Tribiwnlys Addysg Cymru Education Tribunal for Wales

DECISION

Date of Birth:	2013
Appeal By:	The Parents
Against Decision of:	The Local Authority
Concerning:	The Child
Hearing Date:	2023

Persons Present:

The Parent	*Parent*
The Parent	*Parent*
Parent Representative, Solicitor	*Parent Representative*
Occupational Therapist	*Parent Witness 1*
Private Educational Psychologist	*Parent Witness 2*
LA Representative, Counsel	*LA Representative*
ALN Service Manager	*LA Witness 1*
Principal Educational Psychologist	*LA Witness 2*
Senior Educational Psychologist	*LA Witness 3*

1. The parents appeal the needs, provision and placement sections of the Individual Development Plan (IDP) made for their Child by the Local Authority (LA).

Mode of Hearing

2. The case was listed for oral hearing by way of video. The hearing was fully effective in this manner and no party objected this mode of hearing.

Attendance

3. Both parents attended the appeal. They were represented by a solicitor. Their witnesses were parent witness 1, an occupational therapist and parent witness 2, a private educational psychologist.

4. Counsel represented the Local Authority. The LA witnesses were LA witness 1, ALN service manager and principal educational psychologist for the LA and LA witness 2, senior educational psychologist.

Preliminary Issues

5. The panel were provided with a main bundle of 656 pages and version 4 of the working document. In addition, evidence that had been served in line with the case management directions was provided in a bundle of 66 by the LA. All of these documents were served in time. All evidence has been considered in full, even where not specifically referenced in this decision.

6. The parents sought to serve late evidence. This was contained in a bundle of 196 online pages. The content and nature of this evidence was discussed in the hearing. Counsel conceded that the evidence was relevant, counsel's objection was that it was served late. On checking, counsel had had a chance to read the evidence in full. Further, counsel had 2 educational psychologists with them as witnesses to deal with any matters arising. It was considered that there was no prejudice to the LA and therefore, the evidence was admitted as potentially relevant.

7. The parents had sought to serve, post 17.00 on the day before hearing, submissions of around 16 pages. The panel had not read these due to the lateness of them being provided. Counsel advised that should these be submitted and was going to ask for the appeal to be adjourned for the issue of secondary transfer to be considered as the parents had raised the issue for the first time in the appeal. Further, counsel was going to ask for the appeal to be relisted for a 2-day listing. We checked with the parties that the secondary transfer consultation had not yet started. It was confirmed that that was the case. We therefore sought agreement that the issue of secondary placement was not before us, as an initial decision had not yet been reached. The parties agreed. We found that therefore, there was firstly no need for the adjournment and certainly no need for another day of hearing just to deal with the parents' views. Parents are always asked to give their views in appeals that they bring. We did however accept that the parents' submissions were served after the working day and from what we had heard, dealt with matters not before us. We therefore declined to consider them in written form but invited the parents to tell us orally anything they wished to during the hearing, after confirming at the start of the hearing that that was the approach that we would take. No adjournment application was made on the basis of our approach.

8. The parent's solicitor had made an application to have a witness present from School B. This was made in writing prior to the hearing and the parties were told that all late applications would be dealt with at the start of the hearing. The parent's solicitor was reminded that the standard position was that each party could bring 2 witnesses but that in exceptional circumstances, an application could be made for additional witnesses. The parent's solicitor was asked what the exceptional reasons were in this case as it appeared that the issue of placement was live at the time of appeal. The parent's solicitor confirmed that they could not say that there was anything exceptional in the appeal but wanted to have the School B present in case the Tribunal had questions on suitability or how the Child's anxiety was presenting. We took the view that there was no need to hear from the School B. Suitability was not disputed by the LA and parent witness 2 was present who could, in their area of

professionalism, give evidence on the Child’s anxiety, having recently assessed them. The request for an additional witness was refused.

Background to the appeal

9. The Child had previously attended a mainstream school in England, where they had an Education, Health and Care Plan (EHCP). The school wrote a letter in July 2022 stating that they considered that the Child required a more specialist provision. That was the view expressed also at the annual review of the EHCP. The family moved to Wales in August 2022 and there is some dispute between the parties about the liaison prior to this. As stated in the appeal hearing and in case management, we are not looking at anything other than the issues in this case. What is not in doubt is that the Child started at School B, an independent mainstream school, in September 2023. The Child was given a LA IDP in May 2023. This IDP does not name anything under the “placement” section.

10. The parents consider that the Child’s needs are such that the Child requires more provision than is currently in the IDP and that the Child requires the specific environment of School B to allow them to make progress and manage to be more independent at school.

