



DECISION

Date of Birth: 2009
Appeal By: The Parents
Against Decision of: The Local Authority
Concerning: The Child
Hearing Date: 2024

Persons Present:

The Parent	<i>Parent</i>
The Parent	<i>Parent</i>
Representative	<i>Parental Representative / Helper</i>
Representative	<i>LA Representative, Solicitor</i>
ALN Manager	<i>Representative</i>
Educational Psychologist	<i>LA Witness 1</i>
Solicitor	<i>Observer</i>

1. **Introduction** - The Appeal in this case concerns the Child who is 15 and should be undertaking their GCSEs. The Child was attending School A. The Child lives in the Local Authority with their family. The Local Authority maintains the Child's Individual Development Plan (IDP). The Child has diagnoses of ASD, dyspraxia and ADHD.
2. This Appeal follows a previous Appeal decision in May 2024 that the Child has ALN and requires an IDP. The Local Authority issued an IDP in June 2024.
3. The current Appeal is brought by the Parents in relation to the Child's IDP. They argue that the description of the Child's Additional Learning Needs (ALN) is not adequately set out and the Additional Learning Provision (ALP) set out is insufficient to meet the Child's needs. As the Child is not attending school, and the Parents agreed at the hearing that there was little realistic prospect of the Child returning to school this academic year, an issue also arose as to whether the Child should be educated otherwise than at school. If the Child was to be so educated, the further issue arose as to what educational provision the local authority should make available to meet the Child's needs in the Child's individual circumstances.

4. **Representation** – The Parents were represented by the Parental Representative. The LA Representative represented the local authority. We thank them for their hard work in preparing and presenting their respective cases.
5. **Case Amendments** – It is fair to record that the Parents case has changed during the proceedings. When it became apparent on the first day of the hearing that they were no longer seeking the Child's return to School A, an issue arose as to whether the Child was able to attend a school, and if not, what alternative provision was available. Neither party had presented evidence of alternatives to School A that might meet the Child's needs. Both sought to adduce further late evidence to address this. Admitting this evidence was likely to lead to unfairness to one party or the other. On the first day of the hearing we therefore concentrated on the issue of whether the Child could attend a school, and then adjourned for the parties to provide evidence as to alternatives. We thank the parties for their hard work in ensuring that an alternative educational placement had been viewed by the Parents, and alternative tutoring provision that was available in the area had been identified.
6. The LA Representative referred to the late changes in the parents' case. The LA Representative was anxious that we did not criticise the LA in these circumstances for producing evidence late. We have not done so in our considerations. We do, however, comment that the local authority has known for some weeks that the Child was having difficulty in attending school, and in particular attended a meeting with the parents in October 2024 where these issues were aired.
7. **The Parents' Case** – It is the parent's case that the Child is extremely anxious because of their school experience and is not able to attend school. They argue that the Child needs to be provided with tutoring in the Child's 10 GCSE subjects away from a school environment. They wish this to build up to 2 1/2 hours per subject per week. They also sought some support for the Child's anxiety.
8. **The LA Case** – The LA argued that there was a lack of objective evidence regarding the Child's ability to attend school. The LA Representative urged caution about the weight to be given to the evidence about this issue when it came from an unobjective source i. e. the Parents.
9. It was primarily argued by the LA that the Child could return to School A.
10. It was secondly argued that a Pupil Referral Unit could meet the Child's needs and an emergency LA panel meeting had determined that it could meet the Child's needs. That unit provides for young people with similar difficulties. It was argued that as that unit could meet the Child's needs the test under section 53 in the 2018 Act, of "unless it is inappropriate", could not be met. As it could meet the Child's needs, it was further argued, any argument the Child required EOTAS was off the table.

11. Thirdly it was argued that if it was decided that EOTAS was the only alternative, the parents suggested provision would be too intensive for the Child to manage, and there would be a lack of oversight of the Child's education.

12. **The Child's Subjects** - The subjects that the Child has been studying and that the Child would like to complete are English Language, English Literature, Maths, Biology, Chemistry, Drama, History, Spanish, Latin and Classical Civilisation. These are all examined by Edexcel.

13. **The Law** – S53 of the 2018 Act sets out:

“Additional learning provision otherwise than in schools

(1) A local authority may arrange for the additional learning provision described in an individual development plan it maintains for a child, or any part of that additional learning provision, to be made otherwise than in a school.

(2) But a local authority may only do so if it is satisfied that it would be inappropriate for the additional learning provision to be made in a school.”

14. This wording is the same as the equivalent provision in English law. That is important as case law in England can therefore be considered in relation to this case. We bear in mind in particular *M v Hertfordshire CC* [2019] UKUT 37(AAC) para 45, in which account was specifically taken of a child's anxiety in deciding that it was inappropriate for the child in that case be educated in a school.

