



Date of Birth: 2019
Appeal By: The Parents
Type of appeal: ALN
Against Decision of: The Local Authority (LA)

Attendance:

The Parent participated in the hearing. Parent SALT, speech and language therapist, attended as a witness.

LA Counsel, represented the LA and the LA Early Years Inclusion Officer, attended on behalf of the LA. Their witness was an LA Educational Psychologist, Educational Psychologist.

An LA solicitor observed the hearing.

The hearing was held fully remotely by video with the consent of both parties. Parties and their witnesses raised no concerns about their ability to participate in proceedings. The Tribunal panel considered that all outstanding issues between the parties could be decided fairly and justly and that parties had been able to give oral evidence and submissions effectively at the hearing.

The Appeal

1. The parents appeal under s.70 of the Additional Learning Needs and Tribunal Wales Act 2018 (the “Act”) against the decision of the LA that their child, the Child, does not have Additional Learning Needs (ALN).

Background

2. The Child is currently 3 years and 10 months old. They have not attended pre-school or nursery since October 2022 but is due to start in reception class of school in September 2023. They are currently under compulsory school age as defined in the Education Act 1996 s. 8.
3. From June 2020 until January 2022 the Child attended a Childcare Centre, a pre-school setting, three times per week. From September 2021 until March 2022 they also attended a Nursery, also a pre-school setting. In May 2022 the Child attended 8 sessions at another nursery provision. The Child returned to the Childcare Centre in March 2022 until October 2022 when parents withdrew the Child due to safety concerns. Since that time they have not attended pre-school education.

4. Parents initially requested the LA consider the Child's ALN needs in April 2022. At this time the LA decided that their needs could be met through "universal provision, good quality inclusive practice in the setting, and there is currently no requirement for Additional Learning Provision". Following the provision of additional evidence, parents re-requested an ALN consideration to gain better understanding of the Child's needs and how these might be best supported. A decision of the LA was issued in June 2023 (page 184) which again records that the LA decided that the Child does not have ALN as they were making progress in pre-school settings and the outcomes and provisions discussed and agreed with parents were deemed by an Inclusion Panel at the LA to be Universal Provision in a pre-school setting.

It is against this decision that the appeal is registered.

Procedural Issues

5. It was agreed with the parties at the start of the hearing that the electronic evidence bundle totalled 537 pages. Page references given in the decision refer to the relevant page of the electronic evidence bundle.

Late Evidence

6. The day before the hearing, the LA made an application for two reports to be included as late evidence. These were from an NHS Speech and Language Therapist dated June 2023 and a Specialist Doctor in Community Paediatric dated July 2023. The parent agreed that the information in these documents would be relevant. The Tribunal decided that they should be allowed to ensure any decision is based on the most up to date information available.
7. A further document headed chronology of key events provided by the LA's Pre-school Outreach team was also included as late evidence by agreement as it provided a useful summary of the information provided by this team.
8. All documents admitted as late evidence are to be added to the end of the evidence bundle.

Attendance of an observer

9. At the start of the hearing the LA requested that a solicitor be allowed to observe the hearing for training purposes. No previous notification had been given of this application. The Parent did not object to the solicitor's attendance. The Tribunal allowed the request as it will support the training of LA staff.

Issues

10. The law that the Tribunal must apply in making their decision in the appeal was explained to parties at the start of the hearing. It is to be found in the Additional Learning Needs and Educational Tribunal (Wales) Act 2018 (the "Act") at section 2 and section 3. As The Child is under compulsory school age, specifically s. 2(3) applies.

