

CO/4782/2002

Neutral Citation Number: [2003] EWHC 135 Admin
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 30th January 2003

B E F O R E:

MR JUSTICE HENRIQUES

DM and KC

(CLAIMANTS)

-v-

ESSEX COUNTY COUNCIL

(FIRST DEFENDANT)

SPECIAL EDUCATIONAL NEEDS TRIBUNAL

(SECOND DEFENDANT)

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MR DAVID WOLFE (instructed by Coningsbys, Croydon, CR9 1XE) appeared on behalf
of the CLAIMANTS

MR ALEX BAILIN (instructed by Essex County Council Corporate Services, Chelmsford,
CM1 1LX) appeared on behalf of the FIRST DEFENDANT

The SECOND DEFENDANT did not appear and was not represented

J U D G M E N T
(As approved by the Court)

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1. MR JUSTICE HENRIQUES: This is a statutory appeal against a decision of the Special Educational Needs Tribunal issued on 19th September 2002. The appellants' daughter is four years and five months old. I refer to her as "G". An order has been made under section 39 of the Children and Young Persons Act 1933 restricting publication of both her name and her parents' names.
2. G has autistic spectrum disorder with severely impaired speech and language development and significantly delayed social communication skills. Her parents, the appellants, appealed to the Special Educational Needs Tribunal against the contents of a Statement of Special Educational Needs made by the LEA, Essex, for their daughter G. The tribunal rejected their appeal. The parents now appeal against that decision on the grounds that the tribunal erred in law.
3. The tribunal had to consider two alternative programmes of special needs education for G: the Essex "Good Beginnings" programme for which the LEA made provision in its statement, and the "Lovaas" programme, favoured by the appellants, which she has been receiving at her parents' expense. Evidence to the effect that both programmes were capable of meeting G's needs was accepted by the tribunal.
4. The parents submit that the Essex programme specified by the LEA, and approved by the tribunal, amounts to an unlawful failure by the LEA in breach of its statutory obligations to arrange appropriate provision for G. The essence of the asserted illegality is that the Essex programme requires parents to participate in the delivery of the programme by way of direct teaching of their child, and the appellants have both indicated that they are not willing to so participate. In those circumstances, it is said that the LEA has failed to fulfil its statutory duty to arrange appropriate provision, and accordingly the tribunal erred in law.
5. It should be said at the earliest convenient moment that the appellants' indication that neither of them will participate in the Essex programme is no indicator of parental irresponsibility. On the contrary, both are passionately interested in G's welfare. They are convinced that G's best interests are served by the provision of the Lovaas programme, on which they have already spent a significant sum of money. It should also be stated that the Lovaas programme costs some £28,000 a year, and the LEA have concluded it would entail unreasonable public expenditure.
6. I turn to the legal framework. The Education Act 1996 provides so far as is material in section 324, Statement of Special Educational Needs:

"(1) If, in the light of an assessment under section 323 of any child's educational needs and of any representations made by the child's parent in pursuance of Schedule 27, it is necessary for the local education authority to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs.

"(2) The statement shall be in such form and contain such information as may be prescribed.

"(3) In particular the statement shall- ...

- (b) specify the special educational provision to be made for the purpose of meeting those needs, including the particulars required by subsection (4)."

Subsection (4) is concerned with specifying an appropriate school or institution and is thus immaterial for present purposes.

"(5) Where a local education authority maintain a statement under this section then-

- (a) unless the child's parent has made suitable arrangements, the authority shall-
 - (i) arrange that the special educational provision specified in the statement is made for the child."

7. The appellants rely on the dicta of Turner J in R v London Borough of Harrow, ex parte M [1997] ELR, page 62. That case was concerned with section 168(5)(a) of the 1993 Education Act which was identical to section 324(5)(a) for material purposes. Turner J said this:

"As counsel for the applicant, correctly, submitted this duty is owed personally to the child and the duty is not by this section delegable. It is the duty of the LEA itself to arrange that the provision is made. If, under powers conferred as in s66, the LEA requests help and such is provided, to that extent alone, the authority is making the arrangement required by the statement. But if that help is not forthcoming for any reason s168 provides no let-out for the authority."

In the context of the present case, the parents having taken the stance that they have, help is not forthcoming in relation to the Essex programme, and thus it is said that the LEA have not discharged their duty to the child.

