

DECISION

Child's Name: The Child

Date of Birth: 2009

Appeal of: The Parents

Against Decision of: The Local Authority

Date of Hearing: 2024

Tribunal Panel:

- Tribunal Judge
- Specialist Member
- Specialist Member

Persons Present

On Behalf of the Appellant

The Parents (Appellants)

FE Teacher – Parental Witness

Family Member – Parental Witness

On Behalf of the Respondent

Head of Learner Support Services – LA Representative

Solicitor – LA Legal Representative

Deputy Headteacher, School A – LA Witness

Complex Case Manager – LA Observer

Appeal

1. The Parents (the Appellants) appeal under section 70 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (“the 2018 Act”). The appeal is brought against a decision by the Local Authority (“the Respondents”) that the Child does not have Additional Learning Needs (“ALN”) as defined under section 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (“the 2018 Act”) and the decision by the Respondent not to prepare and maintain an Individual Development Plan (IDP).
2. The appeal has been brought under the following sections of the 2018 Act:

S.70 (2) (a) a decision by the governing body of an institution in the further education sector in Wales under section 11 or a local authority under section 13, 18 or 26 as to whether a person has additional learning needs.

s.70 (2) (b) in the case of a young person, a decision by a local authority under section 14(1)(c)(ii) as to whether it is necessary to prepare and maintain an individual development plan;

Preliminary matters

3. There was an application before the Tribunal by the Respondents to admit late evidence, which was a progress report for the Child; the Parents did not object to this evidence being admitted.
4. There was also an application from the Parents for the admission of late evidence, which was a dyscalculia screening report; the Respondents did not object to this evidence being admitted.
5. The Tribunal, having considered the relevance of the evidence and the overriding objective as set out in Regulation 4 of the Education Tribunal for Wales Regulations 2021 (“the 2021 Regulations”), decided that the evidence could be admitted as it was just, fair and proportionate to do so.
6. The Tribunal had received an email from the Parents suggesting that they might want Education Otherwise Than at School (EOTAS) for the Child. The Parents confirmed that they would like hybrid learning for the Child, with education to be provided both at school and at home. This appeal is in relation to whether the Child has ALN and the decision by the Respondents not to provide an IDP. If this

Tribunal were to decide that the Child does have ALN, the specific Additional Learning Provision would fall outside the scope of these proceedings.

Background

7. The Child is currently 15 years and 1 month old. The Child has a diagnosis of Autistic Spectrum Disorder (ASD), diagnosed in 2023, and Attention Deficit Hyperactivity Disorder (ADHD), diagnosed in 2023. The Child is currently attending School A and is in year 10. The Child is described as a creative, kind, gentle individual who does not judge others and is comfortable expressing themselves through their clothing and music choices.

Issues and the parties' positions

Respondents position

8. The Respondents' position is set out in their Case Statement and supporting documentation. This decision will not repeat all the details raised in the case statement, but its contents and the supporting documents have been fully considered by the Tribunal in reaching its decision.
9. The Respondents oppose the appeal on the grounds that the legislation set out in the 2018 Act, which defines ALN, does not cover the assistance that the Child requires.
10. The Respondents set out section 2 of the 2018 Act, which defines when a person has ALN. They then refer to section 3 of the 2018 Act, which deals with Additional Learning Provision (ALP). Their position is that section 3 requires needs that are additional to or different from those of other students of the same age, and they submit that this criterion is not met in this case.
11. The Respondents state that the support provided to the Child by School A consists of Universal Learning Provision (ULP), which is offered by the school for all students. They state that this process is followed by schools within the Local Authority area in line with the Local Authority's principles regarding Additional Learning Needs.
12. The Respondents set out an extract of Paragraph 20.14 of the Code:

'most children and young people will require a differentiated approach in some aspect of their education at some point. This is a fundamental element of high quality – but routine – teaching'

