IN THE UPPER TRIBUNAL **Case No. HS/2760/2013**
ADMINISTRATIVE APPEALS CHAMBER
JUDGE MARK

Decision: 1. The appeal is dismissed.
2. The suspension of the order of the tribunal below directing the Applicant council to issue a statement of special educational needs is lifted.

REASONS FOR DECISION

1. This appeal is brought with my leave. I held an oral hearing on 10 April 2014 at which the council was represented by Mr Tom Cross of counsel and the Respondent by Ms Anna Tkaczynzka of counsel. I am grateful to both for their helpful submissions.

2. The Respondent's daughter, A, was born in October 2006. She has learning difficulties, the extent of which has been the subject of some dispute, as has the provision which needs to be made for her. As a result, the Respondent requested that the council conduct a statutory assessment of A's special educational needs with a view to a statement being issued.

3. Initially the council refused to conduct that assessment, but, after the Respondent had appealed that refusal it did carry out the assessment and informed the Respondent of the result by letter dated 17 January 2012. It determined that no statement was required but issued a note in lieu instead. It recognised that A had special educational needs but stated that these were not sufficiently severe, long-term or complex to require a statement. It stated that it was envisaged that appropriate arrangements would be made for A, utilising the resources available to her school, and that her needs required an Individual Education Plan (IEP) as available in the School Action and School Action Plus levels of intervention set out in the Special Educational Needs Code of Practice. This would require her progress to be regularly reviewed. Recommendations included a comprehensive IEP "to draw together [A's] educational needs relating to her emotional, social, behavioural and developmental delay difficulties and curriculum access."

4. The Respondent appealed the refusal to issue a statement. Unfortunately matters did not progress with the sort of speed that one would hope for in a case of this kind and there were a number of postponements and adjournments of hearings, mainly because of delay in the provision of expert reports. There were in the end three hearings before the same tribunal, in December 2012 and March and June 2013. The decision was issued on 21 June 2013 and it ordered the council to issue a statement of special educational needs for A.

5. The council's appeal challenges the decision of the tribunal on three grounds: that the tribunal did not ask itself, or answer, the right questions; that, if it did ask and answer the right questions, it has failed to make adequate findings of fact or give good reasons for its decision; and that its decision was perverse.

The law

6. Special educational needs and special educational provision are defined by s.312 of the Education Act 1996 (the Act) as follows:

> (1) A child has 'special educational needs' for the purposes of this Act if he has a learning difficulty which calls for special educational provision to be made for him.
>
> (2) Subject to subsections (3) and (3A) a child has a "learning difficulty" for the purposes of this Act if—
>
> (a) he has a significantly greater difficulty in learning than the majority of children of his age,
>
> (b) he has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in schools within the area of the local authority, or
>
> (c) he is under compulsory school age and is, or would be if special educational provision were not made for him, likely to fall within paragraph (a) or (b) when of that age.
>
> …
>
> (4) In this Act 'special educational provision' means —
>
> (a) in relation to a child who has attained the age of two, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the local authority (other than special schools), and
>
> (b) in relation to a child under that age, educational provision of any kind.

7. Section 313(1) of the Act, as now amended, provides for the Secretary of State to issue and revise "a code of practice giving practical guidance in respect of the discharge by local authorities and the governing bodies of maintained schools and maintained nursery schools of their functions under this Part. Section 313(2) makes it the duty of local authorities and governing bodies and any other person exercising such functions "to have regard to the provisions of the code", and section 313(3) requires a tribunal to have regard to any provision of the code which appears to it to be relevant to any question arising on the appeal.

8. Section 317 of the Act requires schools and local authorities to use their best endeavours to ensure that where a pupil has special educational needs the requisite special educational provision is made.

9. Section 323 provides for the assessment of educational needs by a local authority. So far as material to this case it provides as follows:

> (1) Where a local authority are of the opinion that a child for whom they are responsible falls, or probably falls, within subsection (2), they shall serve a notice on the child's parent informing him—
>
> (a) that they are considering whether to make an assessment of the child's educational needs,

(b) of the procedure to be followed in making the assessment,

(c) of the name of the officer of the authority from whom further information may be obtained, and

(d) of the parent's right to make representations, and submit written evidence, to the authority within such period (which must not be less than 29 days beginning with the date on which the notice is served) as may be specified in the notice.

