

The Special Educational Needs and Disability Tribunal (SENDIST):

Preparation, Tactics And Pitfalls For The Unwary

Presented by

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Session Notes:

Aim: To provide key points for the tactics, preparation and presentation of SENDIST appeals on behalf of Parents and LA's

Useful websites:

www.drc.gb.org

www.disability.gov.uk

www.dfes.gov.uk/sen

www.hmsso.gov.uk

www.inclusion.uwe.ac.uk

www.skill.org.uk

www.lawreportsonline.co.uk

APPEALS TO SENDIST

The starting point for any appeal is that the LA has turned down a request by a parent to become involved in considering a child's special educational needs.

Compliance with the law by local authorities

In May 2003, DfES wrote to all local authorities stating that over half of 124 LAs did not comply with the law (being Regulations 12 and 17 of the Education (Special Educational Needs (England) (Consolidation) Regulations 2001) when advising parents of their right to challenge an LEA decision in respect of:

- Refusal to assess or reassess;
- Refusal to issue a statement;
- Refusal to change the school named;
- Content of statement or amended statement;
- Decision not to maintain;
- Decision not to amend following reassessment.

Each letter must include information about:

- The parents' right of appeal to SENDIST;
- The two month deadline for the appeal;
- The availability of parent partnership services and of the disagreement resolution services; and
- The fact that the disagreement resolution service does not affect the parents' right of appeal.

SENDIST said (via the President) that if all four matters are not included, a late appeal will not be considered to be out of time.

Tribunal's jurisdiction

Grounds of Appeal to the Tribunal:

- Failure to assess (ss329, 329A);
- Refusal to make a Statement (s325);
- Contents of a Statement (s326);
- Refusal to reassess (ss328, 329A);
- Change of school named (para 8, Sch 27 to the EA);
- Ceasing to maintain a Statement (para 11, Sch 27 to the EA).

The Tribunal must confine its decision to matters which the parties bring before it: see ***M v Essex County Council* (5 November 2001, unreported)**.

Timetable

- (a) Decision letter sent to parents by the local authority (see complying with the law, above).
- (b) Two months within which to appeal (permission to appeal outside the time limit sparingly granted).

- (c) Appeal registered – Case Statement period begins.
- (d) Case statement period for both parties to file evidence as Statements of Case – 30 working days from date parties told that appeal registered.
- (e) Appeals are listed for hearing about four months after the appeal is registered.

SENDIST Regulations of importance are:

Regulation 18: both parties allowed 30 working days to send a statement of their case and written evidence to the Secretary of the Tribunal.

Regulation 30: child entitled to attend the hearing but can be excluded.

Regulation 33: late written evidence can be presented:

- where it was not and could not reasonably have been available to the party before the end of the case presentation period;
- a copy of the evidence was sent to the Secretary and the other party to arrive at least three days before the hearing; and
- the extent and form of the evidence is such that in the opinion of the tribunal it is not likely to impede the efficient conduct of the hearing.

If these criteria are met, the Tribunal must admit the evidence unless it is of the opinion that admission would be contrary to the interests of justice. However practice within SENDIST hearings can vary enormously and you need to be aware of this.

If the criteria are **not** met, the Tribunal can still admit it if the tribunal is of the opinion that:

- the case is wholly exceptional; and
- unless the evidence is admitted, there is a serious risk of prejudice to the interest of the child.

Therefore you need to consider carefully how you can establish exceptional circumstances.

Parties to an appeal

- **Parents** (that can include foster parents) – beware of estranged parents as both have a right to be present, but may not agree with each other as to the right approach!
- **Local Authority (LA).**

The Tribunal has to make its decision in the “interests of the child” – **not** the Children Act standard of best interests.

The Tribunal also has to decide the matter at the time of the hearing – **not** at the date of decision. This means that the Tribunal can include considering what will happen in the following school year at secondary school, depending on the point at which the appeal is heard.

Preparation:

1. Know the legal framework governing the appeal process and in particular understand the present political emphasis upon inclusion, delegation of LA resources into schools, attempts to reduce statements, and the requirement for ‘joined-up’ thinking between statutory bodies i.e. education, health and social services. The Tribunal members will operate and make their decisions within this context.