13. The Respondents also drew the Tribunal's attention to paragraph 20.15 of the Code.
14. They submit that, because there is no ALP required for the Child, it follows that no IDP has been provided by the Local Authority. Instead, other plans have been made, in consultation with the Child and the Parents, which have formed the basis for supporting the Child's education.
15. The Deputy Headteacher at School A gave oral evidence to the Tribunal. They are involved in the Child's care within the school and are the pastoral lead.
16. The Child has a detailed "About Me Profile," updated in 2024. They also have a Pastoral Support Programme ("PSP"), updated on the same date. The PSP will not be repeated in this decision, but relevant extracts include:

"The Child finds attending school full time challenging... The Child has a history of being bullied. However, they have grown in confidence to ensure that all issues are reported to a member of staff."

"Lunch and break times can be a trigger point for the Child. They have a safe space where they spend time with friends and are happy spending time there."

"The Child has experienced social rejection and continues to struggle with this. They have commented that the efforts they go through to fit in are mentally exhausting. This exhaustion causes burnout, and the Child finds it increasingly difficult to regulate as the week progresses. This can impact attendance. Despite not being in school, the Child is excellent in ensuring that work is completed at home. They find home a safe space and enjoy being in clothes of their choice with their pets."
17. The Child finds some lessons more challenging, including PE. The school has timetabled a block of six ELSA sessions during PE lessons over a six-week period; a third PE session is spent in the HAFAN, a time-out space. The Child also finds RVE lessons difficult as they create anxiety. The school states these factors were considered when creating the reduced timetable.

“The Child... can attend the HAFAN, which is the Key Stage 4 wellbeing space. This is the Child’s safe space, where they feel comfortable and are able to re-regulate. The Child has been allowed to wear headphones in the wellbeing space. Additionally, the Child struggles with change and with a lack of routine and structure. For all cover lessons where permanent staff are absent, the Child is encouraged to use the HAFAN wellbeing space.”

18. The Child has a time-out pass, a 5-minute leave-early pass, and a HAFAN pass, all provided to help them feel safe in school and support self-regulation. The Child has described these as working very well, and these supports will continue to be offered at School A.

19. The Child is on the following reduced timetable:

Wednesday (Week A) – Leave at lunch

Friday (Week A) – Leave at lunch

Wednesday (Week B) – Arrive at 10am

Friday (Week B) – Leave at lunch

20. The Child works from home for 4 lessons per fortnight, and teachers have been instructed to set work via the Teams platform. The Local Authority Representative advised that this is a typical reduced timetable for pupils who require one.

21. The Local Authority Representative gave evidence regarding the provisions available within School A for children who require additional support.

22. The Child struggles with Maths, and it had been considered that they might have dyscalculia; however, a recent screening undertaken by the Parents found this not to be the case. The school has offered interventions on a fortnightly basis with a numeracy specialist HLTA.

23. A block of 6 weekly ELSA sessions has been arranged for the Child. Targets have been set to provide a bespoke package to support the Child’s ability to express themselves and regulate their emotions. One of the focuses will be developing strategies to help the Child cope and remain calm in school when presented with situations that may upset them (e.g., others being unkind to them or their friends).

24. The school has suggested that the Child attend a Social Skills Group, which supports students to develop social skills and build relationships.

25. The Local Authority Representative referred to the planning meeting document, stating that the Child's CAT scores are not only above average for the school but also above the national average. They noted that the Child is below average in Maths, which is why numeracy interventions have been put in place, and confirmed that the Child's stronger subjects are Art and English.
26. The Local Authority Representative advised the Tribunal that the Child's current attendance is 56%, with 12% relating to a family holiday. They pointed out that a clearer reflection will be seen at the end of the school year, as it is still early in the academic year. Attendance should ideally be closer to 70%. They agreed that there is a correlation between attendance and progress.
27. The Local Authority Representative advised the Tribunal that the Child would be allowed extra time during exams, as agreed by the exam board, and that the school will consider additional measures, such as providing a quiet space.