(2) A child falls within this subsection if—

(a) he has special educational needs, and

(b) it is necessary for the authority to determine the special educational provision which any learning difficulty he may have calls for.

10. Section 324(1) of the Act then provides that

> 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 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.

11. The use of the same wording in section 324(1) as in section 323(2)(b) suggests that such a statement is required to be made if, following an assessment, the local authority remains of the same view as it had formed which led it to make the assessment that it was necessary for it to determine the special educational provision which any learning difficulty he may have calls for. That is not, however, how it has been interpreted either in the Code of Practice or by the tribunals and courts where the necessity under section 323 has been treated as the need to make an assessment and the necessity under section 324 has been treated as the necessity to make a statement.

12. As Judge Jacobs said in *Buckinghamshire CC v HW*, [2013] ELR 519, at paragraph 12, "in order to satisfy the definition in section 312, it is only necessary for a local authority or tribunal to be satisfied that a child has learning difficulty (as defined) that calls for special educational provision. It is not necessary for the learning difficulty or the provision required to be identified with the precision that would be required in a statement. The purpose of an assessment is to identify them more precisely."

13. The Code of Practice makes it plain that a statement is only to be expected to be made if the local authority "considers that the special educational provision necessary to meet the child's needs cannot reasonably be provided within the resources normally available to mainstream schools and early education settings in the area" (para.8.2). It continues in paras 8.3 onwards to refer to resources in the sense of budgetary resources and to what can be provided from a school's own budget or from central provision by the local authority. In paragraphs 8.8 to 8.14 it sets out criteria for deciding to draw a statement which are stated in paragraph 8.8 to constitute a framework within which detail should be developed locally, and sets out possible approaches and relevant factors to take into account.

14. There is no definition of "necessary". It was described by Judge Jacobs as somewhere between indispensible and useful, but that he was not going to define more precisely, in *Buckinghamshire CC v HW*, [2013] ELR 519, paragraph 16. As he also said, it is a word in common usage and it is that usage that a tribunal must apply. I would take it no further than to observe that if a thing is needed it is necessary. The need may be clear or it may involve a value judgment.

15. Further guidance as to when a statement is necessary is to be found in *LB of Islington v LAO* [2008] EWHC 2297 (Admin) and in *NC and DC v Leicestershire CC* [2012] ELR 365. In *Islington v LAO*, Judge Waksman QC stated at para.5 that a decision to make a statement came "at one end of a spectrum of need with which the local authority concerns itself. There are many children within the remit of a local authority who may have learning difficulties and require some form of educational provision, but this does not in and of itself mean that a statement will be required. Hence, of course, the word "necessary" in section 324(1)." He went on in paragraph 6 to describe the conditions in section 324 as being in somewhat stark form and to refer to the further guidance in the Code of Practice. He identified from the Code of Practice three steps that needed to be taken. The first was to ascertain the degree of the child's learning difficulties and the special educational needs that resulted. The second was to determine what provision was required and the third was to determine whether that provision was available in what he paraphrased as the normal resources available to the education authority.

16. In *NC and DC v Leicestershire*, Judge Pearl held at paragraph 32 that two questions had to be addressed in determining whether it was necessary to issue a statement. The first was whether the provision identified as necessary for the child in the assessment was in fact available within the resources normally available to a mainstream school. If so, the second question was whether the school could "reasonably be expected to make such provision from within its own resources."

17. Both these cases were concerned with issues that involved consideration of the application of the guidance in the Code of Practice to the facts in those cases. I bear in mind that the Code of Practice is precisely what it is said to be – guidance to which the local authority and the tribunal must have regard. It does not affect the generality of section 324 so as to exclude any possibility that a statement may be necessary for some other reason than those indicated in the guidance. For example, if it was the case that a school or local authority, despite having the necessary resources, simply refused to use their best endeavours to provide the requisite special educational provision, a tribunal may well consider it necessary to direct a statement.

