



DECISION

Date of Birth: 2017
Appeal By: The Parent
Against Decision of: the Local Authority
Concerning: The Child
Hearing Date: 2024

Appeal

1. The Parent (the Appellant), appeals under section 70 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (“the 2018 Act”). The Decision was brought against the LA’s Decision of August 2024 to “uphold the school decision of not issuing a school IDP”. The nature of that Decision and the Appeal against it has subsequently been clarified (see below). This is an Appeal against the LA’s decision that the Child does not have additional learning needs (ALN).

Preliminary matters

2. Both parties have agreed to this appeal being determined “on the papers”, without an oral hearing. Having considered all of the information submitted, we are also satisfied that it is appropriate to decide the Appeal on the papers. We have the evidence and submissions that we need to do so.
3. In making that decision, we are conscious of the Appellant’s reluctance to participate in the hearing because they considered that it would bring them into conflict with the School. It concerns us that the Appellant felt anxious about attending the hearing for this reason. This is a specialist and expert Tribunal and we are used to dealing with a wide range of Appeals, which often include hearing from school and other professional witnesses known to the family. For future reference, we assure the Appellant that, in our experience, matters such as this are in almost all cases resolved in a professional way, with school or other witnesses fully appreciating that parents are entitled to exercise their rights of Appeal under the legislation. The process is a neutral consideration of the evidence and application of the relevant law.
4. The LA has not complied with Tribunal Directions in a number of important respects, including in respect of the bundle. The bundle that it submitted did not contain all relevant information (it did not contain all evidence, the Appeal form or the Registration Directions), it contained duplicated information, it was not paginated, it was not clearly indexed, it did not clearly identify who had submitted information. We have found the bundle to be very confusing and difficult to navigate. The LA’s failings have created additional work not just for the Panel but also for the Tribunal Secretariat. The absence of a clearly organised and indexed bundle also makes it difficult for the Appellant to participate in the proceedings, because it is hard to identify what information the Tribunal will be considering.

We remind the LA that it is under a duty to help the Tribunal achieve the overriding objective of dealing with cases fairly and justly, which includes dealing with cases efficiently. It has not complied with that duty in this case. The President has already identified LA failings in respect of these proceedings and required them to be brought to the attention of the Head of Education or Chief Executive. From our perspective, we do not criticise any one individual, but we strongly encourage the LA to reflect on our feedback and to ensure that, in future, it has in place sufficient resources to comply with its duties to this Tribunal. We consider it appropriate that this Order should also be copied to the Head of Education or Chief Executive, so that they can see the full picture and our comments on the lessons to learn (below).

5. We have received and considered the bundle of 175 pages (in PDF format) and all other information relevant to the Appeal though not included in the bundle, including evidence (such as the Selective Mutism report of October 2023), the Appeal form and Tribunal directions. We admitted and considered late evidence from the LA (recent reading test results) and the Appellant (a personal statement).

Background

6. The Child is 6 years old and attends a Primary School (the School) in the Local Authority area. It is common ground that the Child has a number of difficulties that impact on their learning. They have a diagnosis of selective mutism and have been referred for an assessment for Autism. The Child struggles with communication (with adults in particular) and often does not talk to adults in school. They also have hypoglycaemia, which impacts on the Child's blood sugar levels. The Child has a 1 page pupil profile which has regularly been reviewed and updated since starting school.
7. Following a request from the Appellant in May 2023, the School assessed whether the Child had Additional Learning Needs (ALN) that require Additional Learning Provision (ALP). In an undated letter, the School's ALNCo decided that the Child does not have ALN that requires ALP because (in summary), they felt that their needs could be met from *universal provision*.
8. By letter dated July 2023, the Appellant asked the LA to reconsider that School decision. The LA issued its response in August 2023, to the effect that it *upheld the school's decision of not issuing school IDP*. We note that the LA decision letter does not refer to the relevant legal framework and does not accurately identify the decision that it was required to make. The LA has no function to "uphold" a decision of a school under the legislation and, in any case, the relevant matter to decide was not whether there should be a school maintained IDP, but rather whether the Child has ALN. The decision on whether the Child should have a school or LA maintained IDP would only arise if they have ALN.
9. Despite the LA's confused approach to the matter (and subsequent confusion about the basis on which the Appeal has been brought and responded to), it is clear that the LA has decided under section 13 of the 2018 Act that the Child does not have ALN. This was clarified by Order of Tribunal President of March 2024 and this is the basis on which we approach the Appeal.

