Tribiwnlys Addysg Cymru | Education Tribunal for Wales

DECISION

Date of Birth: 2012
Appeal By: The Parents
Against Decision of: The Local Authority
Concerning: The Child
Hearing Date: 2024

Persons Present:

The Parent	*Parent*
The Parent	*Parent*
Representative	*Parental Representative, Solicitor*
Educational Psychologist	*Parent Witness 1*
Representative from School A	*Parent Witness 2*
Representative	*LA Representative, Barrister*
ALN Manager	*LA Witness 1*
Assistant Head of Department, SEN & Inclusion	*LA Witness 2*

1. **Introduction** - This Appeal is brought by the Parents under section 70 of the Additional Learning Needs and Education Tribunal Act 2018 (the 2018 Act) in respect of the content of Parts 2A, 2B and 2D of the Individual Development Plan (IDP) dated June 24 written by the Local Authority in respect of their Child.

2. The Child is 12 years of age and attends School A, a mainstream fee-paying school, that provides for a cohort of pupils with Additional Learning Difficulties (ALN). The Child has been attending there since September 2023. Prior to this, the Child attended School B which is a maintained mainstream school. The Child has a confirmed diagnosis of Dyslexia and Developmental Language Disorder. The Child also developed separation anxiety. The Child has a history of school refusal and suicidal ideation.

3. **Representation** – The Parental Representative represented the parents and the LA Representative represented the LA. We thank them for their hard work in preparing and presenting their cases.

4. **Evidence** – We considered the bundle of documents provided to us, a Working Document, being a version of the IDP that both parties had worked on and provided the wording they respectively contended for, and oral evidence from the Parent, Parent Witness 1, LA Witness 1 and LA Witness 2.

5. During the course of the hearing, we were asked if LA Witness 2 could give evidence concerning two specific areas, SALT and School C. LA Witness 2 had not provided a witness statement or report as directed by the Registration Directions. LA Witness 2 is an Educational Psychologist and not a SALT. LA Witness 2 does not visit the school. The LA was directed to file a statement dealing with the peer group of the class proposed for the Child at the school but ignored this direction. LA Witness 2 has not assessed or even met the Child. In the circumstances it would not have been consistent with a fair trial process for LA Witness 2 to give evidence without the parents having notice of what LA Witness 2 would say, and we considered LA Witness 2 had no relevant evidence that they could give based on their own knowledge. We therefore refused the application that LA Witness 2 should be allowed to give oral evidence about these issues.

6. After the Tribunal had heard evidence on the issues identified by it, the parties were invited to raise any further issues and to provide any further oral evidence they thought appropriate. Both advised that there were no further issues, and they had provided the evidence they wished to rely on. At that stage we therefore moved to closing submissions.

7. **The Parents' Case** – Their case is that the ALN and ALP set out are insufficient to meet the Child's needs and that the Child needed to continue to attend School A, which they could not afford to support financially, and so that school should be named in the Child's IDP.

8. **The LA Case** – The LA argued that the provision required to meet the Child's needs was already set out in their IDP.

9. In relation to placement, the LA argued that the level of provision that the Child requires, if the Child were to attend a maintained school, could be provided by a school within the Local Authority and that paragraph 23.108 of the Code should be applied in this case. That paragraph states:

> **"**Where a child or parent would prefer a placement at an independent school but the child's reasonable needs for ALP can be met within a maintained education setting or FEI, the local authority is not required to fund the learner's place at the independent school. However, where this situation arises, the local authority should explain to the parent and child how the learner's needs could be met without recourse to an independent placement."

10. The LA also provided a table of figures which appeared to relate to an argument in relation to section 9 of the Education Act 1996, although this was not set out in its Case Statement, save for a footnote reference from the Code.

11. The Applicable Law – The following statutory provisions are of relevance in this case.

2018 Act Section 51 Duty to favour education for children at mainstream maintained schools

(1) " A local authority exercising functions under this Part in relation to a child of compulsory school age with additional learning needs who should be educated in a school must secure that the child is educated in a mainstream maintained school unless any of the circumstances in paragraphs (a) to (c) of subsection (2) apply.

(2) The circumstances are—

(a) that educating the child in a mainstream maintained school is incompatible with the provision of efficient education for other children;

(b) that educating the child otherwise than in a mainstream maintained school is appropriate in the best interests of the child and compatible with the provision of efficient education for other children;
(c) that the child's parent wishes the child to be educated otherwise than in a mainstream maintained school.

(3) …

(4) Where a child's parent wishes his or her child to be educated otherwise than in a mainstream maintained school, subsection (2)(c) does not require a local authority to secure that the child is educated otherwise than in a mainstream maintained school.