18. It must also be the case that the tribunal is not limited, on an appeal against a refusal to make an assessment, to looking only at the provision recommended by the assessment and if there is a challenge to the adequacy of the assessment or a change of circumstances since it, the tribunal must make its own findings as to the provision needed and on that basis as to the need for an assessment.

19. It further appears to me that while a tribunal must make findings as to the child's needs and the required provision sufficient to enable it to come to a conclusion as to the need for a statement, those findings do not have to be in the same detail as would be expected in the statement. Otherwise, when directing a statement the tribunal would effectively have to write it.

The present case

20. In this case the Respondent was unhappy not only with the refusal to make a statement but with the adequacy of the assessment. It was further a case in which a decision was reached by the tribunal only some 17 months after the local authority had conducted the assessment and decided not to make an assessment. In the intervening period, there was evidence that A had failed to make any improvement, a problem which the Respondent attributed to the inadequacy of the measures put in place by the local authority and the school and which the local authority attributed to various factors including A's frequent absences from school.

21. Many of the facts were not in dispute and were set out in the tribunal's decision on that basis. Except insofar as there is any issue as to whether they were in dispute, I see no reason not to treat these matters as having been accepted and found as fact by the tribunal. By the time of the tribunal's decision, A was nearly seven and approaching the end of of year 1 at her primary school. She had had a number of health problems which had affected her ability to maintain a full school attendance record. There were issues between the school and the Respondent as to the quality of her progress at school. A's need for a statement was the subject of fairly fundamental disagreement between the experts based on very differing views as to how she was coping and making progress. Her differing abilities in different areas were highlighted by reports that she was at the first centile for copying but the 99th centile for picture similarities. She had problems with concentration and receptive language and had difficulties following instructions. She also had some problems with fine motor skills although their extent was a matter for disagreement.

22. A SCAIT report obtained after the appeal had been brought had ruled out diagnoses of ASD and ADHD but was unable to provide any alternative diagnosis of her problems. There was a possibility that she may be dyslexic but this had not been investigated. The absence of a diagnosis is a fact to be taken into account and may make it more difficult to decide how best to deal with the resulting educational problems, but cannot remove the need to make such a decision.

23. There were plainly difficulties between the Respondent and the school but the tribunal found (para.18) that it had the impression that A was very much liked and cherished there and that the school wanted to do the best it could for her.

24. The tribunal set out the differences between the recommendations of the local authority's expert witnesses and those of the Respondent. It found at paragraphs 58 and 59 that at least until the third hearing before it there appeared to have been a gulf between the Respondent's perception of A's problems and those of the local authority and the school, and also a gulf between the views expressed about progress and reasons for progress or the lack of it. It found in paragraph

59 that by the final hearing it was accepted that attendance problems were almost entirely explained by medical needs and did not in themselves account for A's difficulties. In the absence of a clear diagnosis her difficulties were not made the easier to address but they remained complex.

25. In paragraphs 63 to 66, the tribunal found (1) that it had concerns that A's difficulties could be adequately addressed through the formulation of half-termly provision plans, (2) that there were no formal minuted meetings which required formal inputs from, for example, a speech and language therapist, before the review and formulation of the periodic plans; that it was concerned that the Respondent said that she had not been involved in these plans and that they were not satisfied that they were adequate; and that the tribunal was concerned at the unexplained changes in the plans including a failure to quantify the provisions for numeracy which the Senco was unable to explain; (3) that it questioned the acceptability of the level of progress reflected in the plans, given that her attainment fell below what was to be expected from her being in the average range of cognitive ability; while the evidence at the start of the appeal process was that her progress had been good, this was no longer the case; (4) her phonic targets showed little sign of change in the various plans which meant that little progress had been made; (5) it was worrying that she could not yet write her name and was entering year 2 without any useful ability to write.

26. The tribunal concluded in paragraph 67 that progress was not adequate even with the resources that up to then had been available on School Action Plus and that her needs and the required provision were not yet adequately understood, documented or provided for. It was therefore unable to conclude that without the help of a statement her school or any other mainstream primary school, could secure the teaching and additional support that A needed.

