Statements of Special Educational Needs (and a bit more) [1]

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The SEN Code of Practice	
SEN Code of Practice Section 313 EA 1996	The Tribunal must identify and correctly understand the relevant provisions of the Code and apply them unless it has and states clear reasons for not doing so: *W –v- Blaneau Gwent* [2003] EWHC 2880. Guidance or a statutory code can only be departed from for good reason: *Munjaz v Mersey Plan NHS Trust* [2006] 2 AC 148.
The general duty of the LA to provide education	
What must the LEA provide?	The LA/Tribunal is under a duty to secure provision which meets the child's SEN but is *not* "under an obligation to provide a child with the best possible education. There is no duty on the authority to provide such a Utopian system, or to educate him or her to his or her maximum potential. …": *R v Surrey CC ex p H* (1984) 83 LGR 219. See also Stanley Burnton J in *Hammersmith & Fulham v Pivcevic & SENDIST* [2006] ELR 594 para 51. The duty is to select "an appropriate school …. There is nothing in the statutory scheme which requires the local education authority to specify the optimum available provision….": *R v Cheshire CC ex P C* (1996) 95 LGR 299. "… this does not oblige the local education authority to make available the best possible education, Parliament has imposed an obligation to meet the needs of the child and no more." *S v SEN Tribunal* [1995] 1 WLR 1627. "Needs" (as in what a child "needs") means "what is reasonably required" and calls for a decision on whether what was proposed for inclusion in a statement was reasonably required or whether it went beyond that. Such a decision was pre-eminently a matter for the expert judgment of the SENDIST: *A –v- Hertfordshire County Council* [2006] EWHC 3428; (2007) ELR 95. Exceptional ability is *not* an SEN (whether on an ordinary reading of EA s312(2) or by application of Art 1 Prot 1 ECHR). The issue is whether the child's needs can be appropriately met in a particular school, not whether they could be better met in another school: *S –v- Oxfordshire*

[1] This is the latest (February 2011) version of a paper which I first produced about 5 years ago and which, in earlier forms, has been widely circulated. Each version supersedes the previous versions. No doubt, this one will be superseded in due course as well. I welcome comments and suggestions for additions: davidwolfe@matrixlaw.co.uk

	[2005] EWHC 196, [2005] ELR 443. "It is not the function of the special educational needs provision to provide for a child's social needs (at least not those which are not also educational needs)": *The Learning Trust –v- MP* [2007] ELR 658 para 43. The Tribunal can seek and consider evidence on a child's non-educational needs as part of taking a "holistic" view, but must remember that it is an *educational* tribunal: *W –v- (1) Leeds City Council* [2005] EWCA Civ 988.
Over what time period?	When considering what is "appropriate" (for Parts 3 or 4), the LEA/Tribunal must, where it arises as an issue, have regard to the curriculum presently being followed by the child and the impact of disrupting that curriculum: *W –v- Gloucestershire* [2001] EWHC Admin 481. The LEA/Tribunal should not simply look at the short term needs of a child in drawing up a Statement: *Wilkin & Goldthorpe –v- Coventry* [1998] ELR 345 (error in only looking at the one term the child had at primary and not at what would happen at secondary too); *Southampton –v- G [*2002] EWHC 1516; [2002] ELR 698 (error in not looking at cost of whole GCSE course).
Statements of Special Educational Needs – General	
Statements	Statements have to be intelligible to people who have to read them and not just to their authors. The parties have to be able to reach a good understanding of what the words mean. It is no good if they are ambiguous: *T –v- Hertfordshire* [2003] EWCA Civ 1893.
What order to consider the parts	Part 4 specifies to placement at which the SEP in Part 3 which is required to meet the SEN in Part 2 will be made. The decision-maker (LEA or Tribunal) must thus develop Part 2, then Part 3A then 3B then 4: *A –v- Barnet* [2003] EWHC 3368; "It is important… to identify or diagnose the need before going on to prescribe the educational provision to which that need gives rise, and only once the educational provision has been identified can one specify the institution or type of institution which is appropriate to provide it." *The Learning Trust –v- MP* [2007] ELR 658 para 42: The Tribunal had erred in law in deciding on Part 4 and left it to the parents to "agree some amendments with the LEA to reflect our decision that [P] should be placed in a residential school. That was "putting the cart before the horse" in that Part 4 should only be decided after Part 2, then 3 had been resolved. See also *T –v- Neath Port Talbot* [2007] EWHC 3039.
Part 2	Part 2 can include narrative description of a child as well as specifying SEN (cf *R –v- Secretary of State for Education ex p E* [1992] 1 FLR 377): *W –v- Leeds CC* [2005] EWCA Civ 988, [2005] ELR 617.

