Tribiwnlys Addysg Cymru | Education Tribunal for Wales

Decision

Appeal By: The Parents
Against Decision of: Local Authority
Concerning: The Child
Hearing Date: 2024
Tribunal Panel: Tribunal Judge
Specialist Member
Specialist Member

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 and case management history

2. The case was listed for oral hearing by way of video. Case Management had been undertaken and the parties were asked to provide the Tribunal with a Working Document. Version 6 was provided to the Tribunal shortly before the hearing and that is the version that was worked on throughout. The first day of hearing included the parties and all witnesses and due to the amount of evidence that had to be taken, resulted in the matter having to be adjourned for written submissions to be sent in. The hearing then concluded as a panel only hearing in 2024.

Attendance

3. The Parent attended the appeal. The parents' solicitor, represented them. The parents' witnesses were the Independent Educational Psychologist, the Independent Speech and Language Therapist and the Private Specialist Teacher.

4. Counsel, represented the LA. The LA witnesses were the Deputy Head of School 1, the Specialist Teacher for physical and complex special educational difficulties and the Speech and Language Therapist for the NHS Swansea.

5. Both parties brought observers with them. They were admitted with consent but were not permitted to speak at the hearing.

Preliminary Issues

6. The panel were provided with a main bundle of 860 pages and a supplementary bundle of 75 pages. As stated, version 6 of the Working Document was also provided. The supplementary bundle contained late evidence, all of which was admitted with the consent of the other party. This

was as it was potentially relevant to issues that the Tribunal panel had to decide.

7. At the start of the hearing, the Tribunal judge asked for clarity on the current position and the parties' position moving forward. It was noted that the parents use of "EOTIS" (education otherwise than in school) had been changed to elective home education. It was pointed out that elective home education was very different to EOTIS and that only the parents could elect to take over responsibility to educate their child. On hearing the parties positions it was clear that the parents were not wanting to electively home educate their child and that they were asking for a continuing of the home based package, agreed to be partially funded by the LA as a settlement from an earlier appeal, but as an EOTIS package, i.e. managed, run and fully funded by the LA. The LA's position was that they had offered the parents a continuation of the last deal that they had agreed with them, but that was only in the interests of reaching agreement. Their primary position was that as they had a school that could meet need, the legal test for EOTIS was not made out and thus, could not be ordered.

Background to the appeal

8. The Child has a large amount of physical health problems that affect their self-care, mobility and communication skills. The Child has severe ventricular dysfunction, dyskinetic cerebral palsy (dystonic type), gastroesophageal reflux, cerebral visual impairment and epilepsy. The Child's epilepsy is brittle and they experience daily seizures.

Issues

9. The issues to be addressed are as follows:-
    i. Whether The Child's cognitive impairments should be classed as severe?
    ii. What speech and language provision should be in place?
    iii. What occupational therapy provision should be in place?
    iv. Whether the requested other changes to the provision section to the plan are necessary and appropriate to meet The Child's needs?
    v. Whether School 1 can meet The Child's needs?
    vi. Whether it would be inappropriate for all or any of The Child's additional learning provision to be made in any school?

Evidence and Reasons

10. We have considered all of the evidence, both oral and written, even if we do not specifically refer to it in this decision. We have also kept in mind all guidance on IDPs and what should be contained in them. We remind

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ourselves that all additional learning needs should be clearly set out in the ALN section and provision to meet each and every need must be set out, with sufficient clarity, in the ALP section. This must make it clear who is to do something and how often it is to be done. The rationale about why a certain provision should be in a plan must only be in the rationale section of the IDP, not in the main provision section. The detailed rationale is to be contained in the expert reports annexed to the IDP.

11. The parties had reached agreement on large amounts of the IDP and are to be commended for working together on this case. We have scrutinised all agreed additions and deletions to the IDP and endorse them as fit for purpose.