11. Section 2 of the Act sets-out the definition of when a child has Additional Learning Needs;

- (1) *A person has additional learning needs if he or she has a learning difficulty or disability (whether the learning difficulty or disability arises from a medical condition or otherwise) which calls for additional learning provision.*
- (2) *A child of compulsory school age or person over that age has a learning difficulty or disability if he or she -*
 - (a) *has a significantly greater difficulty in learning than the majority of others of the same age, or*
 - (b) *has a disability for the purposes of the Equality Act 2010 (c. 15) which prevents or hinders him or her from making use of facilities for education or training of a kind generally provided for others of the same age in mainstream maintained schools or mainstream institutions in the further education sector.*
- (3) *A child under compulsory school age has a learning difficulty or disability if he or she is or would be if no additional learning provision were made, likely to be within subsection (2) when of compulsory school age.*
- (4) *A person does not have a learning difficulty or disability solely because the language(or form of language) in which he or she is or will be taught is different from a language(or form of language) which is or has been used at home.*
- (5) *This section applies for the purposes of this Act.*

The definition of Additional Learning Provision is found in section 3;

- (1) *“Additional learning provision” for a person aged three or over means educational or training provision that is additional to, or different from, that made generally for others of the same age in -*
 - (a) *mainstream maintained schools in Wales,*
 - (b) *mainstream institutions in the further education sector in Wales, or*
 - (c) *places in Wales at which nursery education is provided.*
- (2) *“Additional learning provision” for a child aged under three means educational provision of any kind.*
- (3) *In subsection (1), “nursery education” means education suitable for a child who has attained the age of three but is under compulsory school age.*
- (4) *Regulations may amend this section to replace the references to the age of three with references to a different age.*
- (5) *This section applies for the purposes of this Act.*

12. The Additional Learning Needs Code for Wales 2021 (the “Code”) provides statutory guidance on the application of this test and all chapters were carefully considered in reaching the decision including chapter 20 which deals with identifying ALN and deciding upon the ALP required.

Paragraphs 2.12 – 2.15 of the Code specifically set out the approach that must be taken in applying the legal test when deciding whether a child has Additional Learning Needs (ALN). It sets-out a two test approach which is to be taken when deciding when a child is under compulsory school age has ALN;

Applying the definitions to children under compulsory school age

2.12. The application of the tests is slightly different for establishing whether a child under compulsory school age has ALN.

(a) Does the child have a learning difficulty or disability?

2.13. The first test is still whether the child has a learning difficulty or disability, but the meaning of that is slightly different. It is whether the child, when of compulsory school age, is, or would be if no ALP were made, likely to have:

- i. a significantly greater difficulty in learning than the majority of others of the same age, or*
- ii. a disability (within the meaning of the Equality Act 2010) which prevents or hinders the child from making use of facilities for education or training of a kind generally provided for others of the same age in mainstream maintained schools.*

(b) Does the learning difficulty or disability call for ALP?

2.14. The second test is also the same as that for older children and young people, namely whether the learning difficulty or disability calls for ALP. However, for children aged under three, ALP means educational provision of any kind. For those aged 3 and over, ALP has the same meaning as for children of compulsory school age and young people (as set out above). The definition of ALP for children aged under three is slightly different to reflect the fact that these children are not at an age where maintained education is routinely available.

2.15. ALP for those aged under three can take many forms; for instance, group work or individual support - where it is educational provision of any kind. This might include, for example, educational provision in Flying Start or specialist health, physical, communication or sensory support. This can take place in an education setting or elsewhere.

Footnote 2 in the Code (page 29) states;

Section 2(2)(a) uses the term “significantly greater difficulty in learning”, but whether a difficulty in learning is significantly greater will depend on the application of the second test (whether the learning difficulty or disability calls for ALP) so it is not necessary to

consider this point at this stage...

It was explained to parties that the Tribunal would apply these two tests when considering the evidence