15. The other significant relevant case is *NN v Cheshire East Council (SEN)* [2021] UKUT 220 (AAC). This dealt with what should be considered when deciding if it was inappropriate for a child to be educated in school. It sets out a summary of the factors to be considered, in addition to all of the circumstances in the case, as follows:

- a. the child's background and medical history;
- b. the particular educational needs of the child;
- c. the facilities that can be provided by a school;
- d. the facilities that could be provided other than in a school;
- e. the comparative cost of the possible alternatives to the child's educational provisions, either at school or elsewhere;
- f. the parents' wishes but they could not be determinative except in a case where the alternatives were equally balanced.

16. We will now look at those factors in the Child's case.

17. **The Child's background and medical history** – The Child's diagnoses are referred to above. There is no dispute about these. In addition, the evidence shows that the Child's school attendance was dropping off last year and the Child was often late for school. The Parent told us of the difficulties in getting the Child to school and the Child's lateness often arising from this. This

academic year the Child has attended school for only 7 days in September and half a day in October. The Child says that they cannot manage to attend school at the present time even though the Child must be aware that their parents are paying public school fees at the Child's school.

18. While it is correct that we do not have independent expert evidence to establish that the Child is unable to attend school, we bear in mind that young people of the Child's age with the Child's diagnoses do occasionally come to a point where they find the effort of masking their difficulties at school, combined with the rigorous requirements of studying for public examinations, becomes overwhelming. As an expert tribunal we are aware that this occurs. We also accept that the Child, like many young pupils, puts a great deal of effort into masking their difficulties at school and trying not to appear different from their peers. The Child's parents are of the view that the Child is unable at present to attend school, although they did, before the start of this hearing, hope that the Child would be able to return to School A. The Child has been unable to do so, and they have now realised that it is unlikely that the Child will return during the remainder of this academic year.
19. We also have the Child's own views set out at page 263 and the Child clearly says that they are unable to cope with "the essence of school". The Child has also been receiving some support from a counsellor to try to assist them with their anxiety.
20. We have carefully considered all this evidence. We have been cautious as there is no objective independent evidence. That does not mean we should reject evidence from the Child and the Parents, however. We considered the Parents to be doing their best to assist us and to be truthful witnesses. As we have stated that evidence accords with our experience in similar cases. When we consider all of this evidence, we have little difficulty in finding that the Child has not been attending school because of their anxiety, which is related to the Child's diagnoses. That is only one of the considerations we must look at however.
21. **The Child's particular educational needs** – The Child has completed the first year of their GCSE courses. The Child is studying 10 subjects. The Child has completed the coursework in most of their subjects. The Child is academically able and should be capable of achieving high grades in their examinations.
22. The Child would very much like to complete their examinations in all of the subjects the Child studies. This is also influenced by the Child's preferences for A-Level subjects. The Child did agree to drop history when at School A but has indicated since the Child did so to maintain their place at the school. Unfortunately, that has not proved possible. The Child would now like to resume history along with the other nine subjects. They are all examined by Edexcel and the Child needs to conclude their studies with that exam board. If the Child does not the Child's completed coursework will be of no value and the Child will have to start a new syllabus with 6 months until the Child's exams. That would place a great deal of pressure on the Child.

23. The Child needs to appreciate, however, that the Child also has to look after their own well-being when studying for their exams. The Child must ensure that they do not subjugate their own health needs when striving to succeed in their GCSEs. The Child also needs support to manage their anxiety. It is the Child's anxiety that has been a significant barrier to the Child accessing education. In addition, therefore, we find that the Child requires support emotionally to ease their anxiety, support the Child generally with their studies, to boost their self-esteem, and to assist the Child with their understanding of social relationships and situations.
24. Accordingly, the Child's educational needs are at present very specific. The Child needs to complete the courses the Child has commenced and take them in their exams next year and support for the Child's anxiety.
25. **The facilities that can be provided by a school** -Two placements were considered in the evidence.
26. **School A** - The School has stated that it is unable to add to the support that it has given the Child previously. The fact that the Child is no longer feeling able to attend the school suggest that that has in fact not been sufficient. It is able to provide an education in the subjects that the Child wishes to study and with the correct exam board, and some support for the Child's social needs. It provides a cohort of children of a similar age, some of whom the Child has established friendships with. The Child does also have friendships outside of school, however, and goes out with their friends to various locations. Reasonable measures had been put in place by the school, but the Child has not felt able to take advantage fully of these. One reason for this is the Child does not want to be marked out as different from other pupils, and this is a particular issue in terms of the Child's self-esteem.
27. **Pupil Referral Unit** - An alternative provision has been suggested by the local authority, namely a Pupil Referral Unit which provides for up to 12 pupils who have emotional or behavioural difficulties and are unable to attend school. The Parent told us that they had visited the unit. The Parent told us the staff seemed nice and were approachable. The Parent questioned the resources available at the unit as it did not make much use of technology but rather used books. The Child is used to using technology. Writing is difficult for the Child. This could be dealt with, however, by the Child being provided with a laptop for the Child's use, which the LA indicated it would supply.
28. The unit can only provide teaching in 4 out of the 10 subjects the Child is studying. The Child needs 5 passes to go on to college. In the four subjects of the Child's that are studied, the unit does not study the same syllabus. The 4 subjects the Child is described as "passionate about", and wishes to study further in future years, are not available.
29. The Parent said the Deputy Head that spoke with them was quite insistent the unit was for 12 pupils, and it was full. We could override this objection by naming the unit in part 2D of the Child's IDP but this would clearly be contrary to the