11. The LA dispute this. Their position is that the Child does have additional learning needs that are known and that can be appropriately met by provisions that are available in any maintained primary school in the Local Authority. In answer to specific case management directions asking the LA to name what school they were seeking to name and provide specific evidence from that school, they named School A.

Issues

12. The issues to be addressed are as follows:-
    - i) Should a summary of the Child’s additional learning needs (ALN) be set out at the start of section 2A?
    - ii) Does the Child have ALN in relation to a lisp and subtle speech sounds?
    - iii) Has the Child’s Developmental Co-Ordination Disorder (DCD) been defined as moderate, or should it be referred to as such?
    - iv) Are the Child’s self-care skills and mouthing of objects ALN?
    - v) Is more specificity in relation to the Child’s physical needs required?
    - vi) What provision should be specified to manage the Child’s anxiety?
    - vii) Does the Child require an individualised literacy programme and if so, what should it look like?
    - viii) What involvement should speech and language therapy have?
    - ix) Does the Child require a social skills group?
    - x) Does the Child require small class sizes?
    - xi) Does the Child require a specific anti-anxiety teaching approach to mathematics?
    - xii) Should the occupational therapy (OT) direct therapy be specific in terms

of targeted areas of provision and how long should the Child receive direct OT?

xiii) Does the Child require executive functioning coaching?

xiv) Are both school placements suitable?

xv) If both school placements are suitable, does placing the Child at School B amount to unreasonable public expenditure?

Evidence and Reasons

13. We have considered the case holistically as well as scrutinising the issues raised above. As a starting position we set out that the purpose of an IDP is to allow everyone working with a Child or young person with additional learning needs to be able to clearly and quickly ascertain what those needs are and what they need to ensure is in place for a Child to allow them to learn. To this end, the document must contain all relevant information, but it is to be succinctly put with no unnecessary commentary. The document loses its usefulness if it is either so brief that it does not provide the necessary information or too long so that the information is lost in a plethora of prose.

14. The first issue was in relation to a summary of the Child's ALN. We considered that an overall quick summary at the start of section 2A would assist those working with the Child to obtain a general overview of them. We consider that this is both useful and necessary. We find that the wording in its current form was not quite correct so have scrutinised all of the evidence, in particular, from the NHS professionals and have provided a summary of the Child's ALN at the start of 2A.

15. The second issue was in relation to a lisp and speech sounds. Evidence was taken on this and whilst the parents wished this to remain in the IDP, it was clear that it was the Child's stammer, that could sometimes still appear and was the things that could impact the Child's access to education, not the slight lisp and subtle speech sound difficulties. It was highlighted that subtle speech sound difficulties and the lisp were not part of verbal dysfluency which was a separate issue. This was agreed by the parties. It appeared that the parties may have conflated the two difficulties. In any event, the lisp issue was said to be more a historic issue from the evidence of a private educational psychologist - parent witness 2. We have not allowed this change to the IDP as we find that firstly, these things are not impacting the Child's ability to access education and secondly, are historic in nature.

16. We next discussed whether the Child's DCD should be described as "moderate". Parent witness 1, an occupational therapist, was clear that it was not in the gift of an Occupational Therapist to categorise DCD. It is correct to state that the NHS Occupational Therapist has used the term moderate in the paperwork. However, there is no evidence of that classification from a relevant doctor. Further, we find that the term "moderate" can mean different things to different people so does not assist in understanding the Child's needs in any event. It was clarified by Parent witness 1 that it is not a condition that has set criteria for stating that something is mild, moderate or severe. The word "moderate" is therefore not supported by the evidence so is removed.

17. Parent witness 1 explained that the Child has oral dyspraxia. It was said by the parent that the Child could chew on the top of pens to help concentrate in school. LA witness 2, senior educational psychologist, confirmed that they agreed that the needs in relation to self-care and mouthing items were additional learning needs. Although therefore a senior educational psychologist of the LA agreed that this was a need, it was not an agreed change. We find that the experts on both sides confirmed that this is an additional learning need for the Child. Further, we find that life skills are of course always education when it comes to the teaching of them.

18. We next consider the issue of whether more specificity is needed in relation to the Child's physical needs. We consider that it is. The addition requested by the parents is from the report of parent witness 1, occupational therapist,. It deals with both the Child's gross and fine motor skills and is highly relevant to the ability to record work and to undertake the physical educational curriculum. It is an evidence based requested change and we note that the objection was on the basis that it was not a necessary addition, not that it was incorrect. We find that there is not sufficient other information regarding these needs so allow the addition.

