

Tribiwnlys
Addysg Cymru



Education Tribunal
for Wales

DECISION

Child's Name: The Child
Date of Birth: 2020
Appeal of: Parent A and Parent B
Against Decision of: The Local Authority
Date of Hearing: 2024

Tribunal Panel:

Judge
Specialist Member
Specialist Member

Persons Present:

Parent A – Appellant

Parent B

On Behalf of the Appellant

Witness – Private Speech & Language Therapist

Solicitor

On Behalf of the Respondent

Local Authority Representative – Senior Educational Psychologist

Witness - SEN Coordinator Cognition and Learning

Witness – Head Teacher Primary School

Speech and Language Therapist (NHS)

Observer – Complex Case Manager

Appeal

1. The Parents of The Child, Parent A and Parent B (the Appellants), appeal under S. 70 of Additional Learning Needs and Education Tribunal (Wales) Act 2018 (“the 2018 Act”). The appeal is brought against a decision which was communicated to the Appellant on 19th June 2024, by the Local Authority (the Respondent) not to take over the responsibility of the Individual Development Plan (IDP) and also not to revise the Additional Learning Provision provided in the same.
2. The appeal has been brought under the following sections of the 2018 Act:
 - S.70 (d) The Additional Learning Provision in the IDP
 - s.70 (i) The decision by the Local Authority not to take over the IDP

Preliminary matters

3. There was an application before the Tribunal from the Appellants requesting that the grounds of appeal be expanded to include the ground under s.70(c) of the 2018 Act in respect of The Child’s Additional Learning Needs as set out in the IDP. This application has been made by the Appellant’s legal representative as in the current version of the working document (Version 8.), both the Appellants and Respondents, have amended the contents of section 2A. The Appellants state that this application is made out of an abundance of caution, given that, the amendments are agreed between the parties.
4. It was agreed by the Tribunal that the grounds of appeal would be expanded to include an appeal under section 70(c).

5. The respondents confirmed that it had been agreed that they would take over the responsibility of the IDP for The Child. They advised that this had been communicated to the Appellants via a decision letter from the complex needs panel, dated 31st October 2024. As this ground has now been agreed, the Tribunal did not go on to deal with it
6. The Tribunal considered the request by the Respondent to change one of their witnesses, they wished to replace the Headteacher at the (mainstream) Primary School, with the Speech and Language Therapist from the NHS. The Respondent was invited by the Tribunal to make an application under Regulation 43 of The Education Tribunal for Wales Regulations 2021 (“the 2021 Regulations”) requesting an additional witness as opposed to a change of witness. This was not opposed by the Appellant. This was duly granted by the Tribunal, having considered the overriding objective in Regulation 4 of the 2021 Regulations, as it was just, fair and proportionate.
7. The Tribunal then went on to consider the submission of late evidence by the Respondents, this application was not opposed by the Appellants. The applications related to a report from the NHS SALT, dated 2024, an NHS Occupational Therapy Report dated 2024, a Sensory Passport and the aforementioned letter confirming that the Local Authority would take over the responsibility of The Child’s IDP.
8. The Tribunal, having considered the evidence and the overriding objective, agreed the late evidence could be formally admitted into the proceedings.

Background

9. The Child is currently under 7 years old; they were diagnosed with Downs Syndrome five days after birth. They attend a mixed reception and year 1 class at Primary School. They also have access to the nursery class, which is part of the same unit. The Child is described as sweet, cheeky and playful who has a natural charm. They enjoy books, music, singing, exploring and story time.
10. The Child’s Downs Syndrome affects them in the following ways:

Hypotonia, which means that their gross and fine motor skills take time and support

Significant speech delay, they are preverbal and uses gestures, expressions, physical touch and is at early stages of developing Makaton signing to communicate

A learning disability that affects their understanding, cognition, social, emotional, communication and play skills.

Poor visual acuity and cerebral visual impairment

They seek sensory feedback particularly around their proprioception, vestibular and tactile senses.

