Neutral Citation Number: [2014] EWCA Civ 398

Case No: C3/2013/2742

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM UPPER TRIBUNAL, THE ADMINISTRATIVE APPEALS CHAMBER**
**UPPER TRIBUNAL JUDGE WILLIAMS**
**HS14442013**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2014

**Before:**

**MASTER OF THE ROLLS**
**LORD JUSTICE PITCHFORD**
and
**LADY JUSTICE RAFFERTY**

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**Between:**

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| **WENDY HAINING** | **Appellant** |
| **- and -** | |
| **WARRINGTON BOROUGH COUNCIL** | **Respondent** |

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**David Wolfe QC** (instructed by **Maxwell Gillott**) for the **Appellant**
**Matthew Stockwell** (instructed by **Warrington Borough Council**) for the **Respondent**

Hearing dates: 11 & 12 March 2014

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# Approved Judgment

**Master of the Rolls:**

1. Section 9 of the Education Act 1996 ("the 1996 Act") provides:

> "In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

2. The question that lies at the heart of this appeal is how the words "public expenditure" should be interpreted. In relation to local authorities, do they mean expenditure incurred by local authorities in discharging their functions under the Education Acts as defined in section 573 of the 1996 Act ("education functions") (the narrow meaning); or do they mean expenditure incurred by *any* public authority as a result of the discharge by the local authority of the education functions (the wider meaning)? There is also a possible intermediate meaning, namely that "public expenditure" means expenditure incurred by a local authority in the discharge of *any* of its functions (including, but not limited to, education functions). Neither party contends for this intermediate meaning. In my view, they are right not to do so.

3. Ms Haining is the mother of B. He is 12 years of age and has significant special educational needs within the meaning of Part 4 of the 1996 Act in relation to which Warrington Borough Council ("Warrington"), as the responsible local authority, makes and maintains a Statement of Special Educational Needs.

4. B's parents would like him to attend W school ("WHS"), which is an independent residential special school (which Warrington accepts would meet his needs). Warrington says that he should go to G school ("GHS"), which is a maintained day special school. Warrington accepts that, if he attends GHS as a day pupil, it will also provide him with residential "respite care", which it currently provides for him at WHS. The comparative figures put before the Upper Tribunal (Administrative Appeals Chamber) (Judge David Williams) ("the UT") for the two schools were as follows. The total figure for a placement at WHS was £92,900 and the total figure for a placement at GHS was £90,441. The main differences between the figures were that (i) the school costs for WHS were £33,448 and the school costs for GHS were £61,238; and (ii) the cost of a placement at GHS included £29,336 for boarder/respite fees, whereas there was no such cost in respect of WHS.

5. Warrington made a Statement of Special Educational Needs in respect of B naming GHS. B's parents appealed. The First-tier Tribunal ("FTT") dismissed their appeal concluding at para 39 of its decision: "whatever way you look at it, a placement at WHS is much more expensive than a placement at GHS, would be over-provision, and could not be justified on educational grounds".

6. The parents appealed to the UT. Judge Williams expressed the provisional view that the decision of the FTT may be erroneous with regard to its analysis of what constitutes "public expenditure" in section 9 of the 1996 Act. He directed a hearing of this issue. He refused the parents permission to appeal on the other issues that they sought to raise. Following the hearing, he dismissed the appeal on the "public expenditure" issue. I refer to the material parts of his judgment at paras 22 to 26 below.

7. The issue that arises on this appeal is whether, in comparing the cost of placements at the two schools, Warrington (and on appeal the FTT and the UT) should have left out of account respite care and other costs that were to be met from public expenditure, and limited the comparison to the costs that were to be met from its education budget.

