IN THE UPPER TRIBUNAL Upper Tribunal case No's HS/2996/2015 & HS/2997/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal.

Hearing: Cardiff Civil Justice Centre, 7th March 2016.

Attendances: For the appellants, Ms N Morris (non-legally qualified representative).
For the respondent local authority, Mr M Small, solicitor, of Baker Small solicitors.

DECISION

1. Under section 11(2) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal dismisses the appellants' appeal against the First-tier Tribunal's decision that the local authority was not required under section 324 of the Education Act 1996 to make and maintain a statement of their son's special educational needs. The First-tier Tribunal's decision (ref. *SE 885/13/00018*) involved no error on a point of law.

2. Under section 11(4) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal refuses the appellants permission to appeal against the First-tier Tribunal's decision (ref. *SE 885/14/00015*) that the local authority was not required under section 323 of the Education Act 1996 to carry out an assessment of their son's educational needs. The appellants' case does not have a realistic prospect of success.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom these appeals are concerned. This order does not apply to (a) the child's parents, (b) any person to whom any parent discloses such a matter or who learns of it through parental publication (and this includes any onward disclosure or publication), (c) any person exercising statutory (including judicial) functions in relation to the child. The child's real name is not used in these reasons.

REASONS FOR DECISION

Introduction

1. In this case, the Upper Tribunal is invited to give guidance about the application of its decision in *NC & DH v Leicestershire County Council* [2012] UKUT 85 (AAC). In that case, the Upper Tribunal addressed the statutory test for deciding whether an authority is required, under section 324 of the Education Act 1996, to make and maintain a statement of special educational needs (SEN). The Upper Tribunal identified two questions to be asked, the second

of which is whether "the [maintained, mainstream] school can reasonably be expected to make [the special educational provision called for] from within its resources".

2. I am told that answering this question has caused difficulties where a child does not, when the relevant decision falls to be taken, attend a maintained school.

3. In my view, *NC & DH* should be applied pragmatically where the child in question does not attend a maintained school. In fact, I would respectfully suggest that a more practical route to the *NC & DH* destination is simply to ask whether, without a statement, the decision maker can be satisfied, to a reasonable degree of certainty, that the required educational provision will be delivered. In answering that question, regard should be had to the legal consequences of a statement (described in paragraph 40 below) in that a statement generates certainty of, and a significant degree of stability in, educational provision. The child is in part insulated from the trade-offs that, for other children, are an inevitable part of fixing their state educational provision.

4. In these reasons "EA 1996" means the Education Act 1996. The SEN provisions of the EA 1996 are being phased out in relation to England. This decision is about the EA 1996, not the replacement provisions in the Children & Families Act 2014.

5. At the hearing, I indicated to the parties that, since I was being asked to give general guidance about an opaque, yet important, set of legislative provisions, my decision might be delayed. I hope this has not caused undue inconvenience.

Background

6. In these proceedings, two related cases are before the Upper Tribunal.

Case 1 (HS/2996/2015; First-tier ref. SE 885/13/00018) – refusal to make a statement of SEN

7. Case 1 arose from the parents' appeal against the local authority's decision of 22nd May 2013 not to make and maintain a statement for their son Ben (not his real name). Given the sequence laid down by the EA 1996, it follows that the authority had already carried out a statutory assessment of Ben's educational needs.

8. Ben's parents appealed to the First-tier Tribunal which dismissed their appeal. The Tribunal's decision was set aside on 21st November 2014 by Upper Tribunal Judge Jacobs. The Judge decided the Tribunal did not apply, or demonstrate it had applied, the Upper Tribunal's decision in *NC & DH v Leicestershire County Council* [2012] UKUT 85 (AAC) (see below). In particular, the First-tier Tribunal's reasons did not show that it turned its mind to the question whether it was reasonable to expect a maintained school to allocate sufficient resources to deliver the special educational provision called for by Ben's learning difficulties.

9. The Upper Tribunal remitted the appeal to the First-tier Tribunal for re-hearing. The Tribunal gave its decision on 3rd August 2015. Again, the appeal was dismissed. It is fair to say the Tribunal found its application of *NC & DH* complicated by the fact that Ben was not attending a maintained school. He was attending an independent school funded by his parents. *NC & DH*, however, directs attention to whether "the maintained school" can reasonably be expected to make the required special educational provision from within its resources.