2. Key reference documents will be:

- **Education Act 1996 Part IV and Schedule 27**
- **Education (Special Educational Needs) (England) (Consolidation) Regulations 2006**
- **SENDIST Regulations 2001/600**
- **Code of Practice on SEN**
- **SEN Toolkit**

3. Be fully conversant with the statutory assessment processes pursuant to **Part IV Education Act 1996**. They underpin the appeal process and without this knowledge and understanding you will be at an immediate disadvantage.

Presentation of the case is underpinned by the documentary evidence, which is in 3 parts:

1. **Reasons for Appeal:**

Concise, clear, detailed explanation as to why there is disagreement with the LEA decision and Parts 2, 3 and 4 of the Statement, by reference to the **Code of Practice** if at all possible. If you are seeking specific amendments to the statement try and set them out (you can always adjust later if more evidence is available), or explain why it is not possible to do so eg reports awaited.

2. **Parental Case Statement**

No obligation to submit a case statement and no prescribed format or requirements. However this is the last point at which you can put in evidence as of right. Therefore aim to have all expert and factual evidence possible ready to submit with case statement, if possible.

3. The LA Case Statement

The Tribunal provides a very useful document which sets out what they expect of an LA case statement, which always arrives with the Notice of Appeal. Make sure that you have set out the five things necessary (Regulation 13) for a case statement, in order to avoid criticism at the Tribunal hearing and/or an application to strike out:

- (a) The grounds upon which you rely
- (b) The name and profession of the representative
- (c) A summary of the facts relating to the decision
- (d) The reasons for the disputed decision
- (e) The views of the child, or why you have not ascertained these views

The grounds upon which you rely should be more than a mere incantation of your original decision. **Deal with the Reasons for Appeal in detail if at all possible. Do not ignore them. It is however permissible to state that you cannot respond to requests for specified provision where expert reports have not been disclosed or are awaited.**

Both parties should consider the following:

- **Disclose/seek disclosure of the local authority's policy and criteria for making statements:**

check that those criteria have been followed in this case: disclose/seek disclosure of the SEN budget, and the mechanism for delegating funding (to show that there is enough money to do what you are saying that the school can do). Find out the SEN budget for the school, and the amount of money that the school spends on staffing /any slack in the budget. If there are issues about therapeutic help, disclose how OT and SALT are funded: what is provided in the area without a Statement? Determine and show using the criterion set out in the Code of Practice (para 7:34-7:62) whether relevant and purposeful measures

can be additionally taken or have been unsuccessfully taken without a Statement of Special Educational Needs.

- **For an appeal against a failure to issue a Statement:**

disclose/seek disclosure of the policy for issuing statements: the criterion against which children are judged. Make sure that you can prove that a Statement is necessary/not “necessary”. Set out clearly the provision that you will be seeking/making (making it as specific as possible).

- **For an appeal against a Statement under section 326:**

- Check and draw up a table of comparative costs: this should include transport costs, if they are relevant, delegated funding arrangements and any additional costs to the LA of both placements (B v Oxfordshire [2002] ELR 8 (this includes the AWP: any extra funding granted under the Statement: costs of paying for private therapy: extra costs of teaching time: costs of placement at a school out of borough (B v Harrow [2000] ELR 1)).
- Social services and health needs are now included within any costs (see O v LB of Lewisham [2007] EWHC 2092). You can cost matters over time (Southampton v Hewson [2002] ELR 680), so that, if for example, education would go onto 19 instead of 16, that cost differential can be taken into account by the Tribunal. Put in the final figure of the difference in costs. Think about the comparative costs, if, for example, the Tribunal orders some of the parental recommendations, and so include, if necessary, the hourly/weekly/annual costs of therapy: teaching time: LSA time (including on-costs).