Appellants position

28. The Parents have set out their position in their case statement and attached supporting documents. This decision will not repeat all the details raised there, but its contents and the supporting documents have been fully considered by the Tribunal in reaching its decision.
29. It is the Parents' position that the Child has ALN and is entitled to an IDP; they also state that the Child's needs are being met by "Universal Provision", which they argue is not referred to in the law or Code relating to ALN.
30. They submit that the Child is neurodiverse, with diagnoses of ASD and ADHD, which they argue are the root cause of the Child's barriers to learning.
31. The Parents advised the Tribunal that the Child struggles with noise and people, and that with help they would excel in their learning. They stated that, despite numerous requests, the Child has not had an assessment by an Educational Psychologist (EP). They question how the Respondents can state that needs are met if no EP assessment has taken place.
32. The Parents describe their relationship with School A as tense, stating that this is due to concerns about the education being provided, the levels of bullying the Child has experienced, the treatment and attitudes of school staff, and the negative

impact of the school experience on the Child's mental, emotional and physical wellbeing.

33. The Parents refer the Tribunal to the legislation governing ALN in Wales, the Code, and the Senedd interim educational reform report.

34. It is the Parents' position that a PCP is not an adequate alternative to an IDP.

35. The Parents set out examples of where they state that provision in the PCP has not been adhered to. They state that the Child was not given work when accessing the wellbeing space during Maths, Science and PE. When working from home, very little work was posted for the Child. They state that although the Child is allowed to access the wellbeing space, there have been occasions when access was refused, and the Child was told to attend lessons.

36. The Parents submit that the school is not providing the support or education the Child requires to achieve their potential. They state that the Child wants to learn, is capable of producing good or even outstanding work, but declining grades and attendance demonstrate that needs are not being met. They argue the Child is being failed by the school.

37. The Parents submitted that the Child did attend the numeracy class, but pupils in that class included individuals who had previously bullied the Child and who were disruptive. The Child failed to attend further classes as they were not reminded and instead went to normal lessons; the Child requires reminders or they will forget. The Local Authority Representative apologised for this and explained it should have been flagged on attendance sheets. They agreed that the school will provide a different numeracy support class for the Child.

38. The Child is not attending the ELSA provision because, after one session, they found it emotionally exhausting to talk about feelings. The Child is engaged with an external youth service. The Local Authority Representative advised that the first session is often the most difficult, but that it gets easier. The school has tried to timetable ELSA sessions during PE. This provision is delivered on a 1:1 basis.

39. The Local Authority Representative acknowledged that the Child works extremely hard both in school and at home. They stated that the Child is making academic progress, but not much progress with the PCP, and that there has been a lack of engagement.

40. The Parents dispute that there has been a lack of engagement, stating that the Child has tried to engage. They state that some teachers are not adhering to the PCP, for example not allowing the Child to sit with friends, or asking them to answer questions in class, despite being aware that this causes anxiety.
41. The Parents disagree that the support provided is general provision available to all pupils; they argue that it goes beyond that and should be considered ALP. They state that the Child's needs are long-term and have existed since Year 7, noting that in Year 9 the Child contacted them daily to be collected from school.
42. The Parents dispute the Respondents' reliance on the statement recorded at a meeting in 2024 which said the Child felt "everything is working good". They argue the wider document contains important information showing the Child's struggles.
43. The Parents dispute what is stated in the Respondents' case statement regarding comments said to have been made at a multi-agency meeting in 2024. They were also disappointed that a staff member whom the Child trusts was not present, though reasons for their absence were provided by the Local Authority.
44. The Parents are concerned that when the Child returns from school they are exhausted, sit on the sofa and lack energy. They state that due to their ASD and ADHD profile, the Child experiences "burnout", which is different to someone who is not neurodiverse.
45. The Parents state that they engaged a home tutor for Maths, and the Child reported having a positive relationship with this tutor and liking their teaching style. The Parents would like the Child to have hybrid learning, with some school-based learning and some home tuition provided by the Local Authority.
46. The Parents state that one school wellbeing room is not a safe space because of a past incident where a large group of pupils behaved disruptively, making comments toward the Child, without staff intervention.
47. The Local Authority Representative explained that the Child can access another wellbeing space with limited access and side rooms available.
48. The Parents accept that there can be a correlation between attendance and progress but submit that the Child's wellbeing is more important. They state that the Child sometimes requires home tutoring instead of school-based lessons,

struggles with the school environment and can break down under pressure. They submit that the Child works better in a 1:1 setting or in small groups.