10. The Tribunal answered the first *NC & DH* question - whether the special educational provision identified in the statutory assessment is in fact available within the resources normally available to a mainstream school – affirmatively. It arrived at that conclusion in reliance on the evidence it heard about the provision available at two local maintained schools as well as its own experience of the provision normally available in maintained secondary schools.

11. In relation to the second *NC & DH* question – whether "the school can reasonably be expected to make such provision from within its resources" – the Tribunal noted that the local authority had not formally identified a proposed maintained school for Ben. The authority said that, since Ben's parents had not identified a preferred maintained school, they could not themselves do so. In those circumstances, the Tribunal decided it could not directly answer the second *NC & DH* question. Instead, the Tribunal analysed the provision that could reasonably be expected from two maintained schools that the local authority put forward as potentially suitable. The Tribunal concluded:

> "…we would be surprised if the majority of maintained, mainstream secondary schools could not properly meet his needs, His needs are simply not at a level which are likely to call for extensive or expensive provision. What they do call for is good, differentiated provision, which takes account of his specific learning difficulties and his difficulties with Working Memory; technological support, with specific programmes to address those difficulties delivered largely in small groups."

12. On that basis, the Tribunal decided it was not necessary to determine the special educational provision called for by Ben's learning difficulties and dismissed the appeal. The Tribunal granted Ben's parents permission to appeal to the Upper Tribunal on the ground that it might not have properly applied the decision in *NC & DH*. In granting permission to appeal, the Tribunal judge observed "we would welcome guidance from the Upper Tribunal" on how to apply *NC & DH* where a child is not being educated in a maintained school.

Case 2 (HS/2997/2015; First-tier ref. SE 885/14/00015) – refusal to assess

13. While case 1 was proceeding, Ben's parents made a fresh request for a statutory assessment. The local authority refused and Ben's parents appealed against that decision to the First-tier Tribunal. The Tribunal heard that appeal at the same time as it heard the remitted appeal in case 1.

14. The First-tier Tribunal found that much of the evidence for case 1 was relevant to case 2. There was, found the Tribunal, a good professional understanding of the nature of Ben's learning difficulties and his local authority was not likely to be called upon to make additional provision available to meet his needs. The test for a statutory assessment was not met.

15. The First-tier Tribunal refused permission to appeal to the Upper Tribunal against this decision. Ben's parents applied to the Upper Tribunal for permission. The Upper Tribunal proceedings on case 2 were linked with the proceedings on case 1. The parties agreed that the hearing before the Upper Tribunal in relation to case 2 would proceed on a rolled-up basis. The parties would advance their arguments both on whether permission to appeal should be granted and, if so, whether the appeal should be allowed.

The arguments

Case 1 – refusal to make a statement

16. The parents argue the Tribunal failed properly to apply the *NC & DH* decision. They ignored the second question identified in *NC & DH*. Moreover, the Tribunal needed to have more detailed evidence about local maintained school funding arrangements in order properly to answer the second question. The authority's witnesses – from the two maintained schools suggested by the local authority – conceded they did not know the size or make-up of their schools' delegated budgets. Accordingly, the Tribunal could not be confident Ben's required special educational provision would be delivered in a maintained school setting.

17. According to the parents, the First-tier Tribunal also failed to make sufficient findings of fact about the special educational provision that the two maintained schools could provide, including a failure to identify the types of provision that were only made available to children with statements. The school witnesses gave evidence that, until they had assessed Ben, they could not say for certain into which class he would be placed. This evidence meant the Tribunal irrationally concluded that Ben's needs were known and understood and appropriate provision had been identified. I am not certain permission to appeal was granted on those grounds but no objection was raised by the authority. To the extent that the First-tier Tribunal's grant of permission to appeal did not embrace these points, I amend the grounds of appeal accordingly.