Relationship between Part 2 and Part 3	Each special educational need specified in Part 2 must be met by provision specified in Part 3: *R –v- Secretary of State for Education ex parte E* [1992] 1 FLR 377.
Part 3 – Special Educational Provision	
Relationship between Part 3A (objectives) and Part 3B (provision)	Where something is identified as an "objective" in Part 3A, Part 3B needs to specify the SEP intended to meet that objective: *C –v- East Sussex CC* [2004] EWHC 3122 (Admin), [2005] ELR 367.
Relationship between SEP (Part 3) and non-educational provision (Part 6)	The question of whether any particular provision is educational or non-educational (or a mixture of both) is not a question of law; rather, it is a matter for the LEA and, on appeal, the Special Educational Needs Tribunal: *Bromley –v- SENT* [1999] ELR 260. *A –v- Hertfordshire County Council* [2006] EWHC 3428, [2007] ELR 95: It is well established that there is no hard boundary between "educational" and "non-educational" – some things could be both – the LA, then Tribunal, decides. And, just because particular provision brings some educational benefit, it does not follow that there is a special *educational* need for it. Much less does it follow that a provision bringing some educational benefit beyond school hours automatically translates into a special educational need (and thus special educational provision) beyond school hours.
Speech Therapy	Speech therapy should be treated as educational (i.e. Part 3) unless there are "*exceptional* reasons for not doing so": SEN Code para 8.49; *X&X –v- Caerphilly BC*[2004] EWHC 2140, [2005] ELR 78.
Requirement for specification of provision in Part 3	Following from the definition of SEP in EA s312 and the Schedule to the SEN regulations (which prescribe the format for a Statement) Part 3 must describe all aspects of the provision which differ from the provision normally made in *mainstream* schools in the area. Thus: • Placement in a different year group: *AB v North Somerset* [2010] UKUT 8. • Different class sizes: *H –v- Leicestershire* [2000] ELR 471. • Staff qualifications/experience: e.g. "teacher who is experienced in working with pupils who have significant learning difficulties and autism/communication disorders": *R –v- Wandsworth ex parte M* [1998] ELR 424. • Where small group work is involved, the size of the group, the length and frequency of the sessions: *L –v- Clarke and Somerset* [1998] ELR 129. • The need for and amount of 1:1 work: *L –v- Clarke and Somerset* [1998] ELR 129. • Input from other professionals, such as sessions of speech therapy: *R –v- Harrow ex parte M* [1997] FCR 761.

SEP in Part 3 must normally be quantified in terms of hours, staffing, etc	Code para 8.37: Provision should be quantified in terms of hours (etc) except, exceptionally, by reference to the "changing needs of the child". A child's needs may be "changing" in that way because the child itself is changing or because of the interaction between the child and its environment; but not because of external factors or changes; it is not permissible to leave provision unspecified or unquantified simply to allow for flexibility in the school's approach/arrangements: *IPSEA –v- Secretary of State* [2003] EWCA Civ 07 [2003] ELR 86. "The real question … is whether [the statement] is so specific and so clear as to leave no room for doubt as to what has been decided and what is needed in the individual case": *L –v- Clarke and Somerset* [1998] ELR 129). Words like "as appropriate", "as required", "regular", "periodic", "subject to review" are all likely to illustrate illegality. Example (of a child in a special school): "LS needs direct involvement with speech and language therapy in the classroom, initially a visit once a week for a term, thereafter reducing to at least once a fortnight. This should involve joint planning and delivery with the class teacher. The speech and language therapist also needs to manage a structured programme, which will include training, to support 'out of school' professionals in providing a consistent approach and assisting LS in developing and generalising his skills in different settings. Similarly LS's parents and carers need support so they may embed more firmly the full range of communication methods used in school so he can apply them in other contexts, including home and respite provision. The speech and language therapist will visit the home at least three times a year." Held, *S –v- Solihull* [2007] EWHC 1139, "much more detail" was needed. See also *M –v- Brighton and Hove City Council* [2003] EWHC 1722, condemning as impermissibly ambiguous (especially the last sentence): "Opportunities for individual and/or small group support within class and a withdrawal basis as considered appropriate to target literacy difficulties and specific areas of the curriculum. J needs to be in a class setting with others who have similar severity of specific learning difficulty and work across the curriculum. He needs to be taught by specialist teachers trained in teaching pupils with severe specific learning difficulties." And per *S –v- SENDIST & Solihull* [2007] EWHC 1139 saying (for example) that the therapist should give "initially a visit once a week for a

	term" was too vague [what happens after the term?]. Likewise, that the SALT "also needs to manage a structured programme which will include training to support out of school professionals in providing a consistent approach and assisting LS in developing and generalising his skills in different settings" [what sort of professionals?]. Similarly "LS's parents and carers need support so they may embed more firmly the full range of communication methods" [what type and intensity of support?]. Nor should the Tribunal have relied on the LEA's assurance that it would flesh out the detail later [unless that led to amendment to the statement, how would the parents appeal?]. The requirement to specify is "not a bureaucratic purpose…. by that provision, local authorities … and tribunals… are required to give full and adequate specific consideration to the needs of the child… the requirement for specificity outlaws … a general statement …. in such broad terms that it could lead to specific needs being ignored or inadequately focussed upon…. the second purpose is that, once made in terms which are specific the purpose of the provision can be furthered and effected by enforceability….": *E –v- Flintshire* [2002] EWHC 388, [2002] ELR 378. The legislative purpose is "to require focussed and express consideration to be given to the specific needs of a child and then to provide for them in terms which will further and effect its enforceability as a provision…": *IPSEA Ltd –v- Secretary of State for Education* [2002] EWHC 504, [2003] ELR 393. An LA policy not to specify/quantify is unlawful. Statements can refer to funding "bands" (see further below) but not as an alternative to specifying/quantifying provision nor so as to override or limit the specified/quantified provision. Note also that the fact that the LA has a policy of delegating "all" SEN funds to schools independently of the statementing regime is *not* an answer to an appeal against a refusal to assess or make a statement; the test for those things remains grounded in whether (per the Code) the child requires provision beyond School Action Plus and whether (per EA 1996 s324) the child's SEN is such that the provision needs to be "determined" by the LA. Funding follows that; not the other way round. The Tribunal is *not* bound by the LA policy.
Can the Statement leave matters in Part 3 to be dealt with by a future assessment?	The Statement must actually set out what has been decided by the LA and, on appeal, the Tribunal. Recall: section 324 refers to the LA "determining" provision. The Tribunal does the same. It cannot leave matters over for future assessment, such as: • the extent of disapplication from the National Curriculum: *C –v- SENT and Greenwich* [1999] ELR 5. • the nature or amount of other provision (say speech therapy) which is to be provided: *Re A* [2000] ELR 639. Example: *E –v- Rotherham MBC* [2002] ELR 266, [2001] EWHC 432 condemning a statement which provided SALT detail but then said that it