Issues and the parties' positions

10. As set out above, the sole issue to determine is whether the Child has ALN. The consequences of that determination are not a part of this Appeal and not for us to decide. If the Child does have ALN, on the face of it, section 14 of the 2018 Act requires the LA to take some action to ensure that they have an IDP: it must either issue an IDP itself or direct the School to issue one. Once issued, the IDP must be maintained by either the LA or the School.
11. The parties' positions, in summary, are as follows:
 - a. The Appellant says that the Child has a range of needs that make school life very difficult for them: these include selective mutism; other difficulties with communication and physical and sensory difficulties. The Appellant suggests that the Child is neurodivergent and is waiting for an assessment. The combined effect of this means that the Child has meltdowns at home, i.e. significant dysregulation, and withdrawal from family life. This shows that, even with the steps being taken, they find school life very difficult. The support that is put in place for them, via the one page profiles, is not sufficient and is not meeting their needs. They continue to find school life very difficult. An IDP is necessary in order to ensure that the appropriate support and provision is identified and made available for the Child.
 - b. The LA refers to the School's assessment and says that, whilst the Child has difficulties in school, these are being met through the provision being made and as set out in the one page profiles. They refer, in particular, to the Child's attainment levels in literacy and numeracy, which show that they are at or above age related expectations. They refer to keeping the matter under review, in particular if the Child is diagnosed with ASD. The LA says that the Child does not have ALN because their needs can be met from *universal provision*.

Legal Framework

12. We take account of the relevant sections of the 2018 Act, the Education Tribunal for Wales Regulations 2014 and the Additional Learning Needs Code for Wales 2021 ("the Code"). We have regard, in particular, to the definition of additional learning needs (ALN) and additional learning provision (ALP) in sections 2 and 3 and the relevant guidance in Chapter 2 of the Code. In determining this matter, therefore, we ask ourselves whether The Child has a learning difficulty or disability which calls for ALP. We remind ourselves that section 2 of the 2018 Act provides as follows:
 - a. A child has a learning difficulty if they have a significantly greater difficulty in learning than the majority of others of the same age.
 - b. A child has a disability if they are disabled for the purposes of the Equality Act 2010 and this disability prevents or hinders them from making use of facilities for education or training of a kind generally provided for others of the same age in mainstream maintained schools.
 - c. ALP means educational or training provision that is additional to or different from that made generally for others of the same age in mainstream

maintained schools in Wales.

13. We have regard to the relevant provisions of the Code, including paras 2.5 to 2.20 and the two stage test to be applied as set out in paras 2.12 to 2.15: does the child have a learning difficulty or disability; and does the learning difficulty or disability call for ALP?
14. There is some confusion in the LA's position about the Decision that it had to take and the reason for that Decision. The LA's position on this is that the Child does not require ALP, because their current interventions are made out of *universal provision* and, as such, are not additional to or different from that made generally for others of the same age in mainstream maintained schools in Wales. In our view, this is the wrong approach and is not consistent with the LA's obligations under the 2018 Act. The correct comparator for these purposes is the provision made for an ordinarily developing child of the same age. We form this view for the following reasons:
 - a. The legislation does not refer to *universal provision* as a relevant criterion for judging whether provision is additional to or different from that generally made. Neither does the Code. There is no legal basis for asserting that the source or description of the provision in this way (whether universal or otherwise) determines whether it is additional to or different from general provision. This question may be relevant to whether an IDP should be maintained by a Local Authority or a school, but it is not relevant to the determination of whether the provision that The Child requires is additional to or different from the provision generally made in a mainstream class.
 - b. That view is consistent with the approach previously taken under the Education Act 1996 and currently taken under the Children and Families Act 2014 (in England), both of which set out the tests in substantially the same way as the 2018 Act. The 1996 Act and the 2014 Act both include a separate test, where a person has special educational needs which require special educational provision, of whether a Statement of Special Educational Needs (a Statement) or an Education, Health and Care Plan (EHCP) are "necessary". Many learners in Wales previously had (and currently have, in England) special educational needs which require special educational provision, without also having a Statement or an EHCP. The decision on whether a learner needs a Statement or an EHCP will depend, at least to some extent, on the resources needed to meet that learner's needs. The 2018 Act does **not** include that separate step of *necessity*. It simply provides (subject to a limited number of exceptions) that where a learner has ALN (which require ALP), they must also have an IDP.
15. That appears to be a clear and deliberate policy choice that the Welsh Government and the Senedd have implemented. Although not submitted by either party, we refer to the following publicly available documents:
 - a. Para. 3.8 of the revised Explanatory Memorandum to the Additional Learning Needs and Education Tribunal (Wales) Bill submitted by Alun Davies AM (Minister for Lifelong Learning and Welsh Language)¹ states the following: *The Bill creates a single statutory plan (the individual*