19. After deciding what the Child's needs are, we moved on to consider the provision that is required. Both parties agree that the Child requires a weekly session to target their anxiety. The LA's position is that this should be an ELSA intervention whereas the parents think that ELSA has been tried and not worked before and think a Cognitive Behavioural Therapy (CBT) approach should be in place. On questioning of the educational psychologists present for both parties, it is clear that there was agreement that both ELSA and CBT should be targeted, time limited approaches where there are interventions followed by an embedding period. We therefore have re-drafted the section to allow for a weekly session of around 30 minutes from a member of staff trained in anxiety management using for example, a targeted ELSA or CBT. This is to be for planned blocks of 6-8 weeks which provides pre and post measures and SMART targets, followed by periods of time in which skills can be practiced and consolidated. We find that, using our specialist expertise and listening to the evidence of the Educational Psychologists on both sides, this allows best practice to be followed in terms of focussed and planned blocks of therapy, but still allows support to be provided to the Child in the consolidation phases, between blocks of direct interventions.

20. The parties agree that the Child has needs around their ability to get their work down on paper. To this end, handwriting and touch-typing programmes were already agreed provision for the Child. The dispute was on the literacy programme and whether it should be specified at the start or put in place responsively. The LA favoured the latter approach. We find that it is clear that the Child requires a literacy programme. We accept the evidence of parent witness 2, private educational psychologist, that the Child requires specific teaching and the reinforming of words and that the Child has an underlying issue with phonetics and phonetic decoding which is why they need constant intervention. We do not agree that the specific qualification level of specialist

teacher is necessary provision, as requested by the parents. Indeed, parent witness 2, in oral evidence, conceded that what was needed was a specialist teacher supporting the intervention to be delivered through a TA but that the specialist teacher must simply be a specialist teacher but that the TA delivering would need additional training. We therefore find that the evidence is made out that a literacy programme should be provided, but not that a stage 5 qualified specialist teacher overseeing it is necessary. We note that the LA did not disagree that the provision was necessary, they simply did not want to specify the model. We remind parties that in an IDP, it should be clear what a provision is, who will do it and how often it would be done. It is to provide clarity for all and once issued, provides the parents with a right to challenge what is in place. Therefore, comments such as that an intervention will be introduced responsively is not sufficient or good practice.

21. The speech and language therapy points were dealt with by submissions as neither party had a speech and language therapist as a witness. We find that there is insufficient evidence to support that the Child requires a half-termly review. This would be a very high level of provision indeed. What is needed is a statement to say that the Child will be referred to specialist speech and language therapists if there is a worsening in their presentation. If there is no worsening, a review every half term would, we find, amount to over provision for a Child who is presenting like the Child. It must of course be noted from the written reports and the evidence of parent witness 2, that the Child has made extensive progress with their communication and interaction.

22. We next considered the need for social skills group. We find that the evidence from the Child's parents is that the Child has made a group of friends and has also joined a football club and has made friends there. The Child appears to now be in a position where they no longer require a social skills group as they are able to form friendships independently and maintain them. We consider that therefore, this is not necessary provision, so do not include it in the Child's IDP.

23. The parents wished small class sizes to be added as necessary provision for the Child. Parent witness 1, occupational therapist, supported this position but when giving evidence, spoke more about the need to be moving around a classroom to meet sensory need and keep regulated. They said that it was reducing the noise and activity in the classrooms, which would come from fewer people, which is what they considered would help the Child. We heard from parent witness 1, private educational psychologist, about their rationale for this and they referenced evidence that claimed supported their position. They advised that a class had to be under 15 for numbers of students to make a difference to a teacher's ability to teach differently but was clear that the teacher also had to adapt their style. We find that parent witness 2, private educational psychologist, gave evidence about why smaller class sizes were good for Children generally but was not persuasive on why smaller class sizes were necessary additional learning provision for the Child. We could not, for example, see how it could be said that a class size of no more than 15 or indeed 12 would enable the Child to manage the provisions that require 1:1 without there being an additional adult present as there would still be a

minimum of 11 other Children in the class at any time.

24. LA witness 1, principal educational psychologist, we found, to be more persuasive in their analysis of the evidence. They referenced the most up to date research on class sizes, that from Education Endowment Foundation 2021, which they explained provided a review of 41 research papers. They explained that there is very low impact from small class sizes and there is only very limited evidence. They said that the study found that more positive effects of reducing class sizes were in the early years of primary and then only when teachers teach differently in addition. They were clear that the gains are likely to come from flexibility in organising of learning, explaining that there is no evidence to say that the same impact cannot be obtained by making reasonable adjustments. They also pointed to CReSTeD status information which does not include class size in the specialist provision for dyslexia.