	was to be "formally reviewed every 6 months by a speech and language therapist" and that "any change in the level [of] support will require a formal discussion between the LEA, the NHS Trust and one or both of [C]'s parents, but the above level of support is to remain at no less than the present level until June this year." Although note that the Court of Appeal accepted as lawful a statement which made provision for future assessment of therapy needs where the statement was seen as necessary to get the child back into school and his therapy needs could not be assessed until he was back in school: *E –v- Newham* [2003] EWCA Civ 07; although presumably the results of the later assessment should then have been encapsulated in a fresh statement.
Can the Statement require parents to provide education?	A Statement cannot lawfully specify (in Part 3 or 4) provision which is to be made by parents: *A –v- Cambridgeshire* [2002] EWHC 2391, [2003] ELR 464. The Tribunal should look at what a statement requires of parents and ask whether it is "educational" or "special educational provision": *KW –v- Rochdale* [2003] EWHC 1770. See thus for example, *Tottman –v- Hertfordshire* [2003] EWHC 1725 [2003] ELR 1725, [2003] EWCA Civ 1893, in which the Tribunal lawfully found that there was no need for educational provision out of school hours (there was merely a need for "consistency of approach").
Can the Statement require other bodies to arrange/fund the required provision?	The Statement must make provision in its Part 3 for *all* the SEP in question and cannot leave it to bodies other than the LA (such as the social services department) to make such provision (whether identified in Part 5 or not): *T –v- Hertfordshire CC* [2004] EWCA Civ 927; *FJ –v- Cambridgeshire CC* [2002] EWHC 2391.
Can Part 3 make it the school's responsibility to fund provision?	Part 3 can make reference to the arrangements for funding the provision (e.g. the balance between school and LA or health and LA): *R –v- Cumbria CC ex parte P* [1995] ELR 337. But, whatever the effect of such arrangements on the relationship between the LA and the school, they have no legal effect in terms of the child's entitlement and the LEA remains ultimately responsible for making the provision if the school fails to do so: *R –v- Oxfordshire ex parte C* [1996] ELR 153*; R -v- Hillingdon ex parte Queensmead School* [1997] ELR 331. Para 8.6 of the Code of Practice. "LEAs have a duty under section 324 of the Education Act 1996 to arrange the special educational provision in a child's statement. LEAs may provide the facility in their funding agreements to intervene when a pupil is not receiving the

	provision in their statement and make the arrangements themselves, charging the costs to the school's budget."
Part 4 – placement – general	
Relationship between Part 3 and Part 4	".... part 4 cannot influence part 3. It is not a matter of fitting part 3 to part 4, but of considering the fitness of part 4 to meet the provision in part 3." *R -v- Kingston upon Thames and Hunter* [1997] ELR 223 at 233C. Recall, after all, that a consultation draft statement contains the LEA's proposals for Parts 2 and 3 but must be silent on type and name of placement: EA Schedule 27 para 2.
Evidence to support a placement	The decision to name a particular school must be based on proper evidence. Before naming a particular school, the Tribunal should normally have *at the very least* the prospectus, or oral evidence or a written statement from a member of its staff. Neither the fact of registration of an independent school nor the fact that other LEAs place children there is evidence of its suitability for children in general let alone for the particular child in question: "a Tribunal may draw reassurance or comfort from those facts, but no more…": *LB Southwark –v- Animashaun* [2005] EWHC 1123, [2006] ELR 208. The decision as to whether a particular child should be placed at a particular school must be based on the particular child and their particular needs. The fact that there are other children with greater SEN whose needs are being met by the school is irrelevant: *MMB –v- Hillingdon* [2004] EWHC] 513.
Must the school have the provision in place already?	The fact that a particular school does not have all the required facilities at the time of the Tribunal does not preclude it being named provided that the Tribunal is properly satisfied by the assurances that it will do so by the time the child attends: *Lawrence –v- LB Southwark* [2005] EWHC 1210; and, of course, the provision specified in Part 3 can, in any event, be enforced by the child through judicial review proceedings: *R –v- Harrow ex parte M* [1997] FCR 761*, VA –v- Cumbria* [2003] EWHC 232. In *N v North Tyneside Borough Council* [2010] EWCA Civ 135 N sought to compel delivery of that SALT in her Statement by judicial review. The Administrative Court refused to compel delivery. The Court of Appeal held that to be wrong. The obligation under the Education Act 1996 s324(5) on an LA to arrange the SEP specified in a statement of SEN was absolute. It was not merely a "best endeavours" obligation which was satisfied where the LA had arranged most of the elements of Part 3 of the statement and considered that the child did not require the others (despite the Tribunal having decided to the contrary). A provision in a statement which purported to allow an LA to change provision without amending the statement was unlawful.
Specifying a type/name	Part 4 *must* set out the "type of school" which is considered appropriate (e.g. mainstream, special, residential, MLD, EBD, etc). But, unless para 3(3) of Schedule 27 compels it, there is no absolute *legal* obligation to name a particular school: *Richardson –v- Solihull* [1998] ELR

