps that it or another authority in relation to the school could take to prevent the incompatibility."

C. Paragraph 8 of Schedule 27 to the 1996 Act, whereby a parent may request a change to the school named in the Statement, reads:

"(1) Subparagraph 2 applies where—

(a) the parent of a child for whom a statement is maintained which specifies the name of a school or institution asks the local education authority to substitute for that name the name of a maintained school specified by the parent, and

(b) the request is not made less than 12 months after—

(i) an earlier request under this paragraph,

(ii) the service of a copy of the statement or amended statement under paragraph 6, … or

(iv) if the parent has appealed to the Tribunal under section 326 or this paragraph, the date when the appeal is concluded,

whichever is the later.

(2) The local education authority shall comply with the request unless—

(a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or

(b) the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources.

(3) Where the local education authority determine not to comply with the request—

(a) they shall give notice in writing of that fact to the parent of the child, and

(b) the parent of the child may appeal to the Tribunal against the determination.

(3A) A notice under subparagraph (3)(a) must inform the parent of the right of appeal under subparagraph (3)(b) and contain such other information as may be prescribed.

(4) On the appeal the Tribunal may—

(a) dismiss the appeal, or

(b) order the local education authority to substitute for the name of the school or other institution specified in the statement the name of the school specified by the parent."

D. Shortly before the date set for the hearing of the appeal the Parent Representative submitted to the Tribunal two authorities and written submissions based on those authorities, in a letter dated June 2011. The authorities were the cases of MH v SENDIST and the London Borough of Hounslow [2004] EWCA Civ 770 and Bury Metropolitan Borough Council v SU [2011] ELR 14.

E. The Parent Representative submitted that the appeal should succeed on the basis of the cases, in that the LA had not produced any evidence of having made reasonable adjustments to prevent any incompatibility under Schedule 27 paragraph 8(2). He concluded:
*"**I therefore consider that as the condition in Schedule 27(8)(2) of the Education Act 1996 has not been satisfied, then the Local Authority is required to follow the legislation as specified in Section 316 of the Education Act 1996…..and must therefore name a mainstream school placement.** I therefore consider that the parental choice of school should be named within part 4 of the statement.*
The legal issues relating to this case are clearly set out in the accompanying cases which I am submitting with this letter….."

F. Accordingly, the Parent Representative sought to deliver a knock out blow to the LA's case. They sought to persuade us that the application of Section 316 compelled the LA (and therefore the Tribunal) to name School C in Part 4 of the Statement, in accordance with the decision concerning paragraph 3 of Schedule 27 made in the Child's needs or the efficient use of resources, save for in respect of subsection 5 of section 316.

G. The LA representative was invited to consider the argument and to respond to it. The LA Representative was specifically asked if the LA wished to place any other case law before the Tribunal. Time was allowed to the LA to enable to seek advice over the telephone. Following this the LA response was that it did not seek to rely on any other legal submissions or case law, and could not counter the argument put forward by the Parent Representative on the law. The LA Representative stated that the LA had wished to argue the case upon the basis of compatibility with the Child's educational needs, by arguing that their needs could not be met at School C, and that this would be an inefficient use of the LA's

resources, and conceded that the LA was in difficulties as it had no other argument to advance. Indeed this is the only argument set out in the LA's case statement at page 49 in the bundle.

H. Upon the basis of the submissions made and the evidence before it, the Tribunal took the view that it was bound by the authorities to apply Section 316 and name School C in Part 4 of the Statement. An indication was therefore given to this effect at the conclusion of the hearing as the Tribunal was concerned to ensure that transitional arrangements could commence before the end of the summer term (the hearing taking place just before the summer half term break.) The appeal hearing then came to an end, with a written decision to be issued in due course, as is usual for the Tribunal.

I. Upon consideration of the Bury case prior to writing the decision the reference to another case was discovered at paragraph 27, which reads:

"Conversely, in Slough Borough Council v C [2004] EWHC 1759 (Admin), [2004] ELR 546 Richards J held that para 8 of Sch 27 was unaffected by s 316 even though there was not an express provision saying so."