Evidence

13. The Child's parents consider that they are significantly delayed in multiple areas of their development when compared to their other children and their peers. These areas include having no awareness of danger; significant speech, language and communication delay and sensory issues. A major concern for the Parent is keeping the Child safe as "they are a climber" and is not aware of danger. They gave an example of an incident, also recorded in an email from the Outreach Service (page 264), where they were able to climb over a fence during a Forest School session whilst attending pre-school. The Child is essentially non-verbal. Following two 6-week blocks of speech and language therapy they have attended in 2023, the Child made little progress and did not gain any more words. They are still in nappies, are unaware of their toileting needs, smears faeces daily and are unable to participate in dressing or undressing. The Parent described the Child as having difficulties with attention, being hyperactive and impulsive. A Sensory Emotional Regulation questionnaire completed by the Parent dated June 2022 (page 60) set out concerns as speech delayed, toe walking, difficulties expressing themselves which resulted in challenging behaviour / meltdowns. Grabbing and pinching people very hard, pushing themselves against us, repetitive play when not engaged by an adult, screaming / screeching, climbing, running off dangerously. Jumping constantly. The Child self-regulates by running cars back/ forth on furniture. Since May 2023 the Child has attended an under 5's playgroup run by STAND (Stronger Together for Additional Needs and Disabilities). They have received 2 blocks of x 6 sessions of speech and language therapy from the NHS therapy team.
14. A document headed "Outcome and Provision" sent to parents along with the LA decision in June 2023 (page 186) sets out the main area of concern as identified by setting staff at that time was speech and language delay. At that time the LA did not agree to an Educational Psychologist assessing the Child.
15. A baseline assessment carried out by staff at the Childcare Centre in September 2022, when the Child was 36 months old, (page 35) identified the Child as not having attained at age expected levels for children between the ages of 27 – 38 months, "outcome 2", in any areas of development except for holding a mark making implement and fine manipulation. In Language, Literacy and Communication Skills they were at the expected level of a 11 – 16 months for listening and understanding and phonological awareness but at the expected level of 6 ¼ - 10 months for expressive language.
16. The LA Educational Psychologist assessed the Child in November 2022 and their report was provided in written evidence (page 88). They were able to observe the Child at home and then sought to triangulate their evidence by speaking with the

Parent and other professionals including staff at their pre-school settings, the Childcare Centre and the Nursey provision. They record that the Child was at that time being supported at the universal level of provision via the setting's Universal Link Worker. They record that they have made progress with their communication skills between in setting assessment between October 21 when they were at below 6 months level to then in May 2022 being at between a 18 – 23 month level. The LA Educational Psychologist's observation is whilst the Child can attend for some time on activities of their choosing, they are still reliant on adults to help them shift/ manage their attention but considers that this would not be atypical in a child whose language skills are developing at a slower pace. Assessment using the SEDAL suggested that the way the Child was developing socially would not be atypical for a child between 21/2 and 3 years old. The LA Educational Psychologist's assessment using the SEDAL tool shows that the Child is functioning lower than normal for their age in terms of their emotional development and would be typical for a child of 18 months to 2 years. A table (page 97) sets-out attainment as at both the Childcare Centre and the Nursey provision between October 2021 and September 2022. It includes the evidence from the baseline assessment from the Childcare Centre. The LA Educational Psychologist identifies that the Child is developing skills at a slower rate than their peers but had made progress over this time. An addendum report from the LA Educational Psychologist dated February 2023 (late evidence) records a meeting with the Parent. The Child's safety specifically in the playground was discussed and parents preferred school from September 2023. Agreed actions were that the LA were to request short-term funding to increase the adult: child staffing ratio to help the Child settle in.

17. When questioned by the Tribunal, the LA Educational Psychologist accepted that the Child "clearly has learning needs" when compared to other children of their age. However, what was important was the fact that the Child had made progress over the time they had been attending pre-school and staff had been able to regularly assess the Child. The LA Educational Psychologist confirmed that they have not seen the Child since her initial assessment in November 2022. Also that they have received no input or support from the Educational Psychology or specialist outreach teams at the LA since October 2022. This is because they have not been attending pre-school. They were not aware of their current levels of learning but again stated that at that time they did see the Child that they were making adequate progress. Compounding factors which will have impacted their learning in the LA Educational Psychologist's view were that they have not been in education since October 2022; the Child missed sessions and had poor attendance when they were in pre-school and the Child moved school in the LA Educational Psychologist's view "a lot". The LA Educational Psychologist was clear in their evidence that the Child cannot be expected to make progress when not attending a pre-school setting. When asked whether the interventions that the Child has received, especially from the Pre-School Outreach Team, were only based on the concerns raised by the Parent, the LA Educational Psychologist conceded they were not. Staff in both settings had also raised concerns about their progress. Following a break and on questioning by counsel for the LA, the LA Educational Psychologist again clarified their previous oral evidence. It remained

the LA Educational Psychologist's view that any needs that the Child has can be managed through universal provision and therefore the Child does not have ALN.