8. More recently, Pitchford J considered the obligation imposed on the LEA by section 324(5)(a) in FJ v Cambridgeshire County Council [2002] EWHC Admin 2391. He said this:

"If the Tribunal found special educational needs included, for example, the provision of specialist communication skills training the home, the LEA, and not the parent, was under a statutory duty to provide it. Only if any separate arrangements made by the parent for provision were objectively suitable, would the LEA be relieved of the duty. In my judgment, the LEA would not be performing its statutory duty if directly or indirectly it imposed upon the parent, when specifying special educational provision under section 324(3), an obligation to meet part or all of that provision herself."

9. In the context of the present case, it is said that in specifying the Essex programme, the LEA was imposing upon the parents an obligation to provide part of the special educational provision themselves, and was thus acting unlawfully.
10. On behalf of the Essex County Council, it is submitted by Mr Bailin that the Essex programme does not require the parents to have overall legal responsibility for the programme. It is said they are not expected to become teachers or therapists. The programme requires cooperation and involvement in their capacity as parents. They are expected to make slight changes to their parenting style, which will make a substantial difference to their child. The programme is tailored to the parental circumstances in which G is raised, and to her needs. A distinction is drawn between parental cooperation and involvement in the programme as distinct from parent delivery of the programme.
11. Accordingly, this appeal must necessarily focus upon an examination of the Essex programme, and the part to be played by parents in that programme, with a view to determining whether their role involves the provision of special education or, as the defendants would assert, the exercise of a supporting parental role.
12. The statement of Paul Conrathe, the solicitor acting for the appellants who appeared before the tribunal, identifies various passages in the Essex documentation which describe the way in which that programme requires parents to undertake, it is submitted, direct teaching of their children. At paragraph 11 of his statement it is said:

"To support the implementation of G's Individual Education Plan at pre-school age, the LEA will provide: ...

(ii) A key worker to support G's parents to develop and deliver her programme in the home setting for up to 10 hours a week."

13. As part of the Essex Good Beginnings service, a document handed to parents prospective to them entering the scheme, it is said at paragraph 5.3.3:

"The key worker and specialist teacher support the parents in implementing the programme."

At paragraph 5.3.12:

"To be effective these programmes need to be implemented throughout the child's day by adults who understand the programme."

14. The protocol for the Essex project states:

"Aims and objectives

"... to work with parents and carers of young children with ASD to enable them to implement the professional advice and planned programmes in the home."

15. Returning to the document entitled "Good Beginnings":

"Parents are active partners with professionals in teaching their child."

Under the heading "**Starting playgroup or nursery**":

"Parents are active partners with professionals in teaching their child."

Under the heading "**Service to children and families**":

"... support from a trained key worker to help the parents implement the agreed programmes."

Under the heading "**What particular approaches are recommended?**":

"Parents and professionals working in partnership.

- The intervention must be planned with you and matched to your needs and style. The family's involvement in early intervention is essential."

Under the heading "**Starting play group or nursery**":

"The programme needs to be delivered intensively and in both the home and preschool group. Parents are active partners, with professionals, in teaching their child."

In chapter 8, "**How to use direct teaching methods**":

"Step by step you teach your child to do a little more and your child will gradually learn to dress himself."

Under "**Designing the programme**":

"A specialist teacher can help you design a programme for your child. Together you will need to consider all points explained in this chapter. In addition you need to find a suitable place to work."

16. Taken together, it is submitted by Mr Wolfe on behalf of the appellants that these several quotations demonstrate that an obligation is being placed upon parents to implement educational procedures.
17. For the defendants, Mr Bailin submits that the Essex programme requires support and cooperation from parents, and no more. He readily concedes that if an obligation is placed upon the parents to implement procedures, then such an obligation is unlawful.
18. It is also right that I include in this judgment his very proper statement that these parents are not work-shy. It is conceded on behalf of the respondents that they are motivated by a intense belief that the Lovaas system is markedly superior to the Essex programme, and are thus not prepared to deprive their daughter of what they consider to be a superior educational regime by participating in the implementation of what they consider to be an inferior regime. At the same time, states Mr Bailin, it makes a mockery of the statutory scheme if parents can enforce their preference by non-cooperation.