11. Due to The Child's ALN, the Appellant wrote to the Respondent Local Authority to request that they review the school based IDP and take over the responsibility of it. The matter went before the ALN Panel on 12th June 2024, and they communicated their decision to the Appellant via a letter dated 2024, confirming that having reviewed the matter, that there was insufficient evidence that would require the LA Respondent to take over the responsibility of the IDP. They requested that the school involve specialist services to clarify the extent and severity of their needs.

Issues and the parties' positions

12. The Tribunal is grateful to both parties for working together, which has significantly narrowed down the issues that remain in dispute.
13. The Tribunal had before it, version 8 of the Working Document. The issues that remained for the Tribunal to determine are set out below.

1:1 Support

14. This point is dealt with on Page 5 of the IDP; the Appellants' position is that The Child should be provided with a dedicated Teaching Assistant. It is the Respondents' position that The Child should be provided with a trained adult.
15. During the hearing, the representative on behalf of the Respondent confirmed that they recognise that The Child does need 1:1 support during the school day and that this had been decided by the ALN Panel in 2024. The Appellants were not aware that this was the Respondents' position.
16. The Headteacher at the Primary School advised that they had received confirmation to recruit an additional member of staff, who would be placed in The Child's class to assist with their needs. It was confirmed through their oral evidence and through the Respondents' representative, that The Child would have 1:1 support, but that in their view it would not be best practice for The Child to receive that support from one person exclusively, but the person providing the support throughout the day could change. That would benefit The Child as they would have access to the different expertise that each member of staff brings to the classroom. They advised that the same member of staff greet and say goodbye to The Child; that the same person would take care of their intimate personal care.

17. The Headteacher at the Primary School stated that The Child is in a mixed class of reception and year 1; there are 29 pupils in the class. They also have access to the nursery class, which only runs in the morning and is comprised of 10 pupils. The Child is free to access the activities in nursery depending on their preference and if they wish to have some time away from the main class. They confirmed that there are 4 adults in the class and that on certain days this increases to 5. The Child also has access to the 'Thrive room' which is a sensory room. The school takes the lead from The Child, depending on what they want to do on any particular day.
18. The Headteacher at the Primary School confirmed that there are 2 pupils in the class that have IDPs, including The Child, and that 13 pupils received additional support, through either Speech and Language, universal provision or the neurodevelopment team.
19. They advised that 2 staff members in the unit use Makaton, and that training is being provided for all staff; they have lanyards with Makaton signs to assist them in understanding. There are also staff who are developing their British Sign Language (BSL) skills.
20. The Appellants confirmed via their Solicitor that they would prefer a designated member of staff for The Child, so that they have consistency.
21. The Tribunal was referred to the report of the private Speech and Language Therapist (B7 of the bundle). The private SALT gave oral evidence to the Tribunal; they advised that The Child's engagement fluctuates throughout the day. That someone needs to be aware of how they communicate and to pick suitable opportunities to progress their language skills. They gave an example of when The Child and a peer were engaged in a book and the peer was also Makaton signing; they engaged with this peer for a short period of time. Sometimes they are not in the zone to engage, and the staff need to be aware of this; that they need to spot when they are ready to engage.
22. They expressed that they had concerns about The Child not having a dedicated Teaching Assistant, because they need to be able to pick up The Child's needs and get to know how they communicate as their Makaton is not precise due to their poor motor skills.
23. In their report at B10, they state:

"A key person who is designated to support The Child would be available to tune into their needs throughout the day, actively spot incidental as well as planned opportunities to develop their communication and consistently respond to their communication throughout the day. It would also enable The Child to receive specific speech work and to access differentiated teaching led by their teacher."