18. The Parent speech and language therapist, assessed the Child in October 2021 (page 83) whilst they were attending the Childcare Centre and the Nursey provision. Following observation in both settings, they found that the Child can be easily distracted by visual and auditory stimuli and was able to focus on the activities resented when the Child had adult support. They were dependent on adults using nonverbal communication and the use of situational clues to support their ability to understand. The Child needs an adult to be with them during activities to use appropriate adult-child interaction skills to encourage and develop their listening skills, verbal comprehension, expressive language skills and play skills. An Individual Communication Plan drafted by Parent SALT dated January 2023, (page 121) sets-out four key areas of focus for therapy sessions with a Speech and Language Therapy Assistant. They record that they have made progress on their joint attention, play and interaction skills and some progress with their language skills since they previously saw the Child in December 2022.
19. In their oral evidence, the Parent SALT confirmed that they have worked regularly with the Child whilst in pre-school settings and most recently when they were attending the STAND play group. The Child can now engage for longer periods of time, but a further assessment undertaken three-weeks previously using Teddy Talks found the Child to be at the 1-word level of verbal communication. They described their communication skills as being "significantly behind for their age". The Child requires visual support such as using Makaton signing to help their understanding. Adults working with the Child will need to provide modelling to develop their imaginative play. It is the Parent SALT's evidence that the Child needs full-time support now to model their language and communication. Even if placed in a small class size with high staff to pupil ratio the Child would require a key person for modelling to meet their needs. In addition the Child requires direct 1:1 speech therapy. This would not be provided within universal or targeted provision but be specialist provision. They confirmed the view of the Parent that at their current age the Child will not be diagnosed with a disorder rather than a delay to their speech, language and communication skills but they have a potential for a language disorder diagnosis. Staff working with the Child will require training in approaches such as ELKAN in order to provide appropriate support. The Child will also require a speech, language and communication programme with targets to be developed/ monitored by a therapist but delivered daily in school.
20. In March 2023 the Child's local Community Early Years Speech and Language Therapist reflected that the Child was making good progress with blocks of therapy, and so it was decided to continue with the local community therapy service. To respond to parental concerns, an additional appointment was offered with the Local Authority Child Development Centre's multi-agency team. A NHS speech and language therapist, assessed the Child for an hour in a large low sensory playroom with their parent and three staff members (late evidence). They concluded in a report dated June 2023 that their speech, language and communication skills are significantly behind for their age, and so cannot not be described as 'strengths'. The

Child presented during the session with needs in developing skills of attention, listening to and processing language, social Interaction (turn taking in play & communication including reciprocal conversation, eye contact, requesting, showing, directing attention, sharing things/sharing enjoyment, social smiling, facial expressions, nodding/shaking their head, gestures, imitation of actions, social chit chat), perseverance, compliance, understanding and expressive use of verbal language, speech (spontaneous & copying), play skills, shared play, imaginative play, copying play, pretend play, symbolic play. The Child would benefit from a rich stimulating environment where an adult can follow their lead, add language and experience. Routine might be very helpful. Total Communication is recommended (Routine, Objects of reference, Speech, Makaton signs, Visuals). Also adults who are not only responsive but also proactive. They recommend continued speech and language therapy involvement at the targeted and universal tiers e.g. skill share, writing individual communication programmes and safely delegating those to parents and staff. Continued speech and language therapy at the specialist tier e.g. blocks of therapy.