49. The Child has a small friendship group. Their views are contained in the evidence bundle. The Child spoke directly to the Tribunal, stating that they find it hard to regulate, that when dysregulated they cry and need time to recover. They use the wellbeing space or go home. They use drawing and music to help regulate. The Child showed the Tribunal artwork to demonstrate that their work is better when created at home. The Child is clearly a talented artist.

50. The Child was asked what would help them attend school. They stated they were unsure but would like flexibility to receive education both at school and at home. They stated they are currently in a good place in school, but the Parents are concerned this may not last based on past experiences. The Child finds one class disruptive but finds their science class less so.

51. The Tribunal thanks the Child for speaking directly and expressing their views.

Submissions

52. The Respondents made submissions to the Tribunal, reiterating the submissions set out in their case statement. They stated that the Child does have a barrier to learning, but that this does not amount to ALN. Their position is that the Child's needs are managed through the PCP and that the Child does not meet the legal test for ALN.

53. The Parents submitted that "universal provision" is not legally recognised and that the provision set out in the PCP is in fact ALP. They argued that by including the provision in the PCP, the Respondents are effectively conceding that the Child requires ALP. They stated that they do not believe that other children would have all of these provisions available to them. In their view, the situation is clear-cut: the Child is being denied an IDP. They stated that this has placed stress on the family and that no one is taking responsibility for the Child's needs.

Decision

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

55. The relevant law is set out as follows:

The Additional Learning Needs and Education Tribunal Act (Wales) 2018 states:

Section 2 Additional learning needs

(1) A person has additional learning needs if he or she has a learning difficulty or disability (whether the learning difficulty or disability arises from a medical condition or otherwise) which calls for additional learning provision.

(2) A child of compulsory school age or person over that age has a learning difficulty or disability if he or she—

(a) has a significantly greater difficulty in learning than the majority of others of the same age, or

(b) has a disability for the purposes of the Equality Act 2010 (c. 15) which prevents or hinders him or her from making use of facilities for education or training of a kind generally provided for others of the same age in mainstream maintained schools or mainstream institutions in the further education sector

Section 6 of the Equality Act 2010 defines disability as:

A person (P) has a disability if—

a) P has a physical or mental impairment, and

b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

The 2018 continues:

Section 3 of the 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

Section 11 Duty to decide: maintained schools and further education institutions

(1) Where it is brought to the attention of, or otherwise appears to, the governing body of a maintained school in Wales that a child or young person who is a registered pupil at the school may have additional learning needs, it must decide whether the child or young person has additional learning needs, unless any of the circumstances in subsection (3) apply.

(3) *The circumstances are—*

(a) *an individual development plan is being maintained for the child or young person under this Part;*

(b) *the governing body has previously decided whether the child or young person has additional learning needs and the governing body is satisfied that—*

(i) *the child's or young person's needs have not changed materially since that decision was made, and*

(ii) *there is no new information that materially affects that decision;*

(c) *the decision is about a young person and the young person does not consent to the decision being made;*

(d) *the child or young person is a registered pupil or an enrolled student at another institution (that institution being a school or an institution in the further education sector) and a local authority is responsible for him or her;*

(e) *a local authority in England maintains an EHC plan for the child or young person.*

(4) *If the governing body decides that the child or young person does not have additional learning needs it must notify the child or young person and, in the case of a child, the child's parent of—*

(a) *the decision, and*

(b) *the reasons for the decision*

Section 12 - Duties to prepare and maintain plans: maintained schools and further education institutions

(1) *If a governing body decides under section 11 that a child or young person has additional learning needs, it must—*