J. The Parent Representative did not refer us to the Slough case. This case deals specifically with paragraph 8(2) of Schedule 27 and its limitations. It is clearly on point and indeed is echoed in the submissions made by the Parent Representative. In the Slough case Richards J. concluded:

*"**In determining whether to comply with a request under para 8, an authority (and, on appeal, the tribunal) must consider the conditions in para 8(2). If none of those conditions is met, it must comply with the request.** If any of those conditions is not met, it need not comply with the request. It does not have to go on to consider s 316(3). Accordingly the situation in relation to para 8 is materially different from that in relation to para 3, as laid down by the Court of Appeal in R (MH) v Special Educational Needs and Disability Tribunal and London Borough of Hounslow [2004] EWHC 462 (Admin), [2004] EWCA Civ 770, [2004] ELR 424. My reasons for that conclusion are as follows:*
[2004] ELR 558

(i) Paragraph 8 has a very limited scope. It is concerned only with a change in the name of the school specified in part 4 of an existing statement. That is clear from the terms of para 8(1)(a) and runs through to the powers of the tribunal in para 8(4)(b). (Although para 8 also applies where the name of an 'institution' is specified in the statement, it is sufficient for present purposes to refer to a school.)

(ii) I reject the submission that the power to change the name of the school carries with it a power to change the type of school. The distinction between type of school and name of school runs through the statutory scheme. It is particularly clear in s 324(4), where the type of school and name of school are referred to in separate provisions: they are separate

aspects of the 'special educational provision' referred to in s 324(3)(b). If para 8 had been intended to confer a power to change both, then one would have expected both to be mentioned.

(iii) In that connection I attach significance to the fact that the tribunal's power on appeal is expressed only in terms of ordering the authority to substitute the name of the school specified by the parent. This is to be contrasted with the power under s 326(3)(b), on an appeal against the making of a statement or an amended statement, to order the authority 'to amend the statement, so far as it … specifies the special education provision' (which, by reference to s 324(3)(b), includes both type of school and name of school). Section 326(3)(b) also confers a power to make consequential amendments to the statement. Paragraph 11(3)(b) of Sch 11 confers a similar power where, on an appeal against an authority's decision to cease to maintain a statement, the tribunal orders the authority to continue to maintain the statement. Paragraph 8 contains no such consequential power. This all serves to emphasise the limited nature of the power under para 8.

(iv) If the type of school specified in a statement is a special school and there is no power to amend the type of school, it would make no sense to be required to change the name of the school from a named special school to a named mainstream school, as might well be required by the operation of s 316(3), if it were applicable in this context. That would be to create an internal inconsistency within the statement and to require a child to be educated in a school which did not fit with the rest of the special educational provision specified in the statement. Such a consequence cannot have been intended. It is avoided by recognising that para 8 is concerned with a very limited exercise to which s 316 has no application."

K. The Slough case therefore makes the approach to be taken very clear. The scope of paragraph 8 is very limited. It requires a materially different approach to that applicable to paragraph 3, and section 316 is not applicable. A change of the name of school can be ordered, but not a change to the type of school.

L. The parties were provided administratively with a copy of the Slough case and invited to make further submissions in writing. The LA, not surprisingly, sought to rely on the Slough case. The Parent Representative sought to extend the ambit of the appeal to Parts 2,3 and 4, but the President has not permitted this.

M. Subsequently, and outside of the time allowed, the Representative has sought to submit that the Slough case can be distinguished from the Child's case upon the basis that in their case naming School C would not cause an internal inconsistency within the Statement. We do not accept that the Slough case can be distinguished from the Child's case. The principle issues are identical, namely changing the school named in Part 4 from a special school to a mainstream school, and the applicability of section 316.

N. Neither do we accept that there would be no internal inconsistency if we were to name School C. We cannot see that a mainstream school can provide the specialist provision set out in Part 3 of her Statement, e.g. access to the curriculum, and across the curriculum, through specialist techniques such as TEACCH, Makaton and Rebus symbols.

O. Further, we reject the submission that as "type" of school is not defined legally this can effectively be ignored as an issue. This conclusion would seek to undermine one basis for the decision of Richards J. in the Slough case, and this cannot therefore be a correct approach if we are to apply the law consistently with that decision. In any event, we cannot conclude that a special school and a mainstream school can be considered to be the same "type" of school, not least because they are clearly differently defined in sections 316(4) and section 337 respectively.

P. Consequently we are precluded from doing the very thing the Representative invites us to do, namely changing the type of school named in Part 4 of the Child's Statement. The Representative was either unaware of this case, or decided not to place it before us. In either event, this is an appeal that in our view should not have been brought in the first place, as it was doomed to fail. This is compounded by the application made for the LA to pay the parents costs, which in the circumstances we dismiss.

Q. It would be remiss of us if we did not state that we have concerns about the way that this case has been pursued on behalf of the parents. The Tribunal has received an e-mail dated June 2011 from which it is clear they understood that they were being legally represented and were being charged at a rate of £200 per hour for the services. We do not understand the Representative to have any professional legal qualification. This is, however, a matter between the Representative and the parents.

ORDER

1. The appeal is dismissed.
2. The application for costs made on behalf of the Parents is dismissed.

Dated June 2011