- Include detailed information about the school you are proposing, and why you consider it appropriate: always include OFSTED report (and not just portions of it which suit your case), and if relevant, Care Standards Commission Report: and the prospectus for the school. It will save time at the Tribunal if you can indicate the number of children in the proposed class, the number of LSA's, any specialist staff, specialist facilities, any particular special programmes that are run, the types of programmes that the staff run at the school (e.g. what sort of multi sensory programmes are provided): number of children on the SEN register: experience and track record of teaching children with particular difficulties: setting out a Transition Plan in some detail if a child is to go into a school. **Do not say that the detail will be sorted out once it is known whether the child will be attending the school.**

- If the **LA** disagrees with the parental choice of placement on the basis that it is unable to meet the child's needs, state clearly why that is the case: make is clear to the Tribunal if your argument is based solely on the fact that a school is an inefficient use of resources: or if you consider the school to be inappropriate to meet a child's special educational needs. If you consider that it is inappropriate, state why that is the case.

- 24 hour curriculum: if this is going to be an issue at the Tribunal, either party should consider involving Health and Social Services at a joint planning meeting prior to drafting the case statement: ask for them to carry out an assessment/approach parents for such an assessment and put in that assessment with your case statement: be prepared to be able to argue clearly why a residential placement is/is not necessary/appropriate: if a child has significant social care/health needs, consider the cost of providing those needs in borough (the Tribunal does have to take these costs into account and it may well be relevant to your assessment of the strengths and weaknesses of the appeal). The Tribunal will, in cases involving children with complex needs, expect the LA to have consulted and be able to produce written reasons from these other agencies as to why a tripartite/bipartite funding agreement is not

required/necessary (see paragraph 8:74 of the Code of Practice and section 322 of the Education Act 1996). If the LA are arguing that joined up services can be provided within the authority, provide evidence of this: think about: what will happen to this child after school: at weekends: during the holidays: what sort of input do they need: how will these professionals meet each other, and respond/interact to provide such a holistic package: is this feasible?

Relevant Factors in Particular Cases:

For cases involving children with ASD: refer and copy the relevant portion of the Autistic Spectrum Guidelines produced by the DFES (found on www.teachernet.gov.uk): the Royal College of Speech and Language Therapists Guidelines. Current buzz word in terms of provision for ASD pupils seems to be 'low arousal' so consider whether that is needed and if so how it can be provided.

For cases involving home based programmes (usually ABA/Options): think about whether or not you need to put in the numerous articles/academic research which has been generated on this topic. The Tribunal is rarely interested in an argument about whether or not in principle ABA is successful: merely whether or not it works for this particular child.

Therapies: Specification and quantification. Specificity is the starting point. Think carefully about whether or not you can realistically rely upon the changing needs /need to have flexibility, if you are arguing that flexibility is not required: all is dependent on the context of the case (see *E v Newham* [2003] ELR 150 at paragraph 65). If a child is to be placed within a unit/special school, generally there is less need for specificity, but that may not be the case if the therapy allocation to a specific unit provision is limited or already over stretched.

Consider:

- if a child is within a mainstream school, about the ability of the child to continue to access the curriculum if large amounts of therapy are asked for: especially for OT and physiotherapy, could there be an argument that the therapy is not necessary (as opposed to beneficial) and/or could not realistically take place within school time?
- If an LA is arguing that OT /physiotherapy/other therapies are not educational needs (remembering that there is a blurry line between what is or is not an educational need: is it directly related to a child's learning difficulties? (see Bromley v SENT [1999] ELR 260), you will need evidence to support this, and remember that if it is not an educational need, it should not be in Part 2 of the Statement: If it is in Part 2, but then there is no provision in Part 3 of the Statement- the Tribunal will want to know why, if the LA consider that it is an educational need, there is no provision for it.
- Remember LA's cannot put in an assessment/permit the decision about the therapy to be delegated to the therapist, as this is unlawful (as it is providing a situation where a Tribunal is delegating its jurisdiction to make/decide upon the contents of the Statement to another).

Always indicate your willingness to try and agree matters beforehand/indicate whether or not mediation has been offered/happened/has been refused. Try not to concede obvious issues at the last minute and try to focus on arguing the genuine points of dispute.

Evidence in support of your case

As a general rule:

- (a) Parents **will** need independent reports.