(5) Subsection (1) does not prevent a child from being educated in—

(a) an independent school, or
(b) a school approved under section 342 of the Education Act 1996 (c. 56), if the cost is met otherwise than by a local authority."

This section requires children to be educated in a mainstream maintained school unless one of the exceptions applies. In this case subsections (2)(c), (4) and (5)(a) can be applied. That relieves the LA of the duty to place in a mainstream school but does not require it to place the child in a fee-paying school if the parents choose it.

2018 Act Section 14

"(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,

(2) The local authority must—

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

This section places responsibility on an LA for preparing and maintaining the child's IDP.

2018 Act Section 14

"(6) If the reasonable needs of a child or young person for additional learning provision cannot be met unless a local authority also secures provision of the kind mentioned in subsection (7), the authority must include a description of that other provision in the plan.

(7) The kinds of provision are—

(a) a place at a particular school or other institution;
(b) ….."

Under this section provision in a school placement can be identified as being required to meet the reasonable needs of a child if they cannot be met otherwise.

Section 9 Education Act 1996
"In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

This section requires the LA to take account of parental preference in its decision making unless it can establish that one of the exceptions applies.

12. **The Issues In Wording in the IDP** – We note the reference in the IDP to "Social, Emotional, Mental Health" provision This phrase is not part of the legislation in Wales and should not therefore appear in IDPs applicable in Wales.

13. We will begin by considering the issues we had to determine in relation to the wording of the IDP. A number of these issues had helpfully been agreed by the parties before the hearing commenced as was set out in the Working Document helpfully provided to us. We will then move on to the issue of school placement.

14. **SALT** – The disputed wording related to the provision of direct input from a SALT, including weekly sessions of 30 minutes duration.

15. We were provided with reports from a Speech and Language Therapist 1, with the most recent being dated May 2024, and a report from Speech and Language Therapist 2, dated February 2024. Both are Speech and Language Therapists. We also had a report from a Specialist Teacher. The reports confirm that the Child has a developmental language disorder.

16. A range of assessments have been caried out with the Child over time. On the WISC testing by Parent Witness 1, Educational Psychologist, all scores were recorded as in the low average range (See page 488.) The BPVS score obtained by the Specialist Teacher, on the 4th percentile, appears to be out of step. There is no narrative to support it. The other scores that the Specialist Teacher provides also confirm a low average profile. We remind ourselves that the Specialist Teacher is a Specialist Teacher and not a SALT, although the Specialist Teacher is able to administer this test.

17. The test scores recorded at page 205 by Speech and Language Therapist 2 show scores between the 5th and 37th percentile. These are in the low to medium range. These are in keeping with scores that the Child sits in the low average range.

18. The wording in relation to a program of work which is to be used with the Child on a day-to-day basis is very similar as compared between Speech and Language Therapist 1's wording and the wording preferred by Speech and Language Therapist 2. As there is agreement as to the need for such a programme, we have amalgamated of the wording to incorporate all the core aspects from both sets of wording.

19. It was agreed between the parties that there should be review of the SALT planned for the Child every six months. We will not specify how long this will take, as we consider that is a matter for the therapist. Similarly, we will not specify an assessment, which is not provision in any event, as this again will be a matter for the expertise of the therapist when the review is being carried out.

20. In relation to Speech and Language Therapist 2's recommendation for direct speech and language therapy, we note that Speech and Language Therapist 2 states that it is required and refers to the nature of the work to be carried out but does not expand with any reasons as to why Speech and Language Therapist 2 says it is required.

21. On balance, taking account of all of the evidence, utilising our own expertise, and having considered the scores referred to, we are not persuaded that the Child's needs are significant enough to warrant direct sessions of SALT. We find that the daily work to be incorporated into the Child's Individual Communication Plan is sufficient to meet the Child's needs.

22. ***"initially with opportunities for transition to an appropriate mainstream group when appropriate"*** - This wording was suggested by the LA. The Child

is currently in a small mainstream class as we understand it, although there are other pupils in the Child's class who have additional learning needs. (See page 500) There is evidence that the Child has settled in well in their current school. We have no evidence as to how the Child would manage, now, with the benefit of an IDP, a diagnosis, and support, in a larger class of pupils. None of which were in place when the Child stopped attending school previously. We consider there is a lack of evidence for us to consider this wording save that the Child has settled in well. We note that the parties have agreed a class size of a maximum of 12 pupils during the course of the hearing following consideration of this issue by LA Witness 1 and the LA Representative.

23. **Literacy support** - We consider it is appropriate that a member of staff who has been trained in delivering a literacy program carries out this work. It matters not, in our view, whether that staff member is a qualified dyslexia teacher.

24. **School Placement –** It was not disputed by the LA that School A could meet the Child's needs. We note that both School A and School C are mainstream schools. We will now consider the evidence, of the suitability of School C to meet the Child's needs.