	319. Where, however, the LEA/Tribunal has identified "mainstream" as the "type", then it should normally name a particular school: *MH –v- Hounslow* [2004] EWCA 770 [2004] ELR 424 (see further below). Type includes "primary" or "secondary" which must be specified: *R(M) –v- East Sussex* [2009] EWHC 1651, rejecting an LA's argument that it did not need to amend a statement to anticipate secondary transfer where the statement did not specify primary and where the school named made provision 5-16 such that (on its case) no amendment was needed, and thus no right of appeal would be triggered.
Relevance of breakdown of relationship between parents and school	The Tribunal is entitled to take account of the breakdown in considering suitability of a placement and "give some weight to it" *L –v- Wandsworth* [2006] ELR 376.
Relevance of stress on a pupil	*R(B) v Vale of Glamorgan* [2001] ELR 529: A 16 year old suffering from mental ill-health refused to attend the school specified in Part 4 of her statement of SEN. Her parents' appeal was allowed because there had been a failure to address how, notwithstanding her refusal, it concluded that the school could provide for her needs. *MW v Halton BC* [2010] UKUT 34: If a tribunal were merely to find that a pupil, while attending or being expected to attend a school, experienced symptoms (from whatever cause) consistent with stress sufficient to be of evident concern to his medical advisers, it would need to be able to form a conclusion that the school proposed was nonetheless "appropriate". This implies a need to consider the impact, if any, of attendance on the child and how, if at all, the condition can be managed in such an environment and (since the circumstances are unlikely to be entirely fixed, or necessarily clear-cut) monitored.
Relevance of multi agency assessment to a residential placement	The SEN Code (para 8.74) says that a residential placement will be appropriate where a multi-agency agreement identifies various specified circumstances but does *not* make the existence of those circumstances a pre-condition to such a placement: *The Learning Trust –v- MP* [2007] ELR 658 para 53.
Where parents ask for a particular *maintained* school placement	
Parental request for a maintained school (mainstream or special)	If (per para 3(3) of Schedule 27 of EA 1996) the parent has requested that a particular *maintained* school should be named, then Part 4 *must* name that school as long as it is: • suitable to meet her or her needs; • his/her attendance would be compatible with the provision of efficient education for the children with whom he/she would be

	educated and the efficient use of resources
Efficient use of resources	The mere fact that the parentally-preferred provision is a bit more expensive is *not* an automatic barrier under para 3(3) as above to placement. The LA/Tribunal must balance the statutory weight given to the parental preference against the extra cost in deciding whether the extra cost is "inefficient", and even if it is found to be "inefficient" the Tribunal must still then, as a second stage, balance the extra cost against any extra benefit it is claimed to bring for the child: *L v Essex, Gibbs J* [2006] ELR 452 (upholding a decision in which the Tribunal had held that £4,000 extra was *not* inefficient, and thus did not even need to go on to consider whether that extra cost was justified by extra benefits to the child). It is only if the extra cost is "significant" that the parentally preferred placement is displaced *Surrey CC -v- P* [1997] ELR 516. See also *C –v- Lancashire* [1997] ELR 377. The "efficient resources" are those of the LA responsible (not LAs generally): *B –v- Harrow (No 1)* [2000] ELR 109 such that: the LA can take into account the cost of an out-of-area placement if that is requested; and the LA can take into account – in a special school funded on a place-led basis – the "wasted" cost of not placing the child at the school. But note that expenditure by a maintained school is by law LEA expenditure such that increased (or reduced) school expenditure (i.e. depending on the child attending) is still taken into account in the resource balance even if the amount delegated to the school would not change the amount delegated to the school by the LEA: *X City Council v SENDIST, AB, MB & GB* [2007] EWHC 2278, (2008) ELR 1
Incompatible with the efficient education of others	A preference under para 3(3) of Schedule 27 EA 1996 was only displaced by a positive finding of "incompatibility with the efficient education of other children" and not merely by evidence of an impact on those other children: *Hampshire v R & SENDIST* [2009] EWHC 626, (2009) ELR 371. When considering the question (in para 3(3) of Schedule 27) whether "the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated" the Tribunal was entitled to consider the impact on all or any children at the school. When explaining its decision, however, it needed to give a clear identification of just what difference D's admission (not the admission of all four children with appeals pending) would have, and on the efficient education of which children: *NA v Barnet* [2010] UKUT 180 (AAC).
EA 1996 s9 in play even where parent requests a maintained school	Even where the para 3(3) *duty* to name the maintained school requested by parents has been displaced by (e.g.) "inefficient use of resources" the s9 obligation (as below) is still in play; i.e. s9 does not only apply where an independent school is requested: *O –v- Lewisham* [2007] ELR 633; But note that the decision maker must consider para 3(3) and section 9 separately – they do not collapse into a single test: *Ealing –v- SENDIST & K* [2008] EWHC 193 (Admin).