25. In analysing all of the evidence, we find that there is nothing in the Child's additional educational needs which would make small class sizes necessary provision for him. We prefer the evidence of LA witness 1 that class size alone does not have a substantial impact and we cannot understand the rationale for class sizes for the Child needs specifically, on hearing the evidence of the parents witnesses.

26. In relation to anxiety-reducing teaching, LA witness 1 was of the view that this was needed for mathematics. However, LA witness 2, senior educational psychologist, was of the view that this was in fact needed for all subjects as the Child's anxiety was around all learning at times. Parent witness 2, private educational psychologist concurred. We allow the requested addition, save as to delete the word "mathematics" so that is the model used for all of the Child's teaching.

27. We allow the parents requested Occupational Therapy provision as a whole, as prescribed by parent witness 1. The evidence was well thought out and reasoned and the provision appeared to be proportionate to the Child's level of need. We find it is important that there are specific targets for therapy to ensure that the Occupational Therapy addresses the Child's additional leaning needs, as set out in 2A. We find that the times for reviews per term are simply in keeping with good practice of working as part of a multi-disciplinary team, particularly where there is to be significant ongoing direct therapy. We find that the LA model of "up to 6 weeks" of direct therapy to firstly, be non-specific and secondly, be wholly inadequate to meet the wide range of needs that the Child has that requires direct therapy by an Occupational Therapist.

28. We accept the evidence of parent witness 1, occupational therapist, that the Child requires direct modelling and then prompts to carry out essential organisational tasks and we find that what is being suggested is no more than is necessary to help the Child learn the life skills that they need to manage their work independently.

29. We lastly considered placement. On case managing this case to ensure that it was ready for hearing, it was noted that the LA had not named a specific

school. Directions were given that the LA were to name a specific school. The reason for this is that whilst the IDP does not name a specific school, the parents had appealed placement as part of the appeal. This is of course their right as the IDP was issued and it is one of the grounds of appeal.

30. The Tribunal, in considering placement, must still consider section 9 of the Education Act 1996. This says that “In exercising or performing all of their respective powers and duty under the education act, 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”. It is of course the case that this does not give a general power to the parents to have the school they wish. However, their preference must be considered fully. The Upper Tribunal have been clear in the case of **IM v London Borough of Croydon [2010] UKUT 205 (AAC)** that a Tribunal must consider the LA’s choice of school and parents choice of school and only if both schools are suitable, then consider whether naming parents’ choice of school amounts to unreasonable public expenditure. If it does not, it must name parent choice of school. Therefore, I find that the section test is not such a low bar as was suggested in submissions.

31. The LA did name a specific school but provided very little in the way of information from that school. It was particularly disappointing to see that despite the parents making every attempt to visit the school, the school refused to have them visit before the Tribunal, citing their prior commitments. LA witness 1, principal educational psychologist and ALN services manager, sought to give evidence on the LA placement. They continued to reference “any mainstream primary school” and a “hypothetical school”. As stated in the hearing, we are not talking about a hypothetical Child, we are talking about a real Child whose needs and provision we now know. The LA have conceded that the parents’ choice of school could meet need. We as a Tribunal had to satisfy ourselves that the LA choice of school could meet need. LA witness 1 stated that they were confident that the school named by the LA could meet need as they were confident about their additional learning needs provision. LA witness 1 was asked a very basic question about the school by the Judge, namely, how many form entry was the school. LA witness 1 could not answer that question. We therefore have no way of knowing if the specific provisions set out in the IDP for the Child could be met, as we have no confidence that either witness has any knowledge of the school. For example, in answer to a specific question on provision, LA witness 1 sought to say that the school could have movement breaks embedded but could not say, having no direct knowledge of the school, whether the school had a curriculum embedded with movement breaks. A specific provision for the Child is that “The Child must be educated in an environment where the curriculum is embedded with movement breaks”. We are not confident that LA choice of school is such a place as we have no evidence from them on this. This applies to other provisions in the IDP.

32. As we cannot be sure that the LA named school is suitable, it follows that there is no alternative school that has been put forward that has been demonstrated as suitable. It cannot then be said that placing the Child at parents' choice of school constitutes unreasonable public expenditure as there is no cheaper suitable option available. We therefore name parent choice of school.

Order

It is ordered that:
The Local Authority do amend the Individual Development Plan for The Child by:-

1) Replacing section 2A with what is in the attached working document;
2) Replacing section 2B with what is in the attached working document;
3) Naming School B in 2D.2

Dated January 2024