18. The local authority pointed out that, unlike the present case, *NC & DH* concerned a child attending a maintained school. They argued that, where a child is not attending a maintained school, *NC & DH* needs to be applied pragmatically. The correct approach is simply to consider whether the maintained school/s advanced by the local authority can reasonably be expected to make the special educational provision required. On that basis, the First-tier Tribunal faithfully applied the substance of the *NC & DH* decision. At the hearing before the Upper Tribunal, the authority argued that Ben's needs were relatively "low-level" so that there was no need for the Tribunal to be presented with detailed financial evidence before it

could properly conclude the maintained schools could reasonably be expected to deliver the necessary provision.

Case 2 – refusal to assess

19. The parents relied on the same arguments as advanced on case 1, but also argued that difficulties in assessing Ben's progress, as revealed by the evidence, showed a statutory assessment was required. The local authority essentially repeated its arguments on case 1 and, in response to the assessment difficulties relied on by the parents, argued the First-tier Tribunal's analysis of Ben's needs and the provision required to meet them was adequate despite patchy evidence about his educational progress.

The legal framework

Core provisions

20. A child has "special educational needs" if the child "has a learning difficulty which calls for special educational provision to be made for him" (section 312(1)). "Learning difficulty" is defined by section 312(2). For a child of compulsory school age, there are two circumstances in which the child has a learning difficulty, namely:

(a) the child "has a significantly greater difficulty in learning than the majority of children of his age"; or

(b) the child "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".

21. For children who have attained the age of two, "special educational provision" means "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)".

22. By section 316(2) of the EA 1996, children without statements of special educational needs must be educated in mainstream schools (although this does not affect a parent's right to make their own arrangements for a child's education in a non-mainstream school: section 316A). A mainstream school is any school apart from a special school or independent school (section 316(4), although for this purpose certain state-funded independent schools such as Academies do not count).

23. For children with statements of SEN, the EA 96 enacts a presumption in favour of mainstream education. Subject to the limited exceptions in section 316A(2), section 316(3) provides:

> "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."

Maintained schools' duties towards children with SEN

24. Section 317(1) EA 1996 imposes general obligations on a maintained school's governing body in connection with a child's special educational needs. These apply whether or not a child has a statement of SEN. Section 317(1) reads as follows:

> "The governing body of a community, foundation or voluntary school or a maintained nursery school shall—
>
> (a) use their best endeavours, in exercising their functions in relation to the school, to secure that, if any registered pupil has special educational needs, the special educational provision which his learning difficulty calls for is made,
>
> (b) secure that, where the responsible person [e.g. headteacher: section 317(2)] has been informed by the local authority that a registered pupil has special educational needs, those needs are made known to all who are likely to teach him, and
>
> (c) secure that the teachers in the school are aware of the importance of identifying, and providing for, those registered pupils who have special educational needs".

25. The term "best endeavours", as used in section 317(1)(a), is important because it limits the extent of the duty to secure the required special educational provision. It means the same thing as "reasonable endeavours", does not impose an "absolute obligation" and, in principle, competing demands may be taken into account (*R v Secretary of State for the Home Department, ex parte IH* [2003] UKHL 59).

Assessments

26. A statutory assessment is the first gateway to the EA 1996's scheme of SEN entitlements. By section 323(3), a local authority must "make" an assessment of a child's educational needs (not simply his/her special educational needs) if they are of the opinion that a child falls, or "probably falls", within section 323(2). Section 323(2) reads as follows:

> "(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."

27. Assuming a child has special educational needs (all agree Ben does), the key concept is that of necessity. However, the statutory test is not a straightforward test of necessity. It is important not to lose sight of section 323(3) because this frames the duty to assess. If section 323(2) is read with section 323(2), it is clear that the duty to assess arises in two cases:

(a) where the decision maker is of the opinion that the child is a child for whom it is necessary to determine special educational provision; and

(b) where the decision maker is of the opinion that the child is "probably" a child for whom it is necessary to determine special educational provision. This trigger for the assessment duty should not be overlooked: the EA 1996 does not make a finding of necessity a pre-condition to the assessment duty. If this is overlooked, the assessment bar will be set higher than Parliament intended.