21. Medical evidence in a letter from a Specialist Doctor in Community Paediatrics, dated March 2023 (page 106) records that the Child has speech and language developmental delay, neurodevelopmental concerns, toileting issues, challenging behaviour and poor sleep. The Specialist Doctor in Community Paediatrics states that the Child will need “constant adult supervision” or will otherwise climb over a fence, run into a road or lock themselves in store cupboards as, reported to Specialist Doctor in Community Paediatrics by the Parent, the Child did at the Childcare Centre. The Specialist Doctor in Community Paediatrics notes the Child’s sensory issues including smearing and noted that at the appointment they were toe-walking with inflections to their toes. The Specialist Doctor in Community Paediatrics confirms they will be making a referral to occupational therapy and is considering a possible referral to behavioural management services. A further appointment is due in 6-months’ time and the Parent has been asked to complete a neurodevelopmental feedback form. A medical report for the ALN request (late evidence) was also completed by the Specialist Doctor in Community Paediatrics at this time.
22. A letter following a previous consultation with an Associate Specialist in Community Paediatrics, dated June 2022 (page 111), in the same NHS team, records that the Child is extremely hyperactive and impulsive as was clearly evident in the consultation where at one point they were trying to jump out of the window. Their recommendation was that the Child needs close adult supervision at all times. Neurodevelopmental behaviours were observed, which the team will monitor. If these behaviours continue in spite of speech progressing, consideration will need to be made for neurodevelopmental assessment when they are a bit older.
23. Written evidence from the LA’s Pre-School Outreach Service included a Foundation Phase Risk Assessment (page 86) carried out whilst they were at the Childcare Centre which identified the Child at medium risk of climbing on/ over furniture also of leaving the Forest School area. It states that the Child is to only be allowed in that areas if it

is on a 1:1 basis. Over eight separate observation reports written following visits from the Outreach service dated from September 2021 until September 2022 (page 211 and 225 plus others) record a consistent and regular level of specialist advice being given to the Childcare Centre and the Nursey provision on how to support the Child whilst they were attending. LA Early Years Inclusion Officer, previously manager of the service has provided further support since that time.

24. An email from the other nursery (page 235) a setting the Child briefly attended in May 2022, states that they settled relatively well but have bouts of tantrums, pushing and screaming.
25. The LA had provided no written evidence as to what they consider to be universal provision but refer to it as the provision that a school or educational setting can be expected to put in place for a child. It remained their view at the hearing that the Child does not have ALN as their needs can be met by universal provision.

Tribunal's decision with reasons

Does the Child have a learning difficulty or disability?

26. The speech and language assessment reports of both the Parent SALT and NHS speech and language therapist agree that the Child has delayed and possibly disordered speech, language and communication skills across all areas. The Parent SALT describes it as a "significant delay". Given the fact that they have worked with the Child over a period of time and has assessed the Child recently, the Tribunal are persuaded that this is how their needs not only present but should be described. The NHS speech and language therapist's assessment that their communication cannot be described as a strength is not specific enough. The evidence in both reports are not disputed by the LA. The Tribunal decided that this evidence alone is enough to find that the Child has a learning difficulty under the requirements of the Act.
27. Evidence from the base-line test and pre-school assessment is that the Child's learning in September 2022 was not in the expected age range. Across all aspects except for physical development they were at least 1 year but up to 2-years behind that expected of children the same age. This is a considerable gap in attainment for a young child and the Tribunal found that it is clear evidence that they have a learning difficulty when compared with peers. Again this evidence is not disputed by the LA. Whilst the Child had made progress when assessed in pre-school, there was no compelling evidence that the Child could be expected to "make-up" that level of learning. The LA Educational Psychologist's oral evidence that the fact they have not been attending pre-school is the reason for not progressing fails to take into account that all pre-school children are expected to learn and make progress outside of the school environment. They did not explain why the Child had not been able to make some level of progress. The Specialist Doctor in Community Paediatrics described the medical team who have seen the Child now a number of times in clinic as having neurodevelopmental concerns which are further being investigated. Given the Child's young age, it is surprising that the LA did not seek to assess the Child more recently given the Tribunal appeal was registered and this was a central issue to be decided.