12. The only dispute left in relation to the ALN section of the plan was in relation to the word severe. The LA wished to add this word and it came from the report of the parents Educational Psychologist. The Parents Educational Psychologist was asked about this in oral evidence and they confirmed again that they thought that "severe" was the correct categorisation of The Child's cognitive difficulties. The Private Specialist Teacher's description of The Child being able to add up numbers to 10 but not add up past 10, we find, using our expert knowledge, to be not out of a line with a finding of severe cognitive impairment for a young person of year 11 chronological age. We note that in relation to recognising words and reading, The Child only currently recognises 23 of the 26 letters of the alphabet. That supports The Parents Educational Psychologist's view.

13. We next considered the provision that The Child needs (ALP) to meet each and every of their ALN. In essence, this means that every need listed in section 2A must be met by a corresponding provision in 2B. Obviously a provision could meet more than 1 need. However, it is not possible to place a provision that is intended to meet a need set out in section 2A in 2C. If something meets a health need but also is necessary to educate or train a child, then it counts as educational provision overall and must be in section 2B.

14. It is noted that the parties are broadly on agreement on what The Child's provision should consist of; the main dispute is about where it is carried out.

15. The parties agree that The Child will receive eye gaze resource development. There is a dispute between the parties on how much time should be allowed for this. The parents are asking for 5 hours per week for 39 weeks of the year. This is based on an estimate from the company currently supplying them who actually state there should be 6 hours allocated a week. The Private Specialist Teacher advised that they currently plan The Child's lessons and that they are then sent over to the current provider who then have their resource developers put vocabulary and programmes on The Child's device ready for those lessons. They agreed that it was, in essence, a data entry function but said that it would be hard for a teacher to do as they put things on like funny noises and quizzes which are outside what they can do. They advised that they spend

5 hours per half term planning subjects and then sending the information over. The Speech and Language Therapist for NHS in the area said that they use a service in Cardiff that can add things onto the eye gaze, if asked, but that teachers have access to the system and can add things and access and upload software. The Speech and Language Therapist for NHS in the area advised that after meeting with The Child and their family and speaking to their treating speech and language therapist, they would not expect that there would be such a need to update their device so regularly, when looking at this rate of learning and their progress towards their targets. They advised that they consider about 2 hours per term would be necessary.

16. We have considered all of the evidence, in particular that of The Private Specialist Teacher regarding how much of each tuition session The Child can actually engage with, on average (we accept that this changes dramatically). We consider that the parental position is excessive but that the LA position does not allow for regular updates to be made. We consider that 1 hour per week, that can be used flexibly per half term, gives those planning The Child's work the ability to have assistance to update their eye gaze, when they deem it necessary.

17. The parties agree that a daily communication programme should be used. The dispute is over whether this should be reported in an Individual Education Plan. We find that this is not necessary provision. The IDP should contain provision. The breakdown of what should be in the programme and how to record it should be left to the treating speech and language therapist.

18. When looking at speech and language therapists, we have considered the position of both parties. The Independent Speech and Language Therapist has set out and justified their provision in the main. They have met and worked with The Child to come to their conclusions. The Independent Speech and Language Therapist was questioned on their proposals and could explain their position. The Speech and Language Therapist for NHS in the area agreed that direct therapy was needed but wanted instead to do it on a block basis. There was confusion as to how the second block of 6 would be used. The Speech and Language Therapist for NHS in the area also seemed to have the opinion that they only had to work on provision until March, rather than consider a year from recommendation. We find that the LA's position was more NHS policy based on blocks of therapy, rather than person focused. The LA on their own evidence accept that The Child is a complex young person and it is clear that improvements to their communication are key to them accessing and progressing with education. We find that the Independent Speech and Language Therapist has developed a nuanced and well-reasoned package of therapy for The Child which we feel has the correct balance of providing the necessary therapy to meet need, whilst not putting too high a time burden on The Child when considering their numerous serious health conditions. We therefore prefer the parental position and allow it, almost in full. As a Tribunal panel, we have considered The Child's health needs and find that to ensure

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sessions are not lost when The Child is unwell and that their needs can be met continuously, find that the direct weekly therapy must be allowed to be changed to indirect if at any point the treating therapist on that week thinks that it is appropriate. We consider that that is important as if the therapist considers something new must be practiced during the week, they can choose to use some or all of that 30 minutes in training the staff working with The Child. Further, if The Child is not able to engage for part of the time during a session, they can use that time to either observe, update the programme or train the staff working with them.