wishes of the senior staff, and this would put pressure on the available resources at the unit.

30. The Parent was also told the existing pupils in the unit are not very sociable and did not talk together. They do play games together but with minimal communication with one another. It appears therefore that the unit may not provide a suitable peer group to support the Child's social functioning.
31. The Parent also told us that the pupils in year 11 receive work targeted at grade D level or below and are all taught together. This is well below the level that the Child requires in that the Child's target grades are all for pass grades and some for top grades.
32. There was flexibility concerning transition to the unit. It was tailored to the needs of the individual student. Despite this, the Parent was of the view that the Child would struggle to attend. This was particularly as the Child would, "not be able to do their subjects that are the Child's passion."
33. We have reflected on this evidence. We are most surprised that the LA Panel considered that such a placement would meet the Child's needs. In our view, for the reasons set out above it would most clearly not do so.
34. **The comparative cost of the possible alternatives to the child's educational provisions, either at school or elsewhere** – The Child was attending a fee-paying school, and this clearly was at a cost. That cost was however met by the Parents who have been funding the Child's education. There is no suggestion that the LA should provide funds for the Child to attend at School A.
35. The cost of the Pupil Referral Unit was said to be of the order of £25,000 per annum. We were provided with hourly rates for the various tutoring services available. The cost of the other alternative packages of tutoring varied but would require something in the region of £50,000-£70,000 between now and the end of the GCSE exam period, on the basis of the calculations we have been able to do on the information supplied.
36. The accommodation can be provided at a discounted price as it is provided already by the local authority, but this still amounts to £66 per day or £33 a half day. That accommodation is not available at all on Tuesdays and so an alternative would have to be found for that day at an unknown cost.
37. All of the above options therefore come at a significant cost but we accept that the tutoring is going to be the more expensive option.
38. **The parents' wishes** - These are also relevant but are not determinative. The parents' wishes are to enable the Child to complete and succeed in their examination subjects. They would ideally have liked the Child to return to School A but have come to recognise that this is just not possible for the Child at present. Their views reflect the Child's own views. They support the Child in

this, and it is their view that a package of tutors in the subjects that the Child wishes to study, is the appropriate way forward.

39. **The Child's Views** – Given the Child's age, we have been careful to take account of the Child's views. We are bound to do so as the 2018 Act requires us to. It states as follows:

Section 6 of the 2018 Act

Duty to involve and support children, their parents and young people

A person exercising functions under this Part in relation to a child or young person must have regard—

- (a) to the views, wishes and feelings of the child and the child's parent or the young person,
- (b) to the importance of the child and the child's parent or the young person participating as fully as possible in decisions relating to the exercise of the function concerned, and
- (c) to the importance of the child and the child's parent or the young person being provided with the information and support necessary to enable participation in those decisions.

38. The Child's views are clearly set out in the bundle, as referred to previously. The Child states they cannot attend a school at present, that the Child wishes to complete their studies in the subjects the Child has been taking and complete their GCSE exams and would accept 1:1 tutoring as the method to achieve this.

39. We also take account of the United Nations Convention on the Rights of Children, which are incorporated into Welsh law. In this it differs from English law. It states that:

“Article 29

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;”

40. The Child is able academically, although it takes more than this to successfully complete courses and pass exams. In accordance with this convention right, the Child needs to be given the opportunity to succeed to the Child's fullest potential. That will also affect the Child's self-esteem and their opportunities in life.

41. **Conclusion** - Having considered all of the above factors, the statute, and the case law, we have no doubt in concluding that at present the Child is unable to attend a school for the foreseeable future and the Child's education has to be provided in some other way. The Child has found it impossible to continue attending School A, and despite the panel decision, we conclude that the Pupil Referral Unit is wholly unable to meet the Child's present needs. We will therefore indicate in section 2B of the Child's IDP that the Child is to be educated otherwise than in a school. Having reached that conclusion we should

not, and do not, insert any school name in Part 2D. We will now turn to consider the packages of tutoring support that are available.

42. **Is Tutoring Additional Learning Provision** – No point was taken in relation to this by the LA but we considered whether private tutoring for exams was Additional Learning Provision.