(a) *prepare an individual development plan for him or her, unless any of the circumstances in subsection (2) apply, and*

(b) *maintain the plan, unless the circumstances in paragraph (b) or (d) of subsection (2) apply.*

(2) *The circumstances are—*

(a) *the governing body considers that the child or young person has additional learning needs—*

(i) *that may call for additional learning provision it would not be reasonable for the governing body to secure,*

(ii) *the extent or nature of which the governing body cannot adequately determine, or*

(iii) for which the governing body cannot adequately determine additional learning provision,

and the governing body refers the child's or young person's case to the local authority responsible for the child or young person to decide under section 13(1);

(b) the plan is about a young person and the young person does not consent to the plan being prepared or maintained;

(c) the governing body requests a local authority in England to secure an assessment under section 36(1) of the Children and Families Act 2014 (c. 6) and, by virtue of the request or otherwise, the authority is responsible for the child or young person (within the meaning given by section 24(1) of that Act);

(d) a local authority in England maintains an EHC plan for the child or young person.

(7) A governing body must—

(a) secure the additional learning provision described in an individual development plan it maintains under this Part.”

If the school is not deciding whether a child has ALN the duty passes to the LA as below:

Section 13 - Duty to decide: local authorities

(1) Where it is brought to the attention of, or otherwise appears to, a local authority that a child or a young person for whom it is responsible may have additional learning needs, the authority must decide whether the child or young person has additional learning needs, unless any of the circumstances in subsection (2) apply.

(2) The circumstances are—

(a) an individual development plan is being maintained for the child or young person under this Part;

(b) the local authority has previously decided whether the child or young person has additional learning needs and it is satisfied that—

(i) the child's or young person's needs have not changed materially since that decision was made, and

(ii) there is no new information that materially affects that decision;

(c) section 11(1) applies and the local authority is satisfied that the question of whether or not the child or young person has additional learning needs is being decided under that section;

(d) the decision is about a young person and the young person does not consent to the decision being made;

(3) If the local authority decides that the child or young person does not have additional learning needs it must notify the child or young person and, in the case of a child, the child's parent of—

- (a) the decision, and*
- (b) the reasons for the decision.*

The Statutory Test for ALN

56. We have set out the test in section 2 of the 2018 Act above. There are two elements to it, firstly, whether a child has a learning difficulty, as defined, and secondly, whether provision is required to meet that difficulty.

Learning Difficulty

57. There are two questions to consider in relation to learning difficulty. If either limb is made out a child has a learning difficulty. The first question is, does the Child have a significantly greater difficulty in learning than the majority of others of the same age?

58. The Child is currently below average in Maths. As the Child has been making good academic progress in the majority of other areas of the curriculum, however, we cannot ignore the possibility that they are working harder than others to achieve this. The Parents made the point that while the Child is doing well, they could be doing better. We would add that they might be able to achieve the same outcomes but, with appropriate support, not have to work so hard.

59. Para 2.23 of the 2021 Code states:

‘It is important to note that a child or young person may be very proficient in one part of their education but have ‘a significantly greater difficulty in learning’ than the majority of others of the same age because of difficulties in other parts of their education.’

60. Paragraph 2.19 states:

‘One aspect of the definition of ALN involves the child or young person having (or in the case of a child under compulsory school age, being likely to have when of compulsory school age a “significantly greater difficulty in learning than the majority of others of the same age” (section 2(2) (a) and (3) of the Act). If a child or young person has (or is likely to have) a greater difficulty in learning than the majority of others of the same age, whether it is (or is likely to be) a significantly greater difficulty in learning compared to those others depends upon the extent of

the educational or training provision called for by it (or that will be called for by the likely difficulty). If it calls for (or the likely difficulty will call for) educational or training provision generally made available in mainstream maintained schools or FEIs (for example, measures such as catch-up provision or differentiated teaching strategies more generally), it would not amount to a significantly greater difficulty in learning. But if the educational or training provision the difficulty calls for (or likely difficulty will call for) is ALP, it is (or will be) a significantly greater difficulty in learning’

61. It is agreed that the Child’s needs call for additional support. The following support is set out in the Child’s PCP:

Reduced timetable

Numeracy intervention

6-week block of ELSA sessions (to assist in expressing themselves and regulating emotions)

Social Skills Group (subject to the Child’s views)

Access to the wellbeing space

Wellbeing pass

62. The Tribunal concludes, based on the evidence and the legislative framework, that the Child does have a significantly greater difficulty in learning than the majority of others of the same age.