In any event, the fact that over 10 months ago it was recorded that they had been making some progress towards expected levels of attainment is not persuasive evidence that the Child does not have a learning difficulty.

28. Having found that the Child does have a learning difficulty, there is no need to move onto decide whether they have a disability as defined under the Equality Act 2010. However for avoidance of doubt, applying the definition under section 6, our conclusion is that the evidence from the speech and language therapists and medical professionals support the Child being found to be a disabled child. The Specialist Doctor in Community Paediatrics' letters further supports this conclusion. Their communication impairment is more than minor or trivial and is therefore substantial. It is long-term as the evidence is that it has been on-going for more than 1-year and has an adverse effect on Child's ability to carry out normal day-to-day activities such as communicating with their peers, understanding instructions. The Parent told us that they are receiving Disability Living Allowance (DLA) for the Child. We see no reasons to doubt what they told us at all. This would be easily available evidence to the LA when deciding whether this criterion of the legal test had been met.

Does the learning difficulty or disability call for ALP?

29. It is the Tribunal's conclusion that the Child has already been receiving ALP. The written evidence from the Pre-School Outreach team, a specialist teaching team, is that the Child experienced numerous issues when attending pre-school to an extent which required them to provide advice and support to both settings not just once but on over eight separate occasions over a period of over a year. This is clearly a level of specialist teaching input that is not just to support a short-term issue. It is provision additional to and different from that made generally for other children of the same age. The Tribunal is clear that the comparator is not what provision is available, or expected to be available, in a school or educational placement as argued by the LA. The correct comparator is with the level of provision made for an ordinarily developing child of the same age. An ordinarily developing child does not require input from a specialist teaching team. It is therefore ALP.
30. The Child has been receiving direct speech and language therapy. Case law under the Educational Act 1996, such as in *X&X v Caerphilly BC [2004] EWHC 2140*, has long established that speech and language therapy is ordinarily to be considered educational provision. Communication is a fundamental skill in learning and therapy therefore educates and trains a child to learn. There is nothing to suggest that such legal precedent is no longer relevant to the ALN law introduced by Welsh Government. The definition of special educational needs and special educational provision under section 312 of the Education Act 1996 are very comparable. The Tribunal have concluded that the level of specialist speech and language therapy input the Child is receiving, as set-out in the evidence of both therapist and not disputed by the LA, is clearly ALP. The fact that it is delivered by the NHS is also not relevant. What is important as a determining factor is that the Child has had their communication needs identified and now requires appropriate provision of direct therapy to meet those needs. Again, an ordinarily developing child of the same age would not be expected

to receive such a level of therapy as education or training provision. In the Child's case, as a child under compulsory school age, the test is in fact lower than is receiving but instead expected to receive ALP when of compulsory school age.

31. At paragraph 45 of the LA's case statement (page 163) they record that the decision that the Child does not have ALN was made based on their view that their needs could be met at "universal/ target universal support" and that the support the Child needed therefore did not meet the threshold for Additional Learning Provision (ALP). It is the Tribunal's view that the LA have misinterpreted the legal test. Under the ALN legislative framework, when a child is identified as having ALN then an Individual Development Plan (IDP) must be drafted and then maintained either by an individual educational placement or the LA. The LA explained at the hearing that "universal provision" was the resources that are expected to be available to a pre-school to support a child with ALN. In deciding whether a pre-school or LA should be responsible for developing and maintaining an IDP i.e. making and funding the provision specified, then consideration of what "universal provision" may well be relevant. This is not the correct legal test to be applied in this case when deciding whether a child has ALN. In any event, even if the LA had been correct with the comparator, they failed to provide any evidence to support what this level of provision can be expected to be delivered for an individual child.

Order

1. The appeal is allowed.
2. **The Child** has Additional Learning Needs under the Additional Learning Needs and Educational Tribunal (Wales) Act 2018 section 2.

Dated August 2023