¹ <https://business.senedd.wales/documents/s68616/Revised%20Explanatory%20Memorandum%20-%20November%202017.pdf>

development plan (IDP)) to replace the existing variety of statutory and non-statutory SEN and LDD plans for learners in schools and FE - including statements of SEN, individual education plans for learners supported through school/early years action or school/early years action plus, and learning and skills plans carried out via assessments under section 140 of the Learning and Skills Act 2000. This will ensure greater consistency and continuity and, unlike the current system, ensure that provision and rights are protected regardless of the severity or complexity of needs.

- b. Para. 25 of the Children, Young People and Education Committee Report on the Additional Learning Needs and Education Tribunal (Wales) Bill of May 2017², having taken evidence from the relevant Minister, states the following: *The Bill provides for the same type of plan - an Individual Development Plan (IDP) - regardless of the learner's age (up to 25) or the severity of their ALN. IDPs for all learners with ALN would therefore replace the current 3 tier-graduated system of School Action, School Action Plus and Statements of SEN.*
 - c. The 2018 Act's Explanatory Notes³ confirm that the definition of ALN and ALP are *very similar* to the corresponding definitions in the 1996 Act, though are wider in scope than those definitions. In respect of the IDPs, the Notes state that: *This plan will form the basis of the system for planning and providing ALP for children and young people with ALN as set out in the Act. Generally, all children and young people with ALN will have an IDP, in contrast to the system under the 1996 Act, which only provided for statements of ALN for those with greater needs.*
16. In light of all of this, it is clear that the relevant legal framework that must be applied when considering whether the Child has ALN which require ALP is substantively the same as the one that would have been applied under the 1996 Act. The resources that may be required to meet those ALN and to make that ALP are **not** relevant to that question. The legislation determines that if the Child has ALN, unless one of the exceptions arises, they must have an IDP. This is a lower bar than previously existed for statements under the 1996 Act and now exists for EHCPs in England under the 2014 Act. That is the deliberate policy choice of the Welsh Government and Senedd, as reflected in the 2018 Act and as explained in related documents.

Evidence and conclusions with reasons

17. We have carefully considered all of the written evidence and submissions. We refer to the evidence that we consider to be particularly relevant.
18. It is common ground that the Child has difficulties in learning and that they require particular interventions to support them with them. There is some dispute between the parties in so far as the Appellant does not consider that the current interventions are working well enough, whereas the LA (referring to the School's evidence) appears to be satisfied that they are, at least for the time being. As noted above, the Appeal really turns on different interpretations of the relevant

² <https://senedd.wales/laid%20documents/cr-ld11055/cr-ld11055-e.pdf>

³ <https://www.legislation.gov.uk/anaw/2018/2/notes/contents>

law and whether the Child's has significantly greater difficulty in learning such that they need ALP. In respect of the Child's needs, we consider the following to be particularly relevant:

- a. The Child has a diagnosis of selective mutism (October 2023), which is an anxiety disorder. A Specialist Speech and Language Therapist gave this diagnosis. Their report states that the Child has all the skills required to be a successful communicator, but that their anxiety about talking in certain situations impacts on how successfully they use those skills. It identifies that without appropriate support, this puts them at higher risk of developing complex social, emotional and mental health needs. This and a brief report from a Speech and Language Therapist suggest provision and adjustments that the Child requires for support.
- b. Brief evidence from an Occupational Therapist (February 2024), following discussion with the Appellant and the School identifies that the Child has a sensitive sensory system and finds the school environment highly stimulating.
- c. The evidence from the Child's family (supported by family friends and others) is that The Child finds school overwhelming and has meltdowns and severe dysregulation when at home. They are very anxious about school.
- d. In the teacher questionnaire for neurodevelopmental assessment, the Child's year 1 class teacher identifies that the Child is very reluctant with new adults and takes a while to warm up. It lists the additional support that the Child is receiving including 40 minute 1:1 sessions with class TA for speech and language every Monday; smaller working groups every day; big voice intervention group twice a week; using a quiet environment.
- e. The School Based IDP Assessment states that the Child is reluctant to communicate and is often non-verbal. It says that "at the moment the Child has stopped talking completely in school and only uses non-verbal communication with all staff members. This has happened twice throughout the year and staff usually start to see progress restart when they become more confident".
- f. The Child's one page profiles are regularly updated. The profile from December 2023 refers to the Child having access to a sensory tent for 5 minutes at the end of the day to regulate their emotions.
- g. School evidence shows that the Child is broadly achieving age related expectations in numeracy and literacy and that the Child's cognitive abilities are within broadly average levels.

Does the Child have a learning difficulty or disability

19. The evidence that we have considered and the description of the Child's presentation at home (meltdowns, dysregulation, anxiety) strongly suggest to us that the Child may well have ASD and, at the very least, has autistic traits. There is no diagnosis of ASD, but that does not in itself determine or confirm whether the Child has learning difficulties or a disability. It is the practical presentation of the Child's difficulties that counts: they are clearly experiencing high levels of anxiety, which in our view are related to communication, sensory and physical difficulties in school leading to them feeling overwhelmed. There is a lack of

detailed evidence on this, but such evidence as there is and drawing on our own experience and expertise as a specialist panel lead us to find that the Child has learning difficulties which are a barrier to them accessing their education. We note, in particular, the Child's very restricted oral communication with adults (and sometimes children) in school, which we consider to be a very significant barrier to their learning. It is particularly notable that the Child has been through more than one period when they have not communicated verbally at all. It is clear to us that the Child's selective mutism, anxiety and sensory difficulties (even if not fully understood) mean that the Child has a significantly greater difficulty in learning than the majority of others of their age. Unlike most other children of their age, they struggle to communicate with adults and that is a significant difficulty in terms of accessing their education.

20. Although not necessary, given our finding above, we also consider whether the Child has a disability which prevents or hinders them from making use of facilities for education or training of a kind generally provided for others of the same age in mainstream maintained schools. Bearing in mind the definition of disability under the Equality Act 2010, we are satisfied that the Child has a disability. They have a mental impairment (even if not yet fully understood) that is long-term (12 months or more) and that has a significant (more than minor or trivial) impact on their ability to carry out normal day to day activities. Their anxiety and difficulties in communication fall squarely within that definition. Do they prevent or hinder them from making use of facilities for education or training of a kind generally provided for others of the same age in a mainstream, maintained school? We are satisfied that they do: their difficulties in communicating prevent them from accessing the curriculum and benefitting from school life in the same way as somebody who does not have that difficulty. It makes their life at school harder than for other children.

Does The Child's learning difficulty/disability call for ALP?

21. The LA's position on this is that the Child does not require ALP, broadly, because the current interventions are made out of *universal provision* and, as such, are not additional to or different from that made generally for others of the same age in mainstream maintained schools in Wales. In our view (see above), this is the wrong approach and is not consistent with the LA's obligations under the 2018 Act. The correct comparator for these purposes is the provision made for an ordinarily developing child of the same age. It is clear to us that the Child is already receiving ALP. An ordinarily developing learner of the same age in a maintained mainstream school would not receive the combination of support that they are receiving: weekly 40 minute 1:1 sessions of SALT support with a TA; daily access to a sensory tent; or regular 1:1 or small group work. Speech and Language Therapy has long been recognised, generally, as educational provision. This provision, when taken in the round, is different from or additional to the provision made available for ordinarily developing learners of the Child's age.
22. Furthermore, there is no real analysis or assessment of whether that provision is meeting the Child's needs. The Child's levels in literacy and numeracy are not evidence that their mental health and physical and sensory needs are being met. The Appellant clearly considers (and we are also satisfied) that these needs are not being met, because their dysregulation continues at home (which strongly