- (b) Try and match the evidence which has been/will be provided by the LA/ parents. If they have an OT report, you should try and get one as well. If not possible then try and obtain professional comment on reports. Often there is no dispute as to the extent of a child's difficulties: the issue is about what provision is required to meet those needs. If the expert commenting has not seen the child the evidential weight given to their evidence will be reduced.

- (c) Pin your professionals down: ask them to set out, quantifying and specifying precisely the provision which they consider is appropriate: this is particularly the case for Speech and Language Therapists and Occupational Therapists who always tend to write ambiguous conclusions which do not help you to assess whether or not a child does require direct and/or indirect therapy. Remember that although the Health Authority may be able to take into account resources considerations, if a child needs it educationally, it **must** be provided for them by the LA. A Tribunal will reject any LA argument which states that such therapy is never provided, or not provided in eg secondary schools, simply because the Health Services do to have the money to do so.

- (d) Try not to repeat the evidence already provided by the parents in the Notice of Appeal: most Tribunal bundles are unnecessarily lengthy and contain a lot of irrelevant information: you do not need to put in obsolete Annual Review documentations/correspondence which is not focused on the current position/problems.

- (e) Obtain the most up to date school reports/IEP's /Annual Review documents and place them within the bundle. Parents should **not** assume the LA will do this.
- (f) Obtain OFSTED and care reports/Prospectuses for both placements.
- (g) Talk to the Head/Manager of both placements: ask them questions about their facilities/provision/fees etc.
- (h) Send your EP (if necessary with a local or independent Social Worker) along to both placements to compare and contrast the two: get them to ask the right questions about curriculum/staffing/therapies. If they can draft a report, then submit it to the Tribunal.
- (i) Consider Data Protection Act/Freedom of Information Act searches.
- (j) Do LA's need to put forward an alternative placement? Think carefully about the school that you have chosen: make sure that it has been consulted under Schedule 27: if you have a likely, but cheaper alternative which may meet the concerns of the parents as a halfway house, suggest that within the case statement, consult it and provide detailed information about it. You can offer more than one placement: but make sure that you have informed the parents at an early stage and your evidence on both is equal. Producing an alternative placement at the last minute may well result in any application for an adjournment being granted and there are potential cost implications.

Procedure

- (a) Disclosure rules and time limits are contained in Parts 2 and 3 of the SENT 2001 Regulations in particular **Regs. 9, 13, 18, 19, 21, 24, and 26.**

- (b) If you are in any difficulty in complying with time limits make an early and well written Regulation 51 application to extend time bearing in mind the 'exceptional circumstances' test'. More chance where party or expert or child ill; or needs have changed for worse; or placement has become in doubt.
- (c) Applications for amendment (Reg. 13(3)), directions (Reg. 21), witness summonses (Reg. 26), delivery of additional evidence (Reg. 33), and adjournments (Reg. 35) must be made promptly and fully. Consider making applications for directions in complex cases, where you wish further evidence to be disclosed/you believe that the other side may not have disclosed everything (remember DPA/Fof IA searches). Do not forget that the President can order a supplementary statement or further particulars (Regulation 23) or order disclosure for such documents (Regulation 24(1)) – in certain circumstances, the President can order disclosure against individuals who are not parties to the proceedings. In certain exceptional cases, where you may wish to examine the credentials of a particular witness, consider a witness summons.
- (d) Any unsuccessful application (apart from witness summonses) can be renewed in front of the Tribunal itself particularly additional witnesses and late evidence.
- (e) Don't assume that late evidence provided sent before 5 days of hearing is almost a formality in terms of admission. Be prepared to explain why evidence not **reasonably available** before end case statement period. If evidence cannot be provided prior to the end of the case statement period, consider asking for an extension of time for service of the case statement and/or putting in the evidence as late evidence. Make sure that the evidence is served reasonably promptly after it is procured.
- (f) If you wish to put extra evidence in on the day (or less than 5 working days before the Tribunal hearing), you will need to provide evidence of "exceptional" circumstances, and that there is a serious risk of prejudice to the interests of the child. In reality, short pieces (i.e. up to date IEP's/evidence of work) maybe

admitted as uncontroversial: longer expert's reports are much more difficult to get admitted at this late stage.