Where parents ask for a particular independent placement/provision	
Parental preference for an independent placement – s9 EA 1996	Regard is to be had to the principle that education is in accordance with parental wishes unless that involves unreasonable public expenditure. There is no obligation (as such) to give effect to such preference: *C –v- Buckinghamshire* (1999) ELR 179. Even if the Tribunal finds incompatibility under section 9, that is not the end of the process. It does not mean that the Tribunal is entitled to ignore the reasons lying behind the parent's choice of school. Those are matters still to be taken into account by the Tribunal in the exercise of its discretion under s324(4) and weighed in the balance among the other factors which the Tribunal considers to be relevant: *Hampshire v R & SENDIST* [2009] EWHC 626.
Efficient instruction and training of whom?	Reference to "the provision of efficient instruction and training" in s9 EA 1996 is to the impact on the education of the other children with whom the child will be educated and not just the child concerned in the appeal: *Hampshire v R & SENDIST* [2009] EWHC 626.
Whose public expenditure?	The term "public expenditure" is concerned with the impact of the parent's choice on the public purse generally and thus required the Tribunal to take into account the cost of social services respite provision which would be saved by placing the child in a residential rather than day school *O –v- Lewisham* [2007] ELR 633. See also *EH v KCC* [2010] UKUT 376 (AAC). Additional expenditure by a maintained school arising from placing a child there is (as a matter of law) additional expenditure by the LEA even where the LEA has in place a scheme of delegation which means that it would not provide any extra funds to the school if the child was placed there: *X City Council v SENDIST, AB, MB & GB* [2007] EWHC 2278, (2008) ELR 1 [2008] ELR 1
How to calculate public expenditure for section 9?	It is only the marginal (i.e. additional) cost of the placements under consideration which is relevant; thus, if the taxi is already provided, or the LSA could look after a second child at no extra cost, then there is no additional public expenditure: *Oxfordshire –v- GB* [2001] EWCA 1358, [2002] ELR 8. But note that a specific evaluation is needed, particularly if the cost balance is critical to the choice between two placements which have been found to be appropriate. Accordingly, where transport was needed, it could not be assumed that the marginal cost of transporting the child was nil where a taxi was already covering that route: evidence was needed as to how the price was affected, if at all, by the number of children carried. The Tribunal should have identified the issues it was considering and then expressly dealt with them: (1) what would be the cost of transport without an escort? (2) what would be the cost of the escort? (3) would an additional vehicle be required and, if so, at what cost? *W –v- LB Hillingdon* [2005] EWHC 1580.

	Note also *Slough v SENDIST* [2010] EWCA Civ 668, where the Court of Appeal upheld a finding of the Tribunal that the costs of providing for the child in the maintained school would inevitably exceed the £10,000 fees of the independent school reasoning that: "this is a perfectly tenable finding unless Mr Hyams is correct in his contention that admission to a maintained school with space for the child is cost-free apart from any special requirements that the child brings with her. This contention is not in my judgment sustainable. Every element of a maintained school carries a cost in public funds. The recurrent exercise for Tribunals is to calculate what it is, because it is ordinarily only with such a calculation that the protection of public money to which the condition in s9 is directed becomes possible. If it were not so, a like-for-like comparison between public and private provision could never be made...." In *EH v KCC* [2010] UKUT 376 (ACC), *Oxfordshire* rather than *Slough* was followed by the Upper Tribunal.
Over what time to calculate for section 9	When considering the cost balance, the LEA/Tribunal should look at the effect over time of the choice of placement – thus the Tribunal erred in not taking into account the fact that, at the parentally preferred school, a year extra would be needed to complete GCSEs: *Southampton –v- G* [2002] EWHC 1516, [2002] ELR 698.
What is unreasonable?	As to what is "unreasonable", note *Wardle-Heron –v- Newham* [2002] EWHC 2806,[2004] ELR 68 in which the judge remitted back to the Tribunal for it to consider whether the extra cost was "unreasonable" a case in which the LEA package would cost £5,641 and the parental package £12,286, thus recognising that the difference (nearly £7k) was not necessarily "unreasonable". Similarly £4,000 was not necessarily unreasonable given the benefits which arose in *Ealing –v- SENDIST & K* [2008] EWHC 193. See also *MM & DM v Harrow* [2010] UKUT 395 (AAC) where the UT declined to decide whether £17,000 (an extra 60%) would inevitably be unreasonable public expenditure. Other appeals have, however, suggested that under the s9 'unreasonable public expenditure' test even fairly modest additional sums required to place a child in the parentally preferred school may prevent the Tribunal from naming it *unless* there is a clear explanation as to the additional benefit to be derived from the parental placement *and* the Tribunal explains why it is not unreasonable for this to be funded by the LA. As always, the detailed reasoning is key when deciding appeals on the basis of respective costs.
Academies and Free Schools	Academies are independent schools not maintained schools, and operate under a contract (a "funding agreement") between the Secretary of State and an "academy trust". As such, obligations on maintained schools do not apply to academies unless academies are specifically mentioned in the legislation or the funding agreement contracts into them. Section 316 EA 1996 (qualified duty to secure mainstream provision) expressly applies to academies, but para 3(3) of Schedule 27 does not

	apply. Section 9 will still apply and the usual approach to s9 should be possible. Accordingly, the Tribunal must look at the particular funding agreement for the particular academy. Funding agreements vary. Early versions varied and often said little about SEN, and later "models" have changed over time. The latest (Coalition Government) model states that the governing body of an academy trust must comply with all the duties imposed on the governing bodies of maintained schools in Pt 4 EA 1996. It also provides that where an LA proposes to name an academy in Part 4 of a statement of SEN, it must give the academy trust written notice of this. The academy trust must consent to being named within 15 days of such notice, except where admitting the child would be incompatible with the provision of efficient education for other children, and where no reasonable steps may be made to secure compatibility. In deciding whether a child's inclusion would be incompatible with the efficient education of other children, the academy trust must have regard to the relevant guidance issued by the Secretary of State to maintained schools. If the academy trust determines that admitting the child would be incompatible with the provision of efficient education, it must, within 15 days of the LA's notice, notify the LA in writing that it does not agree that the academy should be named in the pupil's statement, setting out all the facts and matters relied upon. If the LA does not agree with the academy, the academy must admit the child but can ask the Secretary of State to determine that the LA has acted unreasonably in naming the academy and to make an order directing the LA to reconsider. The Secretary of State's determination is final (subject to the parents' right of appeal to the Tribunal. Decisions of the Tribunal are binding on academies. The Academies Act 2010 simplifies and streamlines the process by which a maintained school becomes an academy, but it is not clear what will happen to the existing body of academies and their funding agreements. "Free schools" are based on the same statutory framework as academies. As yet there are no model agreements, but under the Academies Act 2010 they will need to comply with the SEN obligations.
Where parents want a maintained *mainstream* placement	
Parental requests for mainstream – section 316 EA 1996	DFES Guidance 0774/2001: "22. The starting point is always that children who have statements will receive mainstream education. The new section 316 states that a child who has special educational needs and a statement *must* be educated in a mainstream school unless this would be incompatible with – (a) the wishes of the child's parents; (b) or the provision of efficient education of other children. **These are the only reasons why mainstream education can be refused outright**."