28. The test does not ask in terms – as one might have thought it would – whether it is necessary to assess in order to determine the nature of a child's special educational needs. However, uncertainty as to the precise nature of a child's special educational needs must be a factor tending to show the assessment duty applies. If there are significant gaps in understanding, it will be difficult to argue that the child is not, at the time when it is being considered whether there is a duty to assess, a child for whom it will probably be necessary to determine special educational provision.

29. Another feature of the legislation that is apt to confuse arises from the way in which the statutory test incorporates an analysis of whether it is necessary to "determine the special educational provision which any learning difficulty he may have calls for".

30. Even though the assessment duty incorporates the concept of necessity to determine special educational provision, the assessment itself does not involve a determination of special educational provision. That comes at a later stage if and when the authority decides to make and maintain a statement. This complicates matters. The statutory sequence (assessment decision - assessment - statementing decision - statement determining educational provision) has to be respected. Yet decision makers are asked by the EA 1996 to turn their minds to the final issue (determination of required special educational provision) throughout the process.

31. However, the legislation becomes less confusing, at least at the assessment stage, if it is remembered that the assessment duty arises where a child is "probably" a child for whom it is necessary to determine special educational provision. What this means is that, assuming the special educational needs limb of the test is met, the assessment duty is triggered where (a) a positive finding is made, when the decision whether to assess is under consideration, that a child is one for whom it will be necessary to determine special educational provision, and (b)

a finding is at that time made that it is reasonably likely – "probably" the case - that the child is one for whom it will be necessary to determine special educational provision.

32. So the assessment duty triggers and the statementing duty triggers are closely related focussing, as they both do, on necessity to determine special educational provision. However, that does not mean a necessity finding at the assessment duty stage is binding on the authority when it comes to decide whether to make and maintain a statement. The decision whether to make and maintain a statement will be informed by the results of the assessment which, of course, were not available at that earlier stage.

33. In carrying out an assessment, with limited exceptions the authority must seek written advice from a range of different disciplines: education advice; medical advice; psychological advice from an educational psychologist and the advice of a social worker (regulation 7(1) of the Education (SEN) (Consolidation) Regulations 2000 ("the 2000 Regulations")).

34. Section 329 confers on a parent the right to request an assessment. If there has not been an assessment within six months of the request, the authority must arrange for an assessment under section 323 "if it is necessary for the authority to make an assessment under that section". A parent has the right to appeal to the Tribunal against a refusal to assess (section 329(2)). On an appeal, the tribunal has power to dismiss the appeal or order an assessment (section 329(3)).

The duty to make and maintain a statement

35. The next stage in the process is to decide whether to "make and maintain" a statement of SEN for the child. Again, the statutory test is one of necessity. Section 324(1) of the EA 1996 provides:

> "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 [under the statutory representations procedure], 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."

36. The definition of "special educational provision" means there is a comparative aspect to the section 324(1) test. To recap, the definition refers to "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)". Section 324(1) asks whether it is necessary to "determine" the different educational provision called for by the child's learning difficulty.

37. By section 324(3), a statement must "give details of the authority's assessment of the child's special educational needs" and "specify the special educational provision to be made for the purpose of meeting those needs".

38. Where an assessment does not result in a statement, it seems the EA 1996 does not require details of the assessment to be recorded in writing which might be thought curious. However, regulation 17 of the 2000 Regulations requires the authority to give the parent a notice of their decision not to make a statement which must include reasons. Moreover, paragraph 8.17 of the statutory SEN Code of Practice provides that a local authority should consider issuing "a note in lieu of a statement" to include the evidence gathered during the statutory assessment. According to the Code, such a note may need to be as detailed as a statement and, it follows, should identify the special educational provision required to meet the child's needs.

39. The question whether it is "necessary" to determine special educational provision must mean something other than simply whether there is a need to work out the precise nature of the provision required. That working out can be done without going through the statutory statementing process.