*The statutory framework*

8. The powers and duties of the local authority which are relevant to this appeal are those set out in Part 4 of the 1996 Act. Section 324 provides:

> "(1) If, in the light of an assessment under section 323 of any child's educational needs and of any representations made by the child's parent in pursuance of Schedule 27, it is necessary for the local 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 educations needs.
>
> (2) The statement shall be in such form and contain such information as may be prescribed.
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> (3) In particular, the statement shall—
>
> (a) give details of the authority's assessment of the child's special educational needs; and
>
> (b) specify the special educational provision to be made for the purpose of meeting those needs, including the particulars required by subsection
>
> (4) The statement shall—
>
> (a) specify the type of school or other institution which the local authority consider would be appropriate for the child;
>
> (b) if they are not required under Schedule 27 to specify the name of any school in the statement, specify the name of any school or institution (whether in the United Kingdom or elsewhere) which they consider would be appropriate for the child and should be specified in the statement."

9. Schedule 27 makes provision for the making and maintenance of statements. Para 3(1) requires a local authority to make arrangements for enabling a parent of a child who is the subject of a proposed Statement or proposed amended Statement to express a preference as to the maintained school at which he wishes his or her child to be educated and to give reasons for that preference. Subparagraph (3) provides:

> "Where a local authority make a statement in a case where the parent of the child concerned has expressed a preference in pursuance of such arrangements as to the school at which he wishes education to be provided for his child, they shall specify the name of that school in the statement unless—
>
> (a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or
>
> (b) 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 or the efficient use of resources."

10. The term "local education authority" wherever it appears in the 1996 Act was replaced by the term "local authority" by virtue of the Local Education Authorities and Children's Services Authorities (Integration of Functions) Order 2010 ("the 2010 Order") which was made pursuant to section 162 of the Education and Inspections Act 2006.

*The previous authorities*

11. The meaning of "unreasonable public expenditure" in section 9 of the 1996 Act (and its predecessor section 76 of the Education Act 1944) has been considered by courts and tribunals on a number of occasions. There are conflicting decisions on this issue, but it is common ground that none of them is binding on this court.

12. In *C v Special Educational Needs Tribunal* [1997] ELR 390 at p 401, I said that "public expenditure" must be a reference to expenditure by Local Education Authorities (LEAs), and did not include public expenditure by other bodies such as health authorities. I said that, so far as I was aware, LEAs had no right of access to the details of costs incurred, for example, by health authorities. If Parliament had intended LEAs to take into account the costs borne by health authorities, I would have expected this to be clearly spelt out in the legislation.

13. This decision was followed by Sir Richard Tucker in *S v Somerset County Council* [2002] EWHC 1808 (Admin), [2003] ELR 78. In that case the judge rejected the submission that the tribunal had erred by failing to take account of savings which would have been made to the local authority's social services budget if the parents' preferred school was named in their son's statement of special educational needs. He said at para 32 of his judgment that LEAs were responsible for ensuring that efficient use was made of their own resources

without reference to those of other local authority agencies. He also said that a body such as a Special Educational Needs Tribunal ("SENT") would have no means of knowing what provision could be made for other agencies or what the amount of such provision would be.

14. In *B v Harrow London Borough Council* [2000] 1 WLR 223, the House of Lords considered para 3(3) of Schedule 27 to the 1996 Act. It was not a section 9 case. The LEA had issued a statement of special educational needs in which it named a school maintained by itself rather than one maintained by a neighbouring authority for which the child's parents had expressed a preference. On the parent's appeal, the SENT held, by reference only to the cost to the LEA of paying for the child to be educated in the neighbouring authority's school, that such a placement would be "incompatible with ……the efficient use of resources". This decision was upheld by Moses J. In allowing the appeal, the Court of Appeal held that in such cases para 3(3) also required consideration of the resources of the authority maintaining the preferred school and remitted the case to the tribunal for reconsideration on that basis. The authority's appeal to the House of Lords was allowed. The House held that the tribunal had been entitled to reach its decision without reference to the neighbouring authority's resources.