- (g) Adjournments are much more difficult and Tribunals are reluctant to grant adjournments. Need to show strong basis for seeking to delay the resolution of the appeal, breach of natural justice/prejudice if matter proceeds eg unavoidable absence of a **crucial** witness: See **R v Cheshire CC ex parte C [1998] ELR 66 per Sedley J**).

Specific appeals – preparation and hearing issues

Failure to assess

- Must prove why it is necessary/not necessary to assess – **Code of Practice Chapter 7**
- Depending on Key Stage of child Code of Practice (CoP) requirements of Chapters 4 and 5 also relevant.
- Key issue will be whether appropriate measures taken by the school are producing progress and/or if school should be given longer to implement strategies.
- Think about whether or not you have looked at all the needs of the child: for a child with Asperger's syndrome, their literacy and numeracy skills may be fine, but they cannot go into a school building/operate within a mainstream context: their social communication skills will therefore require assessment.

- Tactics should be to expose *School Action* and *School Action Plus* as either demonstrating that child progress is insufficient/sufficient and/or that other appropriate measures could not/could be taken and that the school is incapable/capable of taking measures at *School Action* or *Plus* that would or would not be sufficient to meet significant need. **CoP paragraph 7:34**

Refusal to make a statement

- This is based upon Chapter 8 of CoP. Read it carefully. **Test in Para. 8:2**
- In many respects the arguments/issues are very similar to refusal to assess but are likely to be more focused on the delegation of resources to the school maintaining the child (or to be proposed to do so).
- The focus of the appeal and questioning of parent must be based on the need for additional resourcing and probably specialist placement. **See CoP paras. 8:8 to 8:14.** Think carefully about whether or not an LA can truly state that a child does not require a high level of specialist intervention and/or why such intervention can be guaranteed under the Note in Lieu: in the main, if resources have to be bid for/audited in some way, there is no guarantee that they will be provided. LA policy will not be determinative.
- It is essential that both parties experts have addressed these relevant tests and can explain fully why the child does not have additional needs.
- Questioning should again center on the adequacy of *School Action Plus*. Questions should also centre the outcomes of children maintained without statements. Parents will be live to the issue of fragmentation of support;/inability to access a high level of support without a Statement: think as well about the

“guarantee” of a Statement: parents will wish to argue that this provides them with legal protection, and the ability to enforce the provision through the courts if required.

Contents of statement

- Parents are usually seeking specific specialist approaches and/or specification of therapies and/or specialist placement as compared to LEA provision. **Chapter 8 paragraphs 8:29 – 8:111.**
- Expert evidence describing the amendments required to Pts. 2 and 3 is essential. These should be incorporated into a draft statement for use as a working document.
- Remember if Part 2 describes a need Part 3 must make provision: **R v SS Education and Employment ex part E [1992] 1 FLR 377**
- ...and that provision must be sufficiently specific: **L v Clarke and Somerset [1998] ELR**
- Tactics must be to persuade Tribunal of nature of need and then provision required to meet it and the environment for the effective delivery of that provision..

Specialist placement issues

- Residential placement requires consideration of **CoP paras 8:70 – 8:80**. Do not forget that the Tribunal can name a type of school under section 324 (5):

Consider is a particular specialist placement is overprovision, and that a suitable and cheaper alternative could be found (see *Hereford and Worcester v Lane* [1998] 3 All ER 569). Do not forget that the parents have to prove that LEA school is inappropriate, if the only issue between parties is costs/resources.

- It is necessary to undermine the proposed school put forward by the LEA and show that it is inappropriate. The LEA may only have to demonstrate parents choice of school is more expensive, provided their own is suitable.
- Key case may be **R v Wandsworth BC ex part M [1998] ELR 424 per Sedley J**, **thus** where statement provides for 'teacher experienced in working with pupils who have ...autism..' 'experienced' meant having a substantial track record of teaching and working with such children and having a real and significant fund of knowledge. Does the school have such a track record? Can you provide such knowledge/information?
- Where both schools are LA maintained, Schedule 27 likely to be effective for parental preference to reign. But remember the statutory requirement to educate in mainstream.