24. The father of The Child was invited to address the Tribunal on this point. They advised that they work full time and their partner, the Appellant and The Child's Mother, is the primary care provider for The Child. They stated that they are very in-tune with The Child and their communication style. Whilst they use Makaton, that they are still learning and have their own nuances when using signs, which makes it hard to have shared communication. They explained that even though they are the parent, due to The Child's communication, they sometimes struggle to understand what they are trying to communicate. They advised that this could lead to The Child getting frustrated. That in their opinion The Child would benefit from a dedicated Teaching Assistant, with whom they can build a relationship and who would be tuned into The Child's needs.
25. The mother of The Child, echoed the views of the father, stating that the person who works with The Child needs to be pro-active and not just reactive. That they need to be always looking forward and thinking of the next steps. They gave examples of where The Child's use of Makaton could be confusing, particularly when signing around their face, due to their reduced fine motor skills e.g. the pincer.
26. The NHS SALT states in their report dated 2024, that *The Child "would benefit from those around them developing their skills and knowledge of sign/use of Makaton to support and recognise The Child's means of communication"*
27. The appellants solicitor made submissions on behalf of the Appellant; they reminded the Tribunal of the concerns raised by the private SALT regarding not having consistency with the 1:1 member of staff. That their submission is that a dedicated Teaching Assistant is required to tune into the needs of The Child and to build a relationship. That this will not prevent them from engaging with the other members of staff in the class as and when they wish to do so. That they and the Teaching Assistant will be experienced and know when they need to step back from The Child to allow them to engage with others. That if this is not working for The Child, it can be amended during the review of the IDP.
28. LA representative directed the Tribunal to consider both the written and oral evidence on this point.

The Speech and Language Provision

29. The frequency of the Speech and Language Therapy (SALT) provision for The Child is also in dispute. The provision is contained in pages 10 and 11 of the working document.
30. The Child has been known to SALT since February 2022 following a referral by a specialist Health Visitor, they have been receiving blocks of therapy. The Child also

receives private SALT, which is funded by their parents and has done so since September 2022.

31. The Respondent made a request under s.65 of the 2018 Act to the NHS for help in respect of SALT intervention for The Child. In response, The NHS SALT produced a report dated 2024. They advised that The Child responded to an '*Intensive Interaction*' approach'.
32. The NHS SALT confirmed in oral evidence that they observed The Child on one occasion, which had been fed into their report, but that their colleague had been working with them over a longer period.
33. The NHS and Respondents submit that The Child will receive 4 block SALT sessions, with the first session taking place at the end of October 2024. The NHS SALT confirmed that 4 block sessions is their standard provision and that on conclusion, there will be a period of approximately 2 months consolidation and then a review. If on review it is determined that The Child requires further sessions, they will be placed on the waiting list (currently approx. 4 weeks) for further sessions. They advised that it is open to parents to telephone them at any time to discuss The Child and it is open to the school if they feel they need assistance from SALT or training.
34. In The NHS SALT's report (pages unpaginated), they confirm that once the block therapy has been completed that they will contact The Child's class teacher/ALNCO to provide support and advice. They offer a range of training packages that would benefit those working with The Child in the school environment.
35. The private SALT gave evidence on this point, they advised that they had seen The Child on 22 occasions, and these have been a mixture of clinic and school based. That they last saw them in October 2024. That they work with them from the perspective of their Downs Syndrome and not as delayed speech and language. They advised the Tribunal that Downs Syndrome is the underlying reason for their difficulties.
36. That it is their opinion as set out on B11, that The Child needs at least 8, 1 hour SALT sessions per school term; that due to the severity of their needs that they require a dedicated, closely supported program.
37. The appellants solicitor made submissions on behalf of the Appellants, stating that there is a difference of opinion between the two experts. They submitted that the Tribunal should prefer the evidence of the private SALT over that of The NHS SALT, as they have been working with The Child for 2 years at school and home. That they have been working with them as a child with Downs Syndrome. That the offer by the NHS for The

Child is their standard provision, it does not consider their Downs Syndrome and is not specific to The Child.

38. The appellants solicitor made submissions to the Tribunal on this point stating that the ALP needs to have specificity and that the provision suggested by the Respondents and the NHS does not provide it, as they state that more sessions might be provided after review. They referred the Tribunal to the case of **E V Rotherham MBC 2001 EWHC Admin 432**. They submitted that the ALP being suggested by the Appellant is specific.
39. They also referred the Tribunal to Para 23.37 of The Additional Learning Needs Code for Wales 2021 (“the Code”):
- “The information recorded in relation to ALP will be more useful the clearer it is. It should be detailed, specific and quantifiable. This clarity might result from describing the specific tasks or actions that will be undertaken; it could also detail the training or qualifications any staff will require. Simply stating that support will be provided will not meet the need for clarity; describing the tasks any staff will undertake or facilitate, what they will be responsible for, and, if necessary, what qualifications or training they will require is important.”*
40. The LA Representative submitted on behalf of the Respondent that the ALP proposed by them is child-focused, that after the 4 sessions there will be a review to establish whether The Child will require further sessions.
41. The views of The Child’s parents were obtained, they advised that there was a reason why they had to engage with their own private SALT, that the sessions provided by the NHS are not consistent enough. That the NHS therapy has been missing a Down Syndrome specific approach. The NHS SALT confirmed that they are working with the parents on this.