19. We do not agree that it is necessary to specify what type of experience a treating speech and language therapist must have. A speech and language therapist is governed by the HCPC and as such, they are only allowed to take on work that they are qualified and able to deliver. We find that the added specificity is unnecessary, particularly bearing in mind that the health needs of The Child during their education will be met by their 2:1 support that has been agreed by the parties.

20. We are at a loss as to why it is not agreed that The Child will be guided on the use and control of their wheelchair by staff. It is of course the case that where the staff should be from has no place in this section. The Child requires their wheelchair to access their learning environment. They should be assisted in how to use it and be given assistance, when necessary. This is to enable them to access their learning.

21. We again do not understand why the LA's requested addition in relation to an intimate care plan and what that will consist of, has not been agreed to. Wherever The Child is educated, there should be a plan in place to keep their basic needs met and they must be provided with a personal evacuation plan. This is true wherever The Child is educated. The LA are responsible for them during their periods of education and thus must be able to keep them safe, whilst they are learning. We allow the addition, save to removing "when accessing the school environment", as this is not a placement specific need.

22. When considering occupational therapy generally and in response to the submissions, specifically the LA submissions on this point, we find that the LA position is not sustainable. As stated above, where there is an ALN set out in section 2A, the correct place for the provision to meet that, in whole or part, is in 2B. If anything has a dual purpose but educates or trains a young person, even in part, that is educational provision and must be in 2B. It is for the LA and the NHS to work out how to provide that occupational therapy. The LA are entirely in their rights to commission the NHS to provide the therapy set out in section 2B, the argument on funding is one for the LA to have. The responsibility to provide what is set out in section 2B lies with the LA. We note in any event, that the LA suggested occupational therapy provision as set out in 2C states that they considered that the provision is to be used in learning and play. This supports the Tribunal's finding in this regard.

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23. When looking at the 2 different occupational therapy approaches, we find that the parental provision is well evidenced in the report of the Occupational Therapist. The LA has not set out clear alternative wording in section 2B. We find that it is necessary for provision to be in 2B. We find that the provision as recommended by the Occupational Therapist is not excessive and adequately, with a change we will set out below, meets the needs of The Child. We find that, like with speech and language therapy, it is important that the treating therapist be given the flexibility to use the direct sessions as indirect sessions if they consider that direct therapy would be inappropriate for them in any given session. This is due to the need to keep The Child safe when considering their health needs. We have slightly changed the wording to make it clear that the hydrotherapy sessions are carried out fortnightly by a qualified occupational therapist whilst the trained adults will only facilitate using a hydrotherapy pool on alternative weeks. This is to ensure, for safety reasons, that it is only the therapist that will undertake direct therapy of this type.

24. We do not agree that the occupational therapist's experience must be specified. As with speech and language therapy, the therapist will be governed by the HCPC and can only take on work for which they are adequately qualified to deliver. Further, again, The Child's agreed 2:1 will be present throughout and thus we consider further specification unnecessary to meet need.

25. Where the requested change to the main body of 2B is rational based, we have not included it. The rationale should be in the rationale section only, to ensure the document is very clear. It is provision that must be specified, not the reason for it. Therefore, the additional wording for fine motor skills and postural management are only partially allowed.

26. We note that there are disputes in section 2C. That is not an appealable section and thus we have not made changes to that section as it outside of our jurisdiction.

27. We then considered whether School 1 could meet need. This is as the LA contend that it can. Only once that school and attendance at it can be disregarded, can we consider whether the legal test for EOTIS is made out.