15. Lord Slynn said at p 228G:

> "It seems to me also relevant in considering the question as to whose resources are referred to in paragraph 3(3) of Schedule 27 to bear in mind that the scheme for special educational needs provision is for children for whom the local education authority is "responsible." Those are children, inter alia, who are "in their area:" section 321(3). It is on the parents of such children that the notice of intended assessment and the statement of special educational needs is to be served and for such children that special provision is to be made. This points in my view to the resources concerned being those of the responsible local education authority. Such a result is reflected in the code of practice issued by the Secretary of State under section 313 of the Act, to which both the local education authority and the tribunal on an appeal must "have regard." That code, at paragraph 4.41, states three considerations governing the naming of a school in a statement, one of which is that the placement is compatible with "the efficient use of *the local education authority's* resources" (emphasis added). "The local education authority" is the authority making the statement. The reference to "the local education authority" is repeated in paragraphs 4.44 and 4.56 of the code. This is in no way inconsistent with the provision in paragraph 3(4) of Schedule 27 that if a local education authority proposes to name a school maintained by another authority, that authority, as well as the school's governing body, must be consulted. What it means is that the resources concerned are those of the

> authority whose resources will be used, i.e. the authority which pays.
>
> I do not regard this result as undermined or excluded by reference to section 322(3)(a) of the Act which provides that a health authority if consulted may refuse to help a local education authority if the authority considers that "having regard to the resources available to *them* [the health authority]" may refuse help (emphasis added). Parliament made it clear there, as the Secretary of State did for the local education authority in the code. It does not follow that references in paragraph 3(3) of Schedule 27 cannot, or do not mean "their resources." In my view that is what the words do mean.
>
> I do not, in any event, consider that it can possibly be intended that the resources other than the two authorities directly concerned should be considered. That would place a very difficult task on the local education authority. If such an exercise had been intended, it is more likely that it would have been imposed on the Secretary of State."

16. At page 229H, he said:

> "I do not consider that section 9 of the Act means that parental preference is to prevail unless it involves unreasonable public expenditure. In dealing with special schools, the authority must also observe the specific provisions of paragraph 3(3) of Schedule 27. This does not mean that the parent loses the right to express a preference. A preference may be expressed but it is subject to the qualifications set out in paragraphs 3(3)."

17. The principal authorities were reviewed by Mr Andrew Nicol QC (sitting as a deputy high court judge) in *O v London Borough of Lewisham* [2007] EWHC 2139 (Admin). O's amended statement of special educational needs provided that he should attend P school, a maintained day special school. His mother wanted him to attend PH school as a boarder. This was also a maintained school, but it was primarily a residential school. On her appeal, the tribunal decided that O did not need a residential setting and to place him at the PH school "would constitute over-provision and an inefficient use of resources". The cost to the LEA of a place at PH school would be approximately £20,000 more per year than one at P school. O's mother argued that if O attended PH school, he would no longer need the respite care that was being provided by the local authority under its social services obligation. This would result in a saving of £16,588, so that overall the extra cost of the placement at P school would be only £3,500 rather than £20,000 per year. The tribunal held that the social services element should not be taken into account in considering the "efficient use of resources".

18. On appeal to the high court, it was accepted that, in the light of the House of Lords decision in *B*, it was Lewisham's costs as an LEA that fell to be taken into account in deciding whether a placement at PH school would represent an

"inefficient use of resources" for the purposes of para 3(3) of Schedule 27. But it was argued that the tribunal should have considered the effect of section 9 and that section 9 had a wider scope than para 3(3) of the Schedule 27. The deputy judge held that the natural meaning of the term "public expenditure" in section 9 was that it was concerned with the impact of a parent's choice on the public purse generally and not exclusively with the cost to the LEA. The tribunal should have taken into account the savings on respite care costs. Its decision was, therefore, quashed.

19. I do not propose to set out his reasoning here. I agree with it and adopt it later in this judgment. I should, however, note that he held that section 9 applies even where the parents' preference is for a maintained school and para 3(3) of Schedule 27 is engaged. It is common ground that he was correct to do so.