suggests that they are “masking” in school) and because the School’s own assessment notes that – at that time – the Child was not talking to anybody in school (because of their selective mutism) and that this was not the first occasion on which this had happened. There is no real analysis as to *why* the Child was not talking to anybody or whether the provision being made was addressing that particular difficulty. There is no assessment by an Educational Psychologist, for example, to understand the Child’s needs or to advise on the provision that they require. In our view, the Child requires yet more tailored provision to meet their ALN. It is clearly not our role, in this context, to identify what that provision should be. That needs to be identified through the preparation of an IDP and, if there is a dispute about that, by the Tribunal. But for these purposes, we are satisfied that the Child’s needs are such that they require additional learning provision.

Findings and Conclusions

23. Given this analysis, we find the following:
- a. The Child has learning needs, in the form of mental health needs (anxiety), communication (selective mutism) and physical and sensory needs (feeling overwhelmed in the classroom). These needs mean they have a significantly greater difficulty in learning than the majority of others of the same age.
 - b. These needs also constitute a disability (in particular the Child’s selective mutism) 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.
 - c. The Child requires a number of education and training interventions to meet their needs, including, at least, the interventions that they are currently receiving and, very likely, further interventions to support them once their needs are better identified.
 - d. These current interventions are different from or additional to the educational provision generally made available for others of the same age in mainstream maintained schools in Wales. As such, the Child is already receiving ALP and, given the limited success of that provision, will need to receive more in the future.
24. In light of those findings, we conclude that the Child has Additional Learning Needs that call for Additional Learning Provision. We therefore allow the Appeal.

Final comments

25. We acknowledge that this is a relatively new legal framework and that all practitioners are still becoming familiar with it. We have set out our view of the legal tests to be considered in this Appeal and we have considered the evidence in light of them, made findings on the basis of that evidence and drawn conclusions from those findings. Schools and Local Authorities dealing with requests for decisions on whether a learner has ALN are required to go through the same process. There are clearly some significant lessons for the LA to learn from this Appeal:
- a. Its Decision letter and accompanying information does not identify the relevant legal framework or accurately identify the Decision that the LA was required to make.

- b. The LA did not, therefore – on the face of it – make a Decision that was available to it under the 2018 Act. This matter was clarified and rectified by the Tribunal President and in this Decision, but this is a very basic error in the LA’s approach towards this matter. If the LA did not obtain legal advice on this matter, it may wish to consider doing so in future cases.
 - c. These failings were not identified or corrected in its response to the Appeal, which does not set out the correct legal framework. To the extent that the LA justified its Decisions to decide that the Child does not have ALN, it does not do so by reference to the statutory tests that must be applied. It refers simply to the Child’s provision being available from *universal provision* that is available to all learners in a mainstream school. It does not identify the legal basis for this assertion which is one that we consider to be wrong in law.
 - d. These are important legal proceedings and the LA’s handling of them have been inadequate. It has not complied with Tribunal directions, which has generated extra work for the Panel and the Tribunal Secretariat and which makes it harder for the Appellant to effectively participate in these proceedings, because there is a lack of transparency in information the Tribunal has.
26. Unless the LA seeks permission to review this Decision or to appeal to the Upper Tribunal, the next step will be for it to take a decision under section 14 of the 2018 Act to do one of the following: prepare and maintain an IDP for the Child; prepare an IDP for the Child and direct the School to maintain it; or to direct the School to prepare and maintain an IDP for the Child. These decisions and decisions on the content of the Child’s IDP are appealable decisions under section 70 of the 2018 Act. It is not for us to advise the Appellant, of course, but we reiterate the message given above that they must not hesitate to exercise their appeal rights: they are there to provide a neutral resolution to the very important issues that arise in respect of the Child’s needs and the provision that they require.

Order

27. It is **ordered** that:
- a. The Appeal is **allowed**.
 - b. **The Child has Additional Learning Needs** under section 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018.
 - c. A Copy of this Decision must be sent to the LA’s Chief Executive or Head of Education within 5 days.

Dated April 2024