Witnesses

- Need EP specialist and relevant therapists and/or head of chosen school. Think about your expert's relevant specific specialism in areas where there will be most number of Tribunals/most debate about suitable provision. These areas are likely to be children with autistic spectrum disorders: children with severe physical impairments: children with severe emotional and behavioural problems: some children with language impairment: children with sensory impairments: some children with Spld.
- Try not to bring an expert who has not met/assessed/observed the child. For example if an LA EP has done a detailed report, bring that EP, not the head of service, or principal EP.

Before the Hearing:

- Have a meeting with your proposed witnesses shortly after the Tribunal bundle arrives: if the Secretariat is being slow at sending out the bundle, ask the LA/parents for disclosure of their case after the end of the case statement period: be prepared to disclose your case statement in return. Think through any holes in your case, and whether or not you could commission/obtain further evidence before the hearing.
- Prepare a draft Statement for use as a working document, if required, and file with your Case Statement if possible. If that is not possible, send it to the other side at least two weeks in advance of the hearing. Make sure it reflects both parties positions, even where agreement is not possible. Find out from relevant therapists/EP's what your final position can be on amendments sought at an early stage.
- Think about the strengths and weaknesses of your case: evaluate the evidence critically: think about relevant costs differences: prepare your questions and final submissions. Do **not** continue to argue for amendments you cannot support, or oppose amendments you know are necessary. It simply undermines your whole case at hearing.

Legal Submissions:

- Not usually necessary. If, however, it is genuinely necessary have these prepared in writing, for disclosure to the other side/Tribunal in advance of the hearing. This is not late evidence. Have final submission prepared and try to amend it as the hearing goes along depending on the oral evidence. If you are relying on case law, make sure that you have a copy of it for the Tribunal members and your opponent, and give it to them in advance. If you want to

rely on legal authorities, take the Tribunal to the relevant passage, and explain to them the brief facts of the case and say why you think that it is relevant to this situation. The Tribunal will be aware of the basic principles, but sometimes do require assistance/clarification of legal issues.

- Make sure the CoP is close at hand.

Advocacy at the Hearing

- The key to all advocacy is preparation: the better you know your case, the more effective you will be on the day.
- Prepare a cross reference index, which has quick page references which will tell you immediately where all the key pieces of information are kept
- Highlight important passages within the paperwork, and make sure that you can refer to them during the hearing
- Write down the questions or areas where you will need to ask questions of your witnesses: remember, it is them, and not you, that give evidence. Whilst the Tribunal operates on a quasi inquisitorial basis, they will expect you to be able to question your witnesses. It is not the other side you need to convince, it is the panel.
- There are two types of witness handling in Tribunal: examination in chief and questions for the other side. Cross examination is positively discouraged and Tribunal Chairs may well intervene if you try to cross examine aggressively. Explain to your witnesses that it is important not to become angry because statements are being made with which they disagree. In particular maintained school witnesses need to understand that a parental case based on the view that their school cannot meet a child's individual needs, is not a personal criticism.

- The process is informal but for examination in chief, general hints are:
 - (a) Do not lead the witness: giving them the answer to the question.
 - (b) Lead them away from comment/criticism of the other party.
 - (c) Present factual information 'factually'. Allow your witness to acknowledge difficulties/uncertainty, but also to explain how they can offer reassurance re outcomes.
 - (d) Do **not** allow a witness to be prompted orally or by a note/whispered to by another witness.
 - (e) Ask short questions: elicit one piece of information at a time
 - (f) Keep questions open: what, where, why, how, who?

For cross examination:

- (g) Keep questions short: ask one question at a time. **Do not 'bully'**.
- (h) If you don't know the answer to the question, or the likely answer, then don't ask the question
- (i) Keep calm and probe gently: the most effective cross examination is cool and controlled.
- (j) If you don't receive the answer to the question you asked, try again. You can look to Tribunal for help. This can be quite tactically effective.

You will be invited to sum up, but no case is ever won or lost on summing up. **Be concise and succinct in summing up: the Tribunal will appreciate your brevity.**

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