40. The question whether it is "necessary" to determine special educational provision has to informed by the wider legislative scheme of which the statementing provisions are part. If a statement is made, the child enters a world of specific educational entitlements that are not enjoyed by other children. In particular:

(a) the local authority must "arrange that the special educational provision specified in the statement is made for the child" (section 324(5)(a)). The specification of a school in a statement involves specifying special educational provision, as is made clear by sections 324(3) & (4). Section 324(3) requires the statement to specify the special educational provision needed "including the particulars required by subsection (4)". Within those particulars, we find "the name of any school or institution…which they consider would be appropriate for the child and should be specified in the statement" (this does not apply if the parent's preferred maintained school is already required to be specified by Schedule 27 to EA 1996). If the specified school is an independent school, section 324(5)(a) requires the authority to fund the child's education at the school but, if there were any doubt about this, section 348(2) puts it beyond doubt;

(b) if the name of a maintained school is specified in the statement, the school's governing body must admit the child to the school. This even overrides the statutory class size limit in section 1 of the School Standards and Framework Act 1998;

(c) statements are entrenched to a significant degree because Schedule 27(2A) to the EA 1996 only permits an amendment in three cases: following a statutory review carried out in accordance with the procedure laid down in Schedule 27; where ordered by the tribunal; where directed by the Secretary of State;

(d) if a child moves to the area of a different local authority, his/her statement is transferred. The new authority is required to arrange the special educational provision specified in the statement (regulation 23 of the 2000 Regulations). Hence, the new authority cannot immediately argue that, because it is less well-resourced than the previous authority, the

educational provision specified imposes an unreasonable burden. The provision specified may only be amended in accordance with the statutory procedures for altering statements;

(e) a local authority does not have a free hand to cease to maintain a statement. The test is whether "it is no longer necessary to maintain it" (Schedule 27(11)(1) to EA 1996). And provision is made so that a determination not to maintain cannot take affect until any appeal is determined or withdrawn (Schedule 27(11)(5));

(f) statements must be regularly reviewed, at least annually, with the review taking the form of a re-assessment (section 328(1)).

41. A statement therefore generates certainty of, and a significant degree of stability in, educational provision. The child is insulated in part from the trade-offs that, for other children, are an inevitable part of fixing their state educational provision. And so the legislative scheme shows that, for certain children with learning difficulties, Parliament decided not to rely on general statutory education obligations, including a governing body's section 317(1) "best endeavours" duty, to secure an appropriate education for the child. For certain children, an additional guarantee of appropriate educational provision was created. This should be taken into account in deciding whether it is necessary to determine a child's special educational provision.

42. If there is a realistic doubt that the operation of the "best endeavours" duty, and other relevant statutory duties, would result in the required provision, that favours a conclusion that the duty to make and maintain a statement arises because it is a case where it is "necessary" to determine special educational provision (in *Buckinghamshire CC v HW*, [2013] ELR 519, Upper Tribunal Judge Jacobs described necessity as falling somewhere between indispensable and useful, but that he was not going to define more precisely).

43. That doubt may arise for a number of reasons. For example, the child's history of educational provision may lead a decision maker to conclude that, without a statement, the required provision is unlikely to materialise. This reflects what Judge Mark said in *Manchester City Council v JW* [2014] UKUT 0168 (AAC): "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". And the nature of the special educational provision in question may, of itself, due to its quantity, specialist nature or for other reasons, lead to the conclusion that a statement is needed in order to ensure appropriate provision is made.

44. The above point can be deduced from the statutory scheme but it probably explains why the SEN Code of Practice states:

> "8.2. The [local authority] will make this decision [i.e. whether it is necessary to determine the special educational provision called for by any learning difficulty the

> child may have] when it 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…in the area".

45. By section 313(3) of the EA 1996, a tribunal is required to have regard to any provision of the Code which appears to it relevant to any question arising on an appeal.

46. I respectfully agree with the finding of Judge Mark in *JW* 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". That applies with even greater force at the earlier stage when a decision-maker is considering whether the statutory test for carrying out an assessment is met.

NC & DH v Leicestershire CC [2012] UKUT85 (AAC)

47. In *NC & DH* His Honour Judge Pearl, sitting as a judge of the Upper Tribunal, was presented with the argument that there was an apparent tension between paragraph 8.2 of the Code (see paragraph 44 above) and paragraph 8.5 which states:

> "Where extra resources are required to enable a school to make the provision specified in statements, the LEA can provide those resources directly from central provision, devolve them to schools on an earmarked basis or delegate them".