20. The authorities were reviewed again by UT Judge Ward sitting in the Upper Tribunal (Administrative Appeals Chamber) in *CM v London Borough of Bexley* [2011] UKUT 215 (AAC). The local authority wished V to attend A school, a maintained school. Her mother preferred B school, which was maintained by the Royal Borough of Kensington and Chelsea ("RBKC"). RBKC recouped costs from other local authorities sending children to B school. The amount that would be paid by Bexley LBC in respect of V's attendance at B school would be £25,500, but no additional cost would be caused to the public purse as a whole by V's placement at B school. The FTT held that the decision in *B v Harrow* was directly in point and binding: detriment to Bexley LBC's resources under para 3(3) was sufficient to determine the appeal against V's mother.

21. Judge Ward held that "unreasonable public expenditure" in section 9 included expenditure by public bodies other than the LEA. The same conclusion was reached by other tribunals such as in *K v London Borough of Hillingdon* [2011] UKUT 71 (AAC) (HH Judge Pearl) and *FS (Re T) v London Borough of Bromley* [2013] UKUT 529 (AAC) (UT Judge Levenson).

*Decision of Upper Tribunal in this case*

22. Judge Williams set out his conclusions at paras 72 to 80. He expressed "concern" about the practical implications of the wide interpretation of "public expenditure" in section 9. At para 75 he said:

> "As I put it to the parties in argument in this case, I have seen nothing in the authorities taking a full view of the kind of "holistic" view of public expenditure that the authorities suggest should be relevant. For example, as judges of this Chamber are fully aware, children with special educational needs are often also children who are disabled and who, or whose parents, have entitlement to a range of state and local benefits. This may, for instance, involve the local authority in decisions about the proper level of award of housing benefit and, since this year, council tax reduction. It may involve costs shared between the local authority and the local health service trusts in providing attention and facilities for the child and in

> the child's home. Looking more widely, it may involve the Department for Work and Pensions and Her Majesty's Revenue and Customs in questions about state benefits and tax credits, for example the carer's allowance payable to those who care for others for 35 or more hours a week. Taken to its logical limit it could include public grants and tax breaks provided for the parents or guardians or those who assist the child in some way (such as a parent's employer)."

23. There were, therefore, "very serious questions to be asked about the practicality of identifying 'holistically' the public expenditure costs of treating a child with special educational needs who is placed in one school rather than another" (para 76). At para 77, he added:

> "Nor should it be forgotten that, as Sedley LJ pointed out in *Oxfordshire CC v GB,* education budgets may be ring fenced within a local authority. If they are, what help is it to a local authority's education budget if it has, as here, to pay out a significant sum for a child, while some other budget outside the ring fence, or possibly in some other authority or indeed at national level, receives the benefit of the saving."

24. He said that these practical difficulties had not been addressed by those judges who adopted the wider interpretation of section 9 "beyond the consideration of the legal powers enabling one authority to enquire of another (but not the costs or delays in doing so)" (para 79). He continued:

> "I therefore have serious reservations about imposing under section 9 a requirement in every case, whether Schedule 27 applies or not, a duty on a local authority—and therefore on a tribunal under its investigative jurisdiction—to explore all probable public expenditure costs and savings when reaching a determination about the regard to be had to section 9 in a particular case. And I cannot see any logical stopping point within the concept of 'public expenditure' between the expenditure of a local education authority (or perhaps of two education authorities in some cases) from its budget and a 'holistic' view that takes in any probable public expenditure on or for the child by any other public authority"

25. He concluded at para 80:

> "I therefore respectfully follow what I consider to be the authority of the House of Lords in *Burridge* and the Court of Appeal in *Oxfordshire v GB* read together with the recent comments of the Court of Appeal in *Shurvington* and do not follow the decision in the *Lewisham* case or the decisions that have followed that decision at this level. Putting it another way, for the above reasons I take the narrow view not the wide view of the proper interpretation of "unreasonable public expenditure" in section 9 of the Education Act 1996. I

> accordingly decide that in this case the First-tier Tribunal was entitled to leave out of account the respite care and other costs that were met from public expenditure but were not met from the education budget of the Council."