	"24. **Mainstream education cannot be refused on the grounds that the child's needs cannot be provided for within the mainstream sector**. The general duty assumes that with the right strategies and support most children with special educational needs can be included successfully at a mainstream school. The local education authority should be able to provide a mainstream option for all but a small minority of pupils. Local education authorities should look across all of their schools and seek to provide appropriate mainstream provision where possible..."
But surely we have to ask whether the mainstream placement is suitable/appropriate?	No. "Suitability" is no longer an issue when considering whether to specify mainstream as a "type" in Part 4 if the parents wants it. In effect, the statute deems that, for all children, mainstream is suitable or can (and thus must) be made suitable, unless that results in incompatibility with the education of others. That requires the LEA/Tribunal to consider (and include in Part 3) the additional support the child requires to make the placement suitable. Additional support must be provided to ensure that a mainstream placement (albeit not necessarily a particular mainstream placement) is made available. The only issue is whether the placement (including thus the additional support put in place to support the child) would be incompatible with the education of other children (section 316(3)(b)) and that incompatibility cannot be removed by the taking of "reasonable steps" (section 316A(5)/(6)). See *MH –v- Hounslow* [2004] EWCA Civ 770, (2004) ELR 424; *Bury MBC v SU* [2010] UKUT 406 (AAC).
So how do we deal with a parental request for a particular *mainstream maintained* school?	Decision steps: 1. If parents have expressed a preference under para 3 of Schedule 27 (i.e. for a maintained mainstream school), consider it by reference to that paragraph first. 2. Unless one of the disqualifiers in para 3(3), applies, they have a *right* to that placement. 3. If one of the disqualifiers bites (see above on inefficient use of resources), then consider the <u>type</u> of placement under section 316. 4. Unless incompatible with the education of others <u>and</u> the steps to remove the incompatibility are unreasonable, then the Tribunal *must* specify mainstream as a *type* in Part 4. 5. It should then try and identify a particular placement. 6. In doing so, all mainstream schools put forward by either parent or LA are candidates including the school put forward by the parent under para 3 (and rejected under para 3). 7. But the parent does not have a *right* to have any particular school named at this stage, only a right to have it considered as a *candidate*, albeit helped by section 9 (the general duty to educate in accordance with parental preference subject to unreasonable expenditure). Example: the child requires classes fitted with hearing aid loops; the parents want mainstream; s316 can secure them mainstream, but not a particular mainstream, such that the Tribunal could order placement at a mainstream which has been equipped by the LA with loops. 8. But it may nonetheless be necessary (to comply with section 316) to prescribe additional provision to make "suitable" that which was considered "unsuitable" (per para 3 of Schedule 27).

Does s316 apply to a request for change of name only?	Section 316 does *not* apply when considering a parental request under Schedule 27 to change the name of the placement in Part 4 (because changing name would not change the "type" i.e. from special to mainstream): *Slough –v- SENDIST* [2004] EWHC 1759, [2004] ELR 546; although that would not be the case where the statement was (unlawfully as it happens) silent as to "type" of placement and Part 3 was consistent with a mainstream placement, such that changing the name was all that was needed to achieve the outcome the parents wanted.
Where parents ask for a home programme or other non-school placement	
What about home programmes or placements out of school? (section 319 EA 1996)	By section 319 EA 1996, LEA can make provision out of school if appropriate provision cannot be made in school. The first question to be asked is what does the child need (i.e. decide on Part 3) then decide if that can be provided in school: *S –v- Bracknell Forest* [1999] ELR 51. *TM v Hounslow* [2009] EWCA Civ 859: To answer the question whether or not it would be "inappropriate" for provision to be made in a school, it is not enough to ask whether the school "can" meet the needs set out in Part 3. One must ask if the school "would not be suitable" or "would not be proper". That requires the LA to take account of the circumstances of the case which would include the child's background and medical history, the particular educational needs of the child, facilities that can be provided by a school and otherwise than at a school, the comparative costs of alternative provisions, the child's reaction to the provisions, the parents' wishes and any other particular circumstances that might apply. Where a "home programme" is identified (e.g. Lovaas) that should be described in Part 3 and can also be described in Part 4: *Wandsworth –v- K* [2003] EWHC 1424 Admin, [2003] ELR 554.
Ceasing to maintain a statement	
What happens when the child reaches compulsory school age?	Where live issues between the parties remained and it was possible that if an appeal went ahead, the Tribunal might have made an order that special educational provision be provided by the LA, then the Tribunal had jurisdiction despite the child being over compulsory school age and not on the roll of a school: *KC –v- Newham* [2010] UKUT 96. See also *Wolverhampton –v- Smith* [2007] EWHC 1117, (2007) ELR 418 and *Hill v Bedfordshire* [2008] EWCA Civ 661.
What happens when the child reaches 19?	Even where the student was 19 or over, cessation was not automatic and a right of appeal remains to consider whether it was no longer necessary to maintain the statement: *AW v Essex* [2010] UKUT 74. In *B v Islington* [2010] EWHC 2539, however, the Administrative Court disagreed with *AW v Essex* and held that its decision prevailed. Subsequent Tribunal decisions have followed *B –v- Islington* despite the