27. The tribunal then went on (1) to refer to evidence that the learning support assistant was only in A's class because of provision for a statemented child which it found unsatisfactory; (2) to refer to the absence of expert advice as to when the OT provision should be amended or stopped, which had been left to the school to determine, and that that needed to be kept under review by appropriate professionals; and (3) to find that a statement would reduce the risk of difficulties being attributed to the wrong factors and in particular to parental attitude and absences, and conclusions being drawn that A was making adequate progress when there was reason to doubt this.

28. For all those reasons, but in particular because A was not on the evidence progressing as she should for a child of her ability, the tribunal concluded that the criteria set out in the Code of Practice were met.

The challenges to the decision of the tribunal

29. The first ground of challenge is that the tribunal failed to adopt the course said to have been laid down in *Islington v Lao* and in *NC and DC v Leicestershire*, in that there was no proper consideration and findings as to what A's special educational needs were, what special educational provision was needed for her, and from what resources that provision should come.

30. It is plain that the tribunal did not consider the appeal by reference to the existence of financial resources. There was virtually no evidence as to this. What little there was to the effect that the money would be available without a statement. However, this is to miss the point. The question was not whether the necessary provision would come from one budget or another, but whether it would be provided at all without a statement, not for financial reasons but because of the failure to that time of the school or local authority, with the best will in the world, to understand what was needed and provide it. Resources are not available just because they exist if the council is unwilling to use them because, wrongly, it does not consider that they are needed. The benefit of a statement is not just that money will be available for the provision, but also that its precise terms can be the subject of an appeal procedure, and where there is disagreement between the parents and the local authority as to what is needed, and as to the source of funding, that can be resolved on appeal. I do not consider that Judge Waksman was suggesting otherwise in the *Islington* case when he referred to the provision being available in the normal resources. It is not available if it is withheld.

31. This case differs from the *Islington and Leicestershire* cases in that here the quality of the assessment was under serious attack both from the start and because, as it was contended, and as the tribunal found, the plans implemented by the school failed to work over a period, significant in the life of a 5 year old, of 17 months. It is true, as Mr. Cross pointed out, that the fact that A had not improved as might have been hoped and expected does not of itself mean that a statement is needed, but the tribunal also made findings as to failings in the plans, in their implementation and in the school's understanding of them and of reasons for changes in them which can reasonably be treated as having contributed to that failure. It appears to me to be a legitimate conclusion on the part of the tribunal that, on the facts of this case, and in the absence of any other acceptable explanation, these defects meant that A was not getting the special educational provision she needed.

32. It further appears to me that the tribunal clearly identified A's special educational needs in the passages to which I have referred. It also identified that the special educational provision which had been made for her was inadequate in ways which it identified. It was plainly in difficulty in identifying in June 2013 the special educational provision which was then required bearing in mind the age of the expert reports by that time, and the absence of any previous consideration of or report as to possible dyslexia, but it appears to me to be sufficient that it identified the significant deficiencies in the provision which the council thought adequate and which had been provided. I agree with the observation of Judge Aitken, who as Deputy Chamber President of HESC, had refused the local authority permission to appeal, that the tribunal was not in a position to explain in detail what provision was required and that that would require it to write Part 3 of the Statement. In effect it decided that the provision made was inadequate and that a statement was needed to ensure that adequate provision would be made.

33. It also appears to me that the reasons given by the tribunal for its decision are adequate, even if they may have been better structured.

34. Mr. Cross also referred to the final three sentences of paragraph 67 of the decision, relating to the alleged presence of a learning support assistant in A's class only because a statemented child was also there, and to the possible need for such support regardless of provision for other children. He submitted that this was an impermissible reason for the conclusion to which the tribunal came and was therefore an error of law. I do not accept this, firstly because the tribunal had made its finding plain earlier in that paragraph based on other matters, and secondly because the tribunal expressly made no finding as to whether such support was needed. It was also said that the tribunal had misunderstood the evidence to which it referred on this point, but no transcript was sought by it. As I do not consider that it formed part of the tribunal's reasons for finding that a statement was needed, I need make no finding as to what was said.

35. Finally, Mr. Cross contended that the decision was perverse because resources were not considered in accordance with the Code of Practice. I agree that resources were not considered, but, for the reasons given above, that did not make the decision perverse.

(signed on the original) **Michael Mark**
Judge of the Upper Tribunal
11 April 2014