43. The 2018 Act defines this in section 3 as follows:

“(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,”

44. This we consider to be a broad definition. It clearly extends beyond “teaching”. In the Child’s case as the Child is not in a school placement, as we have decided that the Child is unable to attend school for the foreseeable future, the provision for the Child must be “additional to, or different from, that made generally for others of the same age”. Using our own expertise, we are also confident the provision is not available in a mainstream school in Wales, given the nature of the subjects that the Child studies. It would also not be available from subject specific qualified teachers on a 1:1 basis, which we consider the Child currently requires due to their anxiety, their ASD and ADHD and their self-esteem.

45. We have therefore concluded that in the Child’s case the package of tutoring sought is ALP within the meaning of the Act.

46. **The Tutoring Packages** – We heard evidence about three potential packages of tutoring.

47. **Package A** - This offered a package of 12 hours a week in the Local Authority. The subjects offered are English Language, English Literature, Mathematics, Biology, Chemistry and History. They are examined by the WJEC Board. Other time can be used in activities such as horse riding, musical sounds and a climbing wall. It does not therefore provide the subjects the Child seeks or the correct examination Board.

48. **Package B** – This organisation was initially found by the Parents, but they did not seek to pursue it as it could not offer the correct subjects or examination Board and was considerably more expensive than the others.

40. **Package C** – This could provide tutors in English Language, English Literature, Mathematics, Biology, Chemistry but with the WJCE Board. It could provide 25 hours per week 1:1 or small group tuition. It does not provide the subjects the Child seeks or the correct examination Board.

41. **Package D** - This could offer all of the Child's subjects and the correct examination Board with tutoring on a 1:1 basis. It has experience in vulnerable pupils and children with SEN. It offers also a learning mentor/ELSA support.
42. **Conclusion About Tutoring** – There is only one of the above which could provide the subjects the Child is studying and the appropriate examination Board. Our conclusion in relation to the tutoring packages is that only that offered by Package D is suited to the Child's needs. Their offer is subject to the LA completing its required processes to ensure that it can contract with this provider. We do hope that can be completed expeditiously as the provider has already carried out the appropriate checks, it appears from its offer, and only employs those who have had appropriate checks and are properly qualified.
43. **School Holidays** - We were concerned that the Child should have a break of some sort during the holiday periods. We note that the amount of tutoring is to be reduced to 10 hours per week during such periods and are aware that there are certain public holidays when tutors will not be working. It may be more difficult to find a location for tutoring during these periods. We have also had regard to the fact that the Child will continue to be anxious about their studies if the Child is not doing some work over a two-week period at Christmas and at Easter. Bearing these factors in mind, we have considered that it is appropriate to allow for tutoring to continue for fewer hours over the Christmas and Easter holidays. We do hope that the Child will understand that the Child needs some time off over the holiday periods and will be supported in this by their parents.
44. **ELSA Support** - We cannot assess as to how the Child will get on with a very intensive package of tutoring. We are concerned that the Child does not become overwhelmed by any package that is put in place, despite the Child's understandable desire to complete exams in all their subjects. With these considerations in mind, we consider it important that the Child has a maximum limit to the number of hours of tutoring a week and access to regular sessions from an ELSA qualified individual, so that the Child can be assisted with their own understanding of their functioning, and how this relates to their social relationships, and to the Child's anxiety and self-management. We hope this will give the Child greater insight and enable the Child to manage such difficulties, in such a way as to be able to continue to function better and recognise their own capabilities and limitations. We have specified a maximum number of hours per week of 25 hours of tutoring, and this is to include one hour a week of time with an ELSA qualified person to support the Child.
45. **Early Review** - We are unable to assess how the Child will manage during the remainder of their GCSE year, and what will happen in terms of education thereafter. For that reason, we consider it important that there is an early review of the Child's needs and the necessary provision to meet them. We are aware that the Child would have completed their examinations by the end of May/early June 2025. We consider it appropriate that there should be a review quickly thereafter. Although the Child's examination results will not as yet be known, the Child's ability to attend an educational institution, will have to be assessed in order to plan the alternatives for the Child education for the following academic year.

46. **Amendments to the Child's IDP** - Section 1A is outside our jurisdiction. It will have to be carefully scrutinised, having regard to our decision, to remove references to the Child's attendance at a school.

47. In Part 2A where the wording accords with the Child now receiving a package of tutoring, we have included that wording.

48. In Part 2B we have removed a reference to invigilation at home as this cannot be provided at home the LA informed us. We have included specific wording in relation to tutoring and ELSA support.

49. **Conclusion** – This Appeal will therefore be allowed with the amendments set out on the IDP annexed to the Order.

Order:

1. This Appeal is allowed.
2. The Individual Development Plan for the Child will be amended in accordance with the copy annexed to this Order.

Dated November 2024