	decision in *Cart v UT* [2010] EWCA Civ 859, [2011] 2 WLR 36. Appeals on this issue are pending in the Court of Appeal.
Transport	
Transport?	Unless someone else has made free travel arrangements, an LEA must make such travel arrangements as they consider necessary in order to secure that suitable home to school travel arrangements, for the purpose of facilitating an "eligible child's" attendance at the relevant educational establishment in relation to him free of charge: EA 1996 s508B(1). Travel arrangements means transport or, with the consent of parents, an escort to accompany the child or payment of expenses: s508B(2). Travel arrangements made by a parent only displace the LEA's duty if the arrangements are made voluntarily: s508B(5). Relevant educational establishment means (essentially) nearest suitable school: s508B(10). Eligible child means of compulsory school age and includes children living beyond the statutory walking distance and children with SEN, a disability or mobility problems registered at a school within that distance who by reason of SEN etc cannot reasonably be expected to walk to school: EA 1996 Schedule 35B para 2. It follows from the above that parents of children with SEN cannot be required to escort their child (although some LEAs apparently do). Transport must be "non-stressful": *R –v- Hereford & Worcester ex p P* (1992) 2 FCR 732. For a child with a Statement, the transport would be "non-educational" – i.e. Part 6. And even then, per 8.89 of the SEN Code it would only exceptionally be put into the Statement (where child has particular transport needs). But, of course, the LEA remains under a s509 duty to provide. Where transport costs impact on the cost balance (whether under para 3(3) of schedule 27 or under section 9) the Tribunal will have to properly evaluate the costs involved – see *W –v- LB Hillingdon* [2005] EWHC 1580. This includes deciding what would be needed by way of suitable transport. *MM & DM –v- Harrow* [2010] UKUT 395 (AAC): "Transport is not an educational need. However, it has to be taken into account. A placement cannot be appropriate if the authority cannot provide suitable transport to the school. ...On appeal, the First-tier Tribunal is not concerned with whether the authority's proposed arrangements were within the range of reasonableness; it had to decide whether or not

	they were suitable. I also accept that stress, safety and comfort are not necessarily the only factors that might make a journey unsuitable." A statement can, in Part 4, name a school on the basis of parental preference and subject to an expressed agreement by parents to transport the child to school without the statement identifying a particular fallback to which the LEA would send the child if the parents ceased to transport: *M –v- Sutton* [2008] ELR 123,
What if the parents want provision in excess of that required?	
What if the school requested for Part 4 provides more than the child needs (e.g. un-needed residential)	Even if the Tribunal considers that the school proposed by the LA is not suitable, it does not follow that it should automatically name the school requested by parents if that latter school costs a lot more because it makes provision (e.g. residential provision) which the child does not need. The Tribunal should specify a type or consider adjourning if there may be other, less costly, options *Hereford & Worcester v Lane* [1998] ELR 319. Extended day provision does not necessarily mean a residential placement provided that appropriate provision beyond the normal school day is available: *R(TA) v Bowen & Solihull* [2009] EWHC 5. Such provision must obviously be taken into account in costs and it should also be specified to some extent in Part 3 rather than simply stating "an extended day" or similar. The decision should make clear the extent of extended day that is being approved as suitable provision for the child.
Fall back positions	In *Bromley v SENT* [1999] ELR 260, Sedley LJ rejected an argument by an LA that the SENDIST should have given it opportunities to canvass alternative schools after it had rejected the LA's proposal. He held: "While proceedings before SENTs are not expected to mimic litigation, a SENT is in the ordinary way entitled to expect each side to bring its full case forward, at least to the extent of putting down the necessary markers. No such marker was put down by the LA." See also Stanley Burnton J in *Hammersmith & Fulham v Pivcevic & SENDIST* [2006] ELR 594 para 62 "if a considerable amount of money turns on a decision of the Tribunal it is incumbent on the LA to prepare for and conduct its case with greater care."
Tribunal procedure	
Tribunal v the family law courts	The Family Division exercising its powers under the Children Act 1989 could not dictate to the Special Educational Needs and Disability Tribunal how it was to exercise its statutory jurisdiction under the Education Act 1996 in relation to a child who happened to be subject to a care order. The family court was no more bound in practical terms by a decision of the tribunal than was a parent and if the family court was able to make other "suitable arrangements" for the child's education then the family court was not obliged to agree that the child be sent to the school identified in the statement of special educational needs: *X County Council –v- DW, PW and SW* [2005] EWHC 162.