63. As the Tribunal has concluded that the Child passes the first limb of the test, there is no requirement to consider the second limb. However, the Tribunal does so for completeness. The second limb asks whether the Child has a disability that prevents or hinders them from making use of facilities for education. The Child has diagnoses of ASD and ADHD, so has a disability; this is not disputed by the Respondent. Unlike most other children of the same age, due to ASD and ADHD, the Child struggles with “burnout” and finds it difficult to self-regulate. This can lead to leaving the classroom and, on many occasions, going home. This creates a significant difficulty in accessing education.

64. The Tribunal has concluded that the Child does have a learning difficulty. We now move on to the second test under section 3 of the 2018 Act.

Does the Child’s ALN call for Additional Learning Provision?

65. The next stage requires consideration of whether the Child's ALN calls for ALP.

66. Is the educational or training provision listed above additional to, or different from, that made generally for others of the same age in mainstream maintained schools in Wales?

67. The correct comparator for these purposes is the provision made for an ordinarily developing child of the same age. We form this view for the following reasons:

a. The legislation does not refer to universal provision as a relevant criterion for judging whether provision is additional to or different from that generally made. Neither does the Code. There is no legal basis for asserting that the source or description of the provision in this way (whether universal or otherwise) determines whether it is additional to or different from general provision. This question may be relevant to whether an IDP should be maintained by a Local Authority or a school, but it is not relevant to the determination of whether the provision that the Child requires is additional to or different from the provision generally made in a mainstream class.

b. That view is consistent with the approach previously taken under the Education Act 1996 and currently taken under the Children and Families Act 2014 (in England), both of which set out the tests in substantially the same way as the 2018 Act. The 1996 Act and the 2014 Act both include a separate test, where a person has special educational needs which require special educational provision, of whether a Statement of Special Educational Needs (a Statement) or an Education, Health and Care Plan (EHCP) are "necessary". Many learners in Wales previously had (and currently have, in England) special educational needs which require special educational provision, without also having a Statement or an EHCP. The decision on whether a learner needs a Statement or an EHCP will depend, at least to some extent, on the resources needed to meet that learner's needs. The 2018 Act does not include that separate step of necessity. It simply provides (subject to a limited number of exceptions) that where a learner has ALN (which require ALP), they must also have an IDP

68. In other words, is the above support set out in the Child's PCP made for an ordinarily developing child of the same age?

69. The Respondents' position is that the Child does not require ALP because the interventions in the PCP are not additional to or different from provision generally made. In our view, this is the wrong approach and is inconsistent with the Respondents' obligations under the 2018 Act. The correct comparator is an ordinarily developing child of the same age. It is clear to us that the Child is already receiving ALP. An ordinarily developing learner in a maintained mainstream school would not receive the combination of support that the Child is receiving.
70. The Tribunal therefore concludes that the provision set out in the PCP is not provision made for an ordinarily developing learner of the same age. They do not have reduced timetables, numeracy intervention, 6-week block of ELSA sessions, Social Skills Group, access to a wellbeing space and wellbeing passes. These are ALP provided by the school to support the Child's ALN.
71. The Tribunal therefore concludes that the Child does have ALN and should have an IDP. The Tribunal notes that there is no Educational Psychologist assessment in this case but recognises that one might be required to identify whether further ALP is needed beyond what is currently being provided.
72. The Tribunal wishes the Child all the best for their future.

Order

The appeal is allowed.

1. The Child has Additional Learning Needs under section 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018.

Dated January 2025