48. HHJ Pearl did not accept that there was, in fact, such a tension. The paragraphs of the Code deal with "two different scenarios". Paragraph 8.2 indicates that, where the required provision can reasonably be provided within the resources normally available to mainstream schools, "then it will not be necessary to require a Statement". Paragraph 8.5, on the other hand, deals with the case where a child already has a statement and identifies different funding options for delivering the provision specified in the statement.

49. HHJ Pearl went on to hold, in paragraph 32 of his decision, that two questions must be addressed in applying section 324 (that is deciding whether an authority is required to make and maintain a statement):

(a) "The first question is whether the special educational provision identified as necessary for the child in the assessment carried out under section 323 is in fact available within the resources normally available to a mainstream school";

(b) "The second question is, if so, can the school reasonably be expected to make such provision from within its resources".

49. While I do not disagree, I think perhaps a more practical route to the same destination is simply to ask whether, without a statement, the decision maker can be satisfied, to a reasonable degree of certainty, that the required educational provision will be delivered. In answering that question, regard should be had to the legal consequences of a statement as described in paragraph 40 above.

50. The advantages of this approach, in my view, include the following. In some cases it will reduce the likelihood of the Tribunal having to spend valuable time dealing with detailed evidence about local school financing arrangements. Evidence about funding is not necessarily required in order for a tribunal properly to conclude that the required educational provision will be delivered. It also simplifies matters where, as here, the child in question does not attend a maintained school.

Conclusions

Case 1 – refusal to make a statement

51. I decide that the First-tier Tribunal applied section 324 of the EA 1996 in the way Parliament intended. It did not err in law and I dismiss the appeal.

52. The Tribunal could not approach section 324 with the benefit of evidence about Ben's educational experience at a particular maintained school because he was attending an independent school. Instead, the Tribunal asked itself whether the two maintained schools put forward as possibilities by the authority could make the provision required to meet his educational needs. It gave coherent and evidence-based reasons for finding that the schools could and would make that provision. The Tribunal applied section 324 as Parliament intended. In substance, the Tribunal was satisfied, to a reasonable degree of certainty, that the educational provision Ben required would be delivered were he to attend a school maintained by the authority.

53. In the circumstances, the Tribunal did not need, in order to arrive at a lawful decision, more detailed evidence about local funding arrangements. It arrived at a rational conclusion about the extent of Ben's needs and heard oral evidence that the maintained schools could supply the provision to meet those needs from within their own resources. The Tribunal was entitled to conclude that staff at those schools could give reliable evidence on that topic without having to check their evidence against the precise funding arrangements for the schools.

54. I do not accept the parents' argument that the Tribunal failed to make sufficient findings of fact about the special educational provision that the two maintained schools were able to deliver. It did not need to construct weekly lesson plans or such like. The Tribunal relied on oral evidence from staff at the schools, as well as its own educational expertise, to arrive at a defensible conclusion that the required provision would be made. In the light of its findings that Ben's needs and requirements were not especially complex, this was a sufficient basis for

its conclusion. Of course, matters of detail were not addressed but how could they be? The fine-tuning of educational provision could only be done if and when Ben attended one of the maintained schools. For this reason, I reject the argument that the school witnesses' evidence was undermined by their concessions that, before they had carried out their own assessments, they could not be certain into which class Ben would be placed.

Case 2 – refusal to assess

55. I do not grant permission to appeal in case 2 because the appeal does not have a realistic prospect of success. Given the affinity between the assessment test and the statementing test, the Tribunal was entitled to rely on the findings it made in deciding the authority was not required to make and maintain a statement. The evidence about Ben's progress at the independent school was analysed in detail and with obvious care by the Tribunal. The Tribunal concluded that he had made only slow progress but that this was consistent with his "underlying level of cognitive difficulty". The Tribunal did not find that progress had been delayed because Ben could not access appropriate special educational provision. And so the assessment evidence provides no real support for the argument that a statutory assessment was necessary to determine educational provision.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
27th May 2016