	A family proceedings court did not have the power to make an order under the Children Act 1989 s91(14) to prevent a mother from applying without permission for the further assessment of the educational needs of her son who was in care. *Re: M (a child)* [2007] EWCA Civ 1550. Even though her child (being M in the case above) was in care, MG could still appeal to the SENDIST against the Statement of Special Educational Needs made for him by the local authority. And, where the SENDIST directed that the local authority make him available for assessment, the local authority (having not challenged the legality of that direction) was obliged to do so – it had no residual discretion to decide not to obey the direction in the light of its view that further assessment was "abusive" (of which, as it happened, it offered no evidence) *MG –v- Tower Hamlets* [2008] EWHC 1577. The child's parents wanted him to attend a residential special school. The LA wanted him to attend a day special school which (because his parents were no longer able to look after him) he could only do so if accommodated by the local authority. The parents sought to exercise a power of veto in s20(7) of the Children Act 1989 over the accommodation, thus blocking the local authority's preference. The SENDIST acceded to that. The Court ducked the issue, which thus remains to be decided. [But note that the Tribunal did not grapple with the question of whether the fact that his educational needs could *only* be met where the school was combined with residential provision meant that the latter was providing education; nor was the point taken on appeal.] *Bedfordshire County Council v Haslam and others* [2008] EWHC 1070.
Role of the Tribunal	The Tribunal stands in the LA's shoes, re-evaluating the available information in order if necessary to recast the statement: *London Borough of Bromley v SENT* [1999] ELR 260. … if there was inadequate information [about the proposed school placement], the Tribunal should have taken the necessary steps to obtain it, if necessary adjourning to do so. Tribunals, it seems to me, cannot proceed on a purely adversarial basis, but have a duty to act inquisitorially, when the occasion arises by making sure they have the necessary information on which to decide the issues before them, rather than rely entirely on the evidence adduced by the parties. The Tribunal will usually have much greater expertise than the parents who appear before them. *W v Gloucestershire County Council* [2001] EWHC 481 para 15; *R(J) –v- SENDIST and Brent* [2005] EWHC 3315; *MW v Halton* [2010] UKUT 34. Note earlier judicial comments to the effect that the Tribunal has no power to consider issues not raised by the parents' grounds of appeal: *M –v- Essex,* 5 November 2001, unreported. It is not clear, however, whether the judge in that case was referred to *Bromley*, which takes

	precedence.
LA's duty to the Tribunal	Although the proceedings are in part adversarial because the LA will be responding to the parents' appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the LA should be placing all its cards on the table, including those which might assist the parents' case. It is not an adequate answer to a failure to disclose information to the Tribunal for an LA to say that the parents could have unearthed the information for themselves if they had dug deep enough: *JF v Croydon* [2006] EWHC 2368.
Can the Tribunal use its own expertise?	"A specialist tribunal, such as the SENDIST, can use its expertise in deciding issues [including rejecting expert evidence], but if it rejects expert evidence before it, it should state so specifically. …… where the specialist tribunal uses its expertise to decide an issue, it should give the parties an opportunity to comment on its thinking and to challenge it.": *L v Waltham Forest* [2003] EWHC 2907. However, the Tribunal can use its expertise in deciding between competing expert views and, for example, in ordering a level of provision in between that contended for by competing experts. *Wiltshire County Council v TM and SENDIST* [2006] ELR 56*; T & A v London Borough of Wandsworth* [2005] EWHC 1869*; D v SENDIST* [2005] EWHC 2722.
Procedure	*Barking & Dagenham v SENDIST & MG* [2007] EWHC 343: A tribunal had been correct in its decision to proceed with an appeal hearing in the absence of the LA and had been correct to rule that staff shortages were not an excuse for failing to submit a statement of case within the requisite time limit. *HJ v Brent* [2010] UKUT 15 (AAC): The Tribunal should have given reasons for its refusal to admit in evidence a video submitted at the hearing. The Tribunal needed to consider whether the evidence was relevant, whether it went to the issues in dispute, why it was submitted late and the overriding objective. *Camden v FG* [2010] UKUT 249 (AAC): Not the case that the Tribunal can only bar a party from attending a hearing following a failure to comply with a direction where there was wilful and repeated disobedience. *NW v Poole & SENDIST* [2007] EWCA Civ 1145, (2008) ELR 232: Where a case had been remitted to the Tribunal for it to provide additional specificity in the statement, that did not necessarily require that there should be a complete rehearing of all the issues.
Reasons	Reasons must, first, deal with the substantial points that have been raised so that the parties can understand why a decision has been reached… What was necessary was that the aggrieved party should be able to identify the basis of the decision. *R v London Borough of*

	Waltham Forest ex p L (2004) ELR 161. The High Court is giving increasing scrutiny to the question of whether the Tribunal has specifically identified the issues it must decide, decided them on the basis of proper evidence, and explained why it has decided each issue as it has: e.g. "We decided …. because ……". Many cases appealed to the High Court are conceded by the Treasury Solicitor (for the SENDIST) and the other party, and thus need to go back for rehearing before a fresh Tribunal, simply because the first Tribunal did not explain how it had decided each of the issues it needed to resolve. In *Jones v Norfolk & SENDIST* [2006] EWHC 1545, (2006) ELR 547, the Tribunal had failed to address the evidence of witnesses called by the child's parents in relation to whether a specialist school was required, and accordingly its decision was quashed.
Review and appeal to the Upper Tribunal	In relation to review, see *RB v First Tier Tribunal (Review)* [2010] UKUT 160 (AAC): "It cannot have been intended that the power of review should enable the First Tier Tribunal to usurp the Upper Tribunal's function of determining appeals on contentious points of law. Nor can it have been intended to enable a later First Tier Tribunal judge or panel, or the original First Tier Tribunal judge or panel, to re-decide the matter. This [the power of review] is intended to capture decisions that are clearly wrong, so avoiding the need for an appeal. The power has been provided in the form of a discretionary power for the Tribunal so that only appropriate decisions are reviewed. This contrasts with cases where an appeal on a point of law is made because, for instance, it is important to have an authoritative ruling.... ....The key question is what, in all the circumstances of the case, including the degree of delay that may arise from alternative courses of action, will best advance the overriding objective of dealing with a case fairly and justly...." *Oxfordshire County Council v GB* [2001] EWCA Civ 1358. [2002] ELR 8: The Tribunal is required to give reasoned decisions and should not respond to an appeal by purporting to amplify its reasons.