28. We heard evidence from the Deputy Head of School 1. They had known The Child when they were in school previously. They advised that they had read the bundle and that their view was that The Child would not sit alone in terms of either their cognitive ability or the delivery of their education. They advised that in their cohort, there are number of other students who communicate verbally and via AACs and that there are a number who are learning similar skills to them on pre-reading and initial communication, understanding of communication and translation. They were clear that The Child would be able to access socialisation with peer interactions that they had expressed a want to do and that they work in line with Curriculum for Wales. They were clear

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that there was outreach to mainstream schools both with their pupils going to work with mainstream students and mainstream students coming into the school, so that The Child would be able to have those engagement times also. They discussed the Estyn reports and highlighted the changes that had been made.

29. Perhaps most importantly, the Deputy Head of School 1 highlighted the changes that had been made since The Child was last with them in school. They explained that they have a new headteacher who was very forward thinking, a greater understanding of the curriculum, progression and assessment and that there were very high expectations of staff. They explained that they now have 1.5 nursing staff on site now and that they therefore can meet intimate and health care needs fully. They also set out how their teaching assistants were highly trained and what their general level of pupil to staff ratios were. We accept, of course, that their general ratios do not really matter to The Child as it is agreed they have dedicated 2:1 support for 32.5 hours per week regardless. They also explained that they now have a specialist classroom in the school, that they did not have previously, that people can access if they need, for example, postural management or specialist care and intervention and that that was not available last time The Child was with them. The Deputy Head of School 1 was noticeably upset when it was suggested that the students at their school were not at a level that could engage with The Child, they were clear that they thought that all of The Child's needs, educational, social, physical and health could now be met in the school. We scrutinised the Estyn reports and the evidence as a whole, particularly the oral evidence of the Deputy Head of School 1 and we find that the school could meet all of The Child's needs.

30. We then considered whether it would be suitable for The Child to attend the school, taking into account the evidence of their Parent that they get up at different times and has fluctuating abilities to engage due to health issues. The Deputy Head of School 1 was clear that the school would work with The Child to ensure that they could have a flexible timetable. We find that that therefore, that is not a hurdle. We next considered travel. We find that the NHS health team have prepared a letter in the bundle. It is clear that they were considering school attendance. They did not at any stage say that it was unsafe or unsuitable for The Child to travel to and attend a school. We note that The Child can and does travel, including going on holiday and find that transport could be booked for a slightly later start to the day, if The Child was not able to attend. Further, we note that there is nursing care on site and a room that The Child can access when they need medical assistance/breaks from learning. We find that therefore, the evidence is that The Child could attend School 1 and that the school could meet all of their needs.

31. It follows that as we have found that School 1 can meet need and that it would not be inappropriate for The Child to attend there, that the test for education

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otherwise than in school, as set out in section 53 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 is not satisfied.

32. When considering this, we have considered of course the evidence of The Parents Educational Psychologist. The Parents Educational Psychologist's rationale, when challenged orally, was centred more on what was better for The Child and that it was risky to change something that was working. When considering the test under section 53, we are not allowed to consider what is better. The law is very clear that EOTIS can only be specified when it is inappropriate for some or all of the additional learning provision to be delivered in a school. Whilst we agree with the submission that educationalists should decide on education matters, when health is being put forward as a reason why school attendance would be inappropriate, we consider that it is for medically qualified professionals, specifically doctors, to state whether or not there is a health risk. Of course this should be part of a multidisciplinary discussion. However, it appears that the NHS position was following multidisciplinary involvement as the doctor would have access to reports from all other NHS professionals working with The Child.

33. We think it is important to point out that we think it is unfortunate that the previous arrangement for education was entered into, continued for so long and that it has, for whatever reason, stopped, just before The Child turns 16. As stated at the start of the hearing, we cannot recommend or endorse the previous arrangement as we must apply the legal tests only. We do consider that The Child will require a lengthy transition to their school placement and have inserted a provision in relation to that in their IDP. We consider it necessary in order to meet their needs.

Order

It is ordered that:
The Local Authority to 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 1 in 2D1.

Judge

Education Tribunal Wales
Date: 2024

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