19. Such consideration does not arise, however, if I conclude that one scheme is lawful whilst the other is not. Mr Bailin also makes reference to the documentation from which I have quoted and submits that it describes a regime of parental support and cooperation. In particular he relies upon two statements of Nicola Gardner, a senior specialist educational psychologist, who was a member of the working group which designed the Essex programme, and who wrote the Good Beginnings Guide for parents. It is important to note that her statements were written after the tribunal hearing, and thus there must be some question as to their admissibility in an appeal by way of review, rather than the re-hearing. I have, however, agreed to consider that evidence de bene esse. She did give evidence before the tribunal, and it is important to note that, according to the contemporaneous note of the appellants' solicitor, she stated that "parents are a crucial element in delivering the Essex programme". Mr Bailin relies on her statement to the extent that she says:

"The aim of the 'Good Beginnings' programme is to work in partnership with parents and to achieve consensus with them about the priorities for the content of the programme."

20. At paragraph 3 she continues:

"We aimed for the parents to be actively involved, as far as possible, with the sessions delivered by the key worker. The reason for seeking their active participation is that evidence from many studies shows that gains made in short-term intensive programmes are not maintained unless they are used and generalised in every day life ... The benefit of working alongside parents is that they can practice incorporating the practical advice into everyday life with their child."

At paragraph 6:

"It is not a requirement that the parents must implement all our advice to receive service for their child."

At paragraph 14:

"Children with autism need the high level of early intervention, which is offered by the Essex Programme, but they also need time and the opportunity to practice their skills throughout the day with the people who are caring for them."

At paragraph 16:

"Parents are children's first and most enduring educators. When parents and practitioners work together in early years settings, the results have a positive impact on the child's development and learning."

21. Mr Bailin also made reference to parents being shown how to teach a child to put on their trousers. Mr Bailin's submission was that the court should look to the nature and degree of parental involvement, and not merely the way in which it may variously be described in order to create a team-work feeling between professional and parental carers.

22. In argument I raised the issue of material being prepared for parents' perusal, couched in terms designed to bring the best out of them as supportive parents at what inevitably must be a difficult time for them. I bear in mind that an appearance of responsibility can be beneficial in terms of obtaining a higher input. I have read the documentation with that possibility in mind.
23. I must also note, however, that Nicola Gardner stated that Good Beginnings is a guide both for parents and professionals. I disregard the fact that at present G's mother plays an active role in the functioning of the Lovaas scheme. That fact has no bearing upon the legality of the Essex programme.
24. All good education involves some degree of partnership between parent and professional. Indeed, in some boarding schools, the parent may be a very minor partner in the education process, save for funding. Most school prospectuses will make reference to partnership without in any way conferring any responsibility or burden upon the parent to discharge teaching functions.
25. I have concluded on the totality of the evidence that the Essex programme does purport to impose a responsibility upon parents to participate in the delivery of the programme. Expressions such as "help the parents implement the agreed programmes", "a specialist teacher can help you design a programme for your child", "to enable them to implement the professional advice and planned programmes in the home" and "to support G's parents to develop and deliver her programme" all point to a regime in which parents are required not only to participate, but to formulate and deliver the programme. Everything I have read points to the parents being given the obligation to which I have referred, supported only by the professionals. That is quite permissible, and would meet G's needs if there were parental consent to such a regime. There is not. Accordingly, I conclude that the LEA has failed to fulfil its statutory duty to arrange appropriate provision, and accordingly the tribunal has erred in law.
26. Accordingly, I quash the tribunal's decision and I remit the matter back to the tribunal.
27. MR WOLFE: I am grateful. My only application is an application for our costs, which I seek to be assessed if not agreed. Can I just add one further thing which is by way of a potential correction? Your Lordship referred to Pitchford J's case as A v Cambridgeshire. It should be FJ v Cambridgeshire.
28. MR JUSTICE HENRIQUES: That will be corrected. Thank you very much.
29. Mr BAILIN: I do not resist the costs application, my Lord.
30. MR JUSTICE HENRIQUES: Costs to be assessed if not agreed.
31. Are there any schedules? That may impress upon you both the need to agree them. You have liberty to apply on the question of costs within the next three working weeks.
32. I thank both counsel for the extremely helpful way they have put the case. I am very grateful.