26. He concluded, therefore, that the decision of the FTT "was to be analysed by reference to the evidenced costs to the Council's education budget in placing B at GHS or WHS and not by reference to respite or other non-educational costs. The FTT was correct in not taking into account the respite and other costs that did not come from the Council's education budget. Accordingly, he dismissed the appeal.

*Analysis*

27. I would allow this appeal essentially for the reasons advanced by Mr Wolfe QC. In my view, the correct meaning of the words "public expenditure" in section 9 is expenditure incurred by a public body, as opposed to "private expenditure" (ie expenditure incurred by a private body). There are three linguistic points to be made. First, this interpretation accords with the natural and ordinary meaning of the words. If it had been intended to limit the expenditure referred to in section 9 to expenditure incurred by the Secretary of State or local authorities *in the exercise of education functions*, the section could and would have said so. Instead, Parliament chose the general words "public expenditure". Secondly, if the public expenditure were limited to expenditure incurred by the Secretary of State or local authorities in the discharge of their education functions, the word "public" would have been unnecessary. The Secretary of State and the local authorities *are* public bodies and expenditure incurred by them in discharging these functions is bound to be "public" rather than "private" expenditure. The word serves the important purpose of distinguishing the expenditure from private expenditure. Thirdly, the language of para 3(3) of Schedule 27 should be contrasted with that of section 9. Para 3(3) requires the local authority to specify the name of the school preferred by the parent unless the attendance of the child at the school would be incompatible *inter alia* with "the efficient use of resources". As we have seen, this phrase has been interpreted as referring to the resources of the LEA (now the local authority) and no other authority. In section 9 Parliament could have used the words "so far as that is compatible with the…..avoidance of the inefficient use of resources". If it had done so, it would have been clear (in the light of the authorities on para 3(3)) that the relevant expenditure was that incurred in the discharge of education functions and no other. I accept, of course, that Schedule 27 post-dated the predecessor to section 9. But the contrast in language in nevertheless striking. In enacting para 3(3), Parliament did not seek to reproduce the language of section 9.

28. It follows that a natural reading of section 9 clearly supports the wider interpretation. I do not accept the submission of Mr Stockwell that it is equivocal.

29. Nor does Mr Stockwell suggest that there is any obvious purpose that would be better served by adopting the narrow interpretation. The explicit purpose of the qualification to the section 9 duty is to avoid unreasonable public

expenditure. The obligation to have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents should not be at the cost of unreasonable public expenditure. Why would Parliament have regarded it as unacceptable for a local authority to accede to a parent's preference if it would involve unreasonable expenditure in the discharge of its education functions, but acceptable if it would involve unreasonable expenditure in the discharge of any other functions of the local authority (or any other authority)? No explanation has been advanced to explain why Parliament would have wished to make such a distinction.

30. In my view, therefore, section 9 should be given its natural meaning unless Parliament cannot have intended this meaning because it gives rise to difficulties which are so serious as to make the statutory provision unworkable or impracticable: see *Bennion on Statutory Interpretation* 6th ed section 313. Mr Stockwell submits that the wider meaning makes section 9 unworkable and/or gives rise to so many practical problems that it cannot have been intended by Parliament. He makes a number of points. First, the wider meaning may create financial problems for a local authority which has a ring-fenced education budget. Take the present case. Ms Haining contends that her choice will not result in unreasonable public expenditure because the (extra) costs of a residential placement of B will be offset by the savings in respite care costs currently provided for her by Warrington in the exercise of its social services functions. In such a case, the result could be that the education budget has to bear the cost of the respite care because the education budget cannot recoup the extra cost of the residential school placement from the social services department of Warrington which is currently responsible for the cost of the existing respite care. Secondly, a local authority may face practical difficulties in obtaining information from another authority about the cost implications for that other authority of meeting a parent's wishes. It should not be assumed that there will always be cooperation between public authorities in relation to the provision of information. Thirdly, non-educational costs or savings might fluctuate and yet there is no mechanism for review and adjustment in the light of changes in funding and expenditure. Fourthly, an authority discharging education functions is familiar with evaluating the reasonableness of expenditure in the field of education, but may not have the expertise to assess the reasonableness of expenditure in other areas, for example the reasonableness of travel costs or the cost of respite care. This suggests that Parliament intended the expenditure in section 9 to be limited to expenditure incurred in the discharge of education functions.