Should the SALT Additional Learning Provision be contained in section 2B or section 2C of the IDP

42. The appellants solicitor on behalf of the Appellants made submissions to the Tribunal regarding where the SALT ALP should be contained within the IDP. They referred the Tribunal to s.21(9) of the 2018 Act which states:
- If the Education Tribunal for Wales orders the revision of an individual development plan in relation to additional learning provision specified under this section as provision an NHS body is to secure, an NHS body is not required to secure the revised additional learning provision unless it agrees to do so.*
43. They submitted that the provision should be contained in s.2B so as to make it enforceable against the Respondent Local Authority.

44. They also clarified that if the Tribunal were to conclude that The Child should receive 8 sessions per term, that the italics suggestions by the Respondent, on page 10 and 11 could be agreed.

45. The LA Representative on behalf of the Respondent submitted that in their experience, if further sessions are required, they can be added into the IDP at that stage.

Decision

46. In reaching the following decision, the Tribunal has considered the written and oral evidence, together with the submissions made on behalf of the parties.

1:1 Support

47. It is no longer disputed that The Child needs 1:1 support and indeed the school is taking steps to recruit additional support. What is in dispute is whether this support should come from one dedicated Teaching Assistant, which is the preference of the Appellants or whether this can be provided via several members of staff within the classroom, which is the position of the Respondent. It is important to note that the Respondent accepts that if the person changes throughout the school day, that The Child will always have someone with them giving them the support. They also state that the same person would greet, say goodbye to The Child and assist with their intimate care.

48. The Tribunal were particularly persuaded by the evidence of the private SALT, who has worked with The Child for over 20 sessions of SALT, they have concerns that if the person who is providing support to The Child is not dedicated to them, that opportunities to progress their communication could be missed. This was further supported by the evidence of the father, as set out above. It is for these reasons; the Tribunal determined that The Child should receive a dedicated Teaching Assistant.

49. The Tribunal further determined, based on the specialist knowledge of the panel, that the dedicated Teaching Assistant should have training and experience of working with children with severe communication difficulties. The person working with The Child will require a thorough facility with Makaton in order to be able to recognise and interpret The Child's signs, and to provide them with appropriate models to improve their own accuracy.

50. This is The Child's preferred method of communication, and it is essential that the person supporting them has the required knowledge of the signing method., to allow them to be understood and to progress their skills. **(please see IDP – Appendix 1)**

The Speech and Language Provision

51. The Child has received SALT since 2022, which has been provided by the NHS and a private therapist funded by the Appellants. The Child is non-verbal and on the evidence of the NHS SALT they benefit from an 'intensive interaction' approach. The private SALT's evidence is that The Child requires at least 8, 1-hour sessions per term, using an approach that recognises the particular features of the speech and language of people with Down's Syndrome. In their opinion The Child's speech, language and communication needs directly affect their access to the curriculum.

52. We note the provision put forward by the NHS is their standard provision and the number of sessions is not specific to The Child's needs. We note that these could be increased after review, but that there would be a delay in them receiving the therapy due to the consolidation period, review and waiting list. It is the view of the Tribunal that this is insufficient to meet The Child's needs.

53. The Tribunal has carefully considered the evidence of the private SALT. Using the Tribunal's expertise as a specialist panel, it is the decision of the Tribunal that The Child should receive 8 sessions of SALT per term that this is sufficient provision to meet The Child's needs. We have removed the requirement for this to be reviewed every half-term as the professional delivering the SALT will carry out regular assessments as part of their delivery program; we do not feel that this needs to be specified in the IDP
(Appendix 1)

Should the SALT Additional Learning Provision be contained in section 2B or section 2C of the IDP

54. The Tribunal has decided that The Child should receive 8 sessions of SALT per term; this is above the offer of SALT put forward by the NHS.