25. **Suitability of School C –** School C has experience of supporting pupils with additional learning needs, including those that the Child has. It has a small class for pupils with additional learning needs in the Child's year group, as set up by the Headteacher at School C in their statement, which the Headteacher at School C states is capped at 15 pupils.

26. The school is part of the Dyslexia Friendly Schools project, it has trauma informed staff available, a counsellor available from the local authority on a visiting basis, and is closer to the Child's home. It is the LA's case that it has provided for children with a similar profile to the Child with success. The provision available to meet learners' needs is set out fully at page 160/161 in the bundle in the statement of the Headteacher at School C.

27. The Parental Representative argued that we must assess whether School C was suitable to meet the Child's needs. The Parental Representative submitted that the designated smaller class is capped at 15 pupils. (See page 158) As it was now agreed a class of up to 12 pupils was required School C was not a suitable placement.

28. The expert evidence provided on behalf of the parents, being the reports of Parent Witness 1, Speech and Language Therapist 2, the Specialist Teacher and the statement of Parent Witness 2 all state that a small class size is recommended for/has suited the Child well. Parent Witness 1's report confirms that the class size should be 8 to 12 pupils. There was no challenge to any of this evidence, and as we have indicated, capping the class size at 12 pupils was agreed by the local authority.

29. The Parental Representative criticises the local authority for not producing details of the peer group in the designated small class identified by the local authority as the one into which the Child would transition. They were directed

by the Tribunal to provide specific details of the peer group in that class. They have chosen not to provide those details as ordered. We therefore have no evidence at all as the suitability of that peer group. As a result, we do not know if that peer group is in any way suitable to meet the Child's needs. The Child has struggled to attend at their previous school due to the Child's ALN and associated anxiety and it would be a significant backward step if the Child was to struggle again because the Child had been placed with unsuitable peers. The Child remains a vulnerable pupil as shown by the agreed wording in the Child's IDP.

30. The LA has not assessed the Child, even when it became apparent that an Appeal to the Tribunal had been made. The evidence in the statement of the Headteacher at School C is not based on an assessment by the school. The table of provision set out at pages 95 to 97 is not titled, dated or signed. We do not know who has prepared it or when. More significantly, we do not understand what evidence it is based on. If it has been produced by school staff at School C, they have not assessed the Child. The LA has placed itself in difficulty in arguing that School C can meet the Child's needs because of the lack of cogent evidence based on assessments carried out.

31. We contrast this with the assessments carried out upon the instructions of the Child's parents which are thorough and up to date. We remind ourselves of the conclusion of Parent Witness 2 as follows:

> "The positive changes observed since the Child's transition to School A, including improved happiness at school and apparent academic progress, indicate that this type of specialised, supportive environment is essential for the Child's SEMH (sic) needs."

32. In their submissions the LA Representative repeated the assertion that School C can meet all the Child's needs, and that more specialist help was available from the LA if required. The LA Representative referred to the small class available at School C, but this was undermined by the agreement that the class size must be capped at 12 pupils and ignored the evidence of the Headteacher at School C that that class can have up to 15 pupils. Counsel also argued that School C could be more flexible in that the Child could move to mainstream classes for individual subjects. This argument fails to recognise that in School A the Child is already in mainstream classes for all their subjects. The LA Representative also pointed to extra activities being available at School C as it is close to the Child's home, but without any evidence to support this assertion. Counsel then made some criticisms in their submissions about School A, despite the acceptance already given that it could meet the Child's needs.

33. Having considered all the evidence and submissions, and the matters set out above, we have concluded that we do not have sufficient evidence to establish that School C is able to meet the Child's needs.

34. **Costings** - As we have identified only one school placement that is suitable to meet the Child's needs, we need not go on to consider whether the LA has

established the “unreasonable public expenditure” exception in section 9. Nevertheless, for the sake of completeness we have gone on to do so.

35. We have evidence in the statement of Parent Witness 2 of the cost of the Child’s placement at School A. It is £29,652 per annum.

36. The LA has produced a Schedule of Comparative Costs at pages 160 and 161. This is an unsigned, undated document that has not been supported by evidence produced by the LA. We do not know who has produced it. It was criticised by the Parental Representative also because it contained some speculative figures, and no attempt had been made to translate the figures it did contain into an end figure in the Child’s case. We agree with those criticisms. The LA bears the burden of establishing the exception of “unreasonable public expenditure” in section 9 and must provide proper evidence if it is to prove it. In this case it has failed to do so.

37. **Conclusion** – This Appeal will be allowed for the reasons set out above and School A will be named in Part 2D.2.

Order:

1. The Appeal is allowed.

2. The Individual Development Plan maintained by the Local Authority will be amended in accordance with the copy annexed to this Decision.

Dated December 2024