31. None of these points persuades me that the natural meaning cannot have been intended by Parliament. The starting point is that section 9 does not impose a duty on a local authority to act in accordance with parental wishes (provided that to do so would be compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure). It is a duty to "have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents" subject to those qualifications. As Denning LJ said in *Watt v Kesteven County Council* [1955] QB 408 at p 424:

> "Section 76 [of the 1944 Act the predecessor of section 9 of the 1996 Act] does not say that pupils must in all cases be educated in accordance with the wishes of their parents. It only lays down a general principle to which the county council must have regard. This leaves it open to the county council to have regard to other things as well, and also to make exceptions to the general principle if it thinks fit to do so."

32. As regards Mr Stockwell's first point, the meaning of "public expenditure" cannot be affected by the particular budgetary arrangements that local authorities may make from time to time in managing their financial affairs. In many (if not most) cases, the only relevant public expenditure will be that incurred by the local authority in the discharge of its education functions in the particular case. In those cases, the question of whether there will be unreasonable public expenditure will depend on a comparison between the direct cost of placing the child at school A and the direct cost of placing the child at school B and nothing else. Where there is an indirect effect on a ring-fenced education budget resulting, for example, from the fact that the cost of respite care comes out of that budget, this might justify a refusal to accede to the parental preference. It might be one of the "other things" to which Denning LJ referred in *Watt.* Alternatively, the local authority may have to adjust its financial arrangements to accommodate the problem. But the possibility of such a problem arising does not show that the natural meaning of "public expenditure" cannot have been intended.

33. As for Mr Stockwell's second point, the potential difficulties in obtaining information were the reason I gave for my decision in *C.* I said that, so far as I was aware, LEAs had no right of access to the records of health authorities. This point was convincingly dealt with by Mr Nicol at para 21 of his judgment in *Lewisham.* He said:

> "I do not have full information as to the legislative scheme which existed at the date of [*C v SENT*], but currently (and at the time that the Tribunal made its decision), an LEA would be able to call for assistance from a Local Health Board, a Primary Care Trust or a local authority when the LEA needed 'help in the exercise of any of their functions under [Part IV of the Education Act 1996]' — see Education Act 1996 s.322. I see no reason why the 'help' should not take the form of information as to the costs of services which that other authority would incur or would save if the parents' choice of school was adopted. The duty under s.322 is qualified where (I summarise) compliance would be unduly onerous or expensive. There may be situations where assessing the costs of services to an individual child would trigger these exceptions, but I do not imagine they are likely to be common. Moreover, where the provision of the information would demonstrate that the parents' choice was an unreasonable public expenditure, one might expect the other authority to be eager rather than reluctant to co-operate. In a case such as the present, the

> information in question would provide detail of expenditure which would be saved if the parent's choice was successful. Again, one might expect the authority, whose budget would be relieved, to be willing rather than unwilling to co-operate in supplying the information."

34. Furthermore, as Mr Wolfe points out, there is no evidence that lack of information has presented a problem for authorities exercising their education functions. This suggests that it is not a reason for preferring the narrower meaning.

35. As regards the third point, there is a mechanism for review. Section 328(5)(b) of the 1996 Act requires a Statement made under section 324 to be reviewed by the local authority within the period of 12 months beginning with the making of the Statement or (as the case may be) the previous review. Furthermore, the local authority can amend a Statement at any time: see para 2A(5) of Schedule 27. In any event, even if there were no mechanism for review, this would not be a reason for preferring the narrow to the wider meaning.