55. Section 3 of the 2018 Act sets out the definition of Additional learning provision as:

(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"

56. There was no dispute that SALT is capable of coming under this definition of Additional Learning Provision.

57. Section 14 of the 2018 Act states:

"Duties to prepare and maintain plans: local authorities

(1) The duty in subsection (2) applies if a local authority is responsible for a child or young person and—

(a) in the case of a child the local authority decides under section 13 that the child has additional learning needs,

(b) in the case of a young person who is a registered pupil at a maintained school in Wales or enrolled as a student at an institution in the further education sector in Wales, the local authority decides under section 13 that the young person has additional learning needs, or

(c) in the case of any other young person, the local authority—

(i) decides under section 13 that the young person has additional learning needs, and

(ii) decides in accordance with regulations under section 46 that it is necessary to prepare and maintain a plan under this section for the young person to meet his or her reasonable needs for education or training.

(2) The local authority must—

(a) prepare and maintain an individual development plan for that child or young person,”

“(10) Where a local authority maintains an individual development plan for a child or a young person, the authority must—

(a) secure the additional learning provision described in the plan,”

58. This section places the duty on the LA to provide the ALP set out in an IDP it maintains.

59. The Respondent in this case requested information and help from the health board, under s.65 of the 2018 Act, which states:

60. ***Duties to provide information and other help***

(1) Subsection (2) applies if a local authority requests a person mentioned in subsection (4) to exercise the person's functions to provide the authority with information or other help, which it requires for the purpose of exercising its functions under this Part.

(2) The person must comply with the request unless the person considers that doing so would—

(a) be incompatible with the person's own duties, or

(b) otherwise have an adverse effect on the exercise of the person's functions.

(3) A person that decides not to comply with a request under subsection (1) must give the local authority that made the request written reasons for the decision.

(4) The persons are—

(a) another local authority;

(b) a local authority in England;

(c) the governing body of a maintained school in Wales or England;

(d) the governing body of an institution in the further education sector in Wales or England;

(e) the proprietor of an Academy;

(f) a youth offending team for an area in Wales or England;

(g) a person in charge of relevant youth accommodation in Wales or England;

(h) a Local Health Board;

(i) an NHS trust;

(j) NHS England;

(k) an integrated care board;

(l) an NHS foundation trust;

(m) a Special Health Authority.

(5) Regulations may provide that, where a person is under a duty to comply with a request under this section, the person must comply with the request within a prescribed period, unless a prescribed exception applies

61. This was a general request for help and information. This is different to a request to the health board under s.20 of the 2018 Act, although this referral did identify a 'relevant treatment or service that is likely to be of benefit in addressing a child's or young person's additional learning needs'. It resulted in the report by The NHS SALT and the offer of 4 sessions of SALT for The Child.

62. Section 21 of the 2016 Act states:

"Individual development plans: Local Health Boards and NHS trusts

(1) If an NHS body identifies a relevant treatment or service that is likely to be of benefit in addressing a child's or young person's additional learning needs following a referral under section 20 it must—

(a) inform the body that made the referral of that treatment or service,

(b) if the referral was not made by a body that maintains an individual development plan for the child or young person, inform the body that maintains the individual development plan of that treatment or service, and

(2) If an NHS body does not identify a relevant treatment or service that is likely to be of benefit in addressing a child's or young person's additional learning needs following a referral under section 20 it must—

(a) inform the body that made the referral of that fact, and

(b) if the referral was not made by a body that maintains an individual development plan for the child or young person, inform the body that maintains the individual development plan of that fact.

(3) If an NHS body informs a body that maintains an individual development plan for a child or young person that there is a relevant treatment or service likely to be of benefit in addressing a child's or young person's additional learning needs, the body that maintains the plan must describe the treatment or service in the plan, specifying that it is additional learning provision to be secured by the NHS body.

(5) If an individual development plan specifies under this section that additional learning provision is to be secured by an NHS body, the following duties do not apply to that additional learning provision—

(a)...

(b) the duty of a local authority to secure provision under section 14(10)(a)

(c) ...

(6) The description of the additional learning provision specified in a plan under this section as provision an NHS body is to secure may only be removed or changed on review of a plan in accordance with section 23 or 24 and with the agreement or at the request of the NHS body.

(7) If, on review of a plan, the NHS body requests a governing body or a local authority that maintains an individual development plan for a child or young person to remove or change the description of the additional learning provision specified in the plan under this section as provision the NHS body is to secure, the governing body or local authority must comply with the request.

(8) Nothing in this section affects the power of the Education Tribunal for Wales to make an order under this Part.

(9) If the Education Tribunal for Wales orders the revision of an individual development plan in relation to additional learning provision specified under this section as provision an NHS body is to secure, an NHS body is not required to secure the revised additional learning provision unless it agrees to do so.

(10) Regulations must provide that where an NHS body is under a duty to inform under subsection (1) or (2), it must comply with that duty within a prescribed period, unless a prescribed exception applies.”

Paragraph 21.39 of 2021 Code states:

“If the Tribunal orders the revision of an IDP in relation to ALP specified as ALP an NHS body must secure, an NHS body is not required to secure the revised ALP unless it agrees to do so. The body maintaining the IDP should work with the NHS body in such circumstances to see what agreement can be reached”

63. The NHS have identified the ALP that The Child requires as being 4 sessions of SALT which is the ALP currently set out in s.2C of the IDP. The Tribunal have determined that this provision is not sufficient to meet The Child’s needs and that they should receive 8, 1-hour sessions of SALT per term. Whilst we have jurisdiction to order the revision of ALP as provision that the NHS is to secure, the NHS are not required to secure the provision unless they agree to do so. The NHS do not agree to provide ALP over and above the 4 sessions of SALT.
64. If the 8, 1-hour sessions of SALT is only contained in s.2C, then this can be ignored by the NHS and it would not fall on the LA to provide the provision, as s.2C of the IDP is the ‘Description and delivery of the ALP to be secured by an NHS body’. The powers of the Tribunal under s.76 of 2018 Act do not extend to ordering NHS bodies to make provision but only to make recommendations.
65. S.21(8) states that ‘*Nothing in this section affects the power of the Education Tribunal for Wales to make an order under this Part.*’ The section is referring to Part 2 of the 2018 Act – Additional Learning Needs. The Tribunal interpretes this as meaning whilst s.21 is in relation IDPS and Local Health Boards and NHS trusts, that s.21 does not prevent the Tribunal giving an order in respect of ALP under Part 2 of the 2018 Act. We have no power to require the NHS to secure relevant treatment or service provision, unless agreed, but there is nothing to prevent the Tribunal ordering that another body is to secure such provision.
66. The Tribunal is of the opinion that this body must be the Respondent LA as they are responsible for maintaining the IDP. It is for this reason that the Tribunal orders that the SALT ALP should be contained in s.2B. How the LA secure the ALP will be a matter for

them and possibly the NHS, if an agreement can be reached. This is outside the remit of this Tribunal.

67. We have also considered if we should order the provision that the Health Board has agreed to provide in 2C, and then specify additional provision within section 2B of the IDP. The SALT sessions proposed by the NHS could potentially be different to the model that the Respondent LA secure to provide the remainder of the SALT sessions. We therefore have decided it is appropriate to delete the ALP as set out in 2C and to order all of the provision is set out in section 2B. **(Appendix 1)**

Order

The appeal is allowed.

It is ordered that the Local Authority amend the Individual Development Plan of The Child as follows:

1. By Consent, in Section 2A, by replacing the existing wording in the Individual Development Plan with the agreed amendments as set out in the final working document contained in Appendix 1
2. In Section 2B, by replacing the existing wording in the Individual Development Plan with the amendments as set out in the final working document contained in Appendix 1
3. In Section 2C, by deleting the SALT provision contained under this section as it has been moved into Section 2B as set out in the final working document contained in Appendix 1

Judge

Tribunal Judge

Date: 2024