36. Nor do I consider that the fourth point can bear the weight that Mr Stockwell seeks to place on it. I accept that an education specialist may not have the expertise to assess the reasonableness of, for example, the travel or respite arrangements that are to be made in respect of a particular child or the reasonableness of the associated costs. But this will be the case whether the arrangements are made by the local authority that is responsible for discharging the education functions or are made by a different public authority. If the person who (on the wider interpretation) is required to decide whether a placement at a particular school will cause unreasonable public expenditure does not have the requisite knowledge to make the decision, then he or she must obtain it. There is nothing surprising or untoward about that. It does not point one way or the other to the correct interpretation of section 9.

37. In summary, therefore, the reasons advanced by Mr Stockwell do not, individually or in combination, justify giving section 9 a strained and unnatural meaning. I would, therefore, allow this appeal.

38. I should add for completeness that, in reaching this conclusion, I have placed no weight on the terms of the 2010 Order. I do not consider that Parliament intended to effect any substantive change to the 1996 Act by substituting "local authority" for "local education authority". As the Explanatory Memorandum made clear, the objective of the change was:

> "to create greater clarity and reduce the scope for confusion by bringing the terminology used in primary legislation into line with current policy and practice. The order does not in itself change the amending of the legislation except where necessary to, as far as possible, re create the original intention or, if it no longer relevant, to repeal the legislation….. The changes made by this order are technical and as there is no substantive change

> to the legislation beyond terminology the publicity will be low key…"

39. The question remains what relief we should grant. Mr Stockwell submits that we should not quash the decision, since it is inevitable that, even if Judge Williams had directed himself correctly, he would have arrived at the conclusion that he did. He would have been bound to hold that a placement of B at WHS would involve the incurring of unreasonable public expenditure. In order to determine whether this submission is correct, it is necessary to consider the relationship between section 9 and para 3(3) of Schedule 27. As I have said, it is common ground that section 9 must be addressed even in a case where para 3(3) is engaged.

40. If a local authority concludes that to specify the name of the school preferred by a parent would *not* be unsuitable to the child's age, ability or aptitude or to his special educational needs (para 3(3)(a)) and would *not* be incompatible with the provision of efficient education or the efficient use of its own resources, then the authority must name the school and section 9 has no role to play in relation to the decision. But if it concludes that to specify the parent's preferred school would be incompatible with the efficient use of its own resources, then it must go on to consider whether and how to exercise its discretion under section 324 of the 1996 Act. Section 324(4) requires it to specify the name of any school or institution which it considers would be appropriate for the child and which should be specified in the statement. One of the matters that it must take into account in exercising this discretion is the impact, if any, of section 9. In this respect, I agree with the analysis of Stadlen J in *Hampshire County Council v R and SENDIST* [2009] EWHC 626 (Admin), [2009] ELR 371 at paras 59 and 60. In other words, the authority must ask itself the question whether naming the school preferred by the parent would involve incurring unreasonable public expenditure generally. In many cases, the only relevant public expenditure will be expenditure incurred by the local authority discharging its education functions. In such a case, it is difficult to see how the result of the section 324(4)/section 9 exercise can properly differ from the result of the para 3(3) exercise. But in a more complicated case involving, for example, the costs of respite care, the answer may be different.

41. This is a more complicated case, although all the relevant public expenditure will be incurred by the same local authority, namely Warrington. It is more complicated because substantial respite care fees are involved. For the reasons I have given, Judge Williams erred in holding that, for the purposes of section 9, the FTT was entitled to leave out of account "the respite and other costs that were met from public expenditure but were not met from the education budget of the Council" (para 80). If those costs were not left out of account, then the cost to the public purse of placing B at WHS (£61,238) was lower than the cost of placing him at GHS (£33,448). In these circumstances, it is impossible to say that, if Judge Williams had directed himself correctly, he would have reached the same conclusion as he did. In my view, this matter must be remitted to the FTT for reconsideration in the light of this judgment.

*Conclusion*

42. For the reasons that I have given, I would allow the appeal and remit the matter for reconsideration by the FTT.

**Lord Justice Pitchford:**

43. I agree.

**Lady Justice Rafferty:**

44. I also agree.