

DECISION

Date of Birth: 2014

Appeal of: The Parents

Against Decision of: The Local Authority

Date of Hearing: 2025

Persons Present:

Parent 1 – Appellant

Parent 2 – Appellant

The Child (prior to the start of the hearing)

The Child's carer – Observer (prior to the start of the hearing)

On Behalf of the Respondent

LA Solicitor – LA Legal Representative

Principal Educational Psychologist – LA Representative

Headteacher, Community Primary School – LA

Appeal

1. The Parents, (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 by the Local Authority ("the Respondents") that the Child does not have Additional Learning Needs ("ALN") as defined under s.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 'One page profile' for the Child. The Tribunal were informed that the Appellants had been provided with the document, outside of the proceedings and as part of a routine communication from the School to Parents.
4. Parent 2 advised the Tribunal that they had not received the document. It is perhaps irrelevant whether they did or did not, as if the Respondents intended to rely on it, it should have been served as part of the hearing bundle. No adequate explanation was provided by the Respondents as to why it had not been included.
5. The Appellants were given time to review the document and raised no objections.
6. The Tribunal, having considered the relevance of the evidence in conjunction with Regulation 47 of The Education Tribunal for Wales Regulations 2021 ("the 2021 Regulations") and the overriding objective as set out in Regulation 4, decided that to not admit the evidence could cause serious risk of prejudice to the Respondents. That in all circumstances it was just, fair and proportionate to do so. The evidence was duly admitted.

Background

7. The Child is currently 11 years old. They are currently attending the Primary School ("the school") and is in year 6. They have a diagnosis of Autistic Spectrum Disorder (ASD) which was diagnosed in June 2024, after private assessment commissioned by the Appellants. An initial referral by the School to

the Health Board, failed to diagnose them as they stated they had insufficient evidence to start the diagnosis process.

- 8 the Child is described as articulate, funny, and enthusiastic; they have social and emotional needs.

The Hearing

9. Prior to the start of the hearing, the Tribunal members had the delight of meeting and speaking to the Child about their interests and school in general. We can attest that the Child is very articulate and funny.
10. It was clear to the Tribunal panel that the Child has ASD, they initially had a hat over their eyes but was comfortable when Parent 1 told them to take it off. The Child was accompanied by their two soft dog toys, which they wore around their neck. They were animated when explaining their love for dogs and told the panel about a dog they had seen on the train on the way to the hearing.
11. The Child was asked if there were any subjects that they liked or disliked. They had very strong opinions in respect of mathematics, stating that they despised the subject.
12. It was agreed with the Appellants that it would not be appropriate for the Child to stay for the hearing, given their age and the Court room setting.

Issues and the parties' positions

Appellants position

13. The Appellants have set out their position in their case statement (p.8-10) and attached supporting documents. This decision will not repeat all of the details raised in the case statement, but its contents and the supporting documents have been considered by the Tribunal to reach its decision.
14. It is the Appellants position that the Child has ALN and that they are entitled to an IDP. That they have a diagnosis of ASD and is waiting on referrals for ADHD and dyspraxia.

15. They submit that the Child is not making good progress academically, they rely on a Vineland assessment, which they state proves they are significantly behind with their adaptive functioning. This is causing them concern regarding the Child's ability to cope when they transition to High School. They state that there is no provision in place for them.

16. The Appellants state:

"Their scores from school were: Communication 94, 34th percentile, Daily living skills 71, 3rd percentile and Socialisation 71, 3rd percentile which gave an ABC score of 78, 7th percentile in the moderately low category. From home they were: Communication 65, 1st percentile, Daily living skills 60, 1st percentile, Socialisation 52, 1st percentile which gave an ABC score of 60, 1st percentile in the low category. When I queried this matter with the LA that clearly they are not functioning at age expected level in all areas they maintained that the scores backed the panel's decision that the Child does not have ALN."

"The Child's difficulties are numerous. They don't understand or really use body language, facial expression or gestures. They have a very rigid and literal understanding of language and don't understand sarcasm or rhetorical questions. The Child is very blunt which leads to them accidentally offending people and either getting into trouble or falling out with friends. they struggle socially with making friends and keeping friends. They believe strongly in following rules and gets upset and agitated when others don't."

"The Child has poor fine and gross motor skills, their presentation is frequently commented on. They can't do zips or laces. They always have something on backwards or inside out. They spill, drop and tip things. They come out of school covered in their dinner. They trip over their own feet. They are very much in 'the Child's world' and takes very little notice of their surroundings or situational dangers. I have to constantly pull them back from wandering into roads, ditches, potholes, poles, parked cars, trees. They seem to genuinely have no awareness at all"

"The Child has a lot of sensory issues due to their autism. They find bright lights, noise and crowded places extremely difficult to cope with and they frequently cause meltdowns and crying."

17. The Appellants gave oral evidence to the Tribunal, they have real concerns regarding the Child's transition into High School, without a transition plan in

place. They dispute that they are doing well academically and that this is being masked due to their communication skills. They reiterated their concerns as set out in their case statement around the Vineland assessment and the results produced.

18. That this year they have seen a difference to their attitude to school, in that they used to like school and now no longer want to attend. They believe this is due to them noticing the difference between themselves and their peers.
19. The Child can become dysregulated in noisy and/or crowded places. When they come home from school they often need a release, they will do this by either sitting in a dark quiet room or by jumping on the trampoline. They believe that they are masking in school and exhibits decompressive behaviour when they get home.

Respondents position

20. The Respondents position is set out in their Case Statement (p.1-7) and supporting documentation. This decision will not repeat all of the details raised in the case statement, but its contents and the supporting documents have been considered by the Tribunal to reach its decision.
21. The Respondents oppose the appeal on the grounds that the legislation as set out in the 2018 Act, which defines ALN, does not cover the assistance that the Child requires.
22. The Respondent sets out s.2 of the 2018 Act, which defines when a person has ALN, they then go on to set out s.3 of the 2018 Act which deals with Additional Learning Provision (ALP). Apply the following test, they state:
 - (i) Does the child or young person have a greater difficulty in learning than others of the same age?

No – School progress data and school reports indicate the Child has, and is, making good progress academically and is working at, or above, an age expected level in all areas. EP assessment confirms this and did not indicate any learning difficulties (such as working memory difficulties, or processing difficulties) being ‘masked’ by the Child’s

above average verbal skills. The Child believes that they can do their work well and views themselves positively as a learner.

- (ii) Does the child or young person have a disability, which prevents or hinders them 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?

No – Although autism is classed as a disability, and the LA recognises the Child's social and emotional difficulties, and some aspects of adaptive functioning. However, the LA position is that the Child's difficulties do not prevent or hinder them from making use of facilities for education of a kind generally provided for others of the same age in their school. School information describes the Child as an academically able, articulate, enthusiastic pupil, who engages well with all aspects of school life. The answer to both these questions is 'no', so the LA's position is that the Child does not have ALN and does not require ALP.

23. That "The LA does not dispute the private diagnosis of ASD, as school staff have identified, recognised and supported the Child's social and emotional difficulties throughout their time in primary school. School staff also recognise strengths demonstrated by the Child, consistent with their neurodiverse profile, such as their creativity, enthusiasm for topics and their unique sense of humour".

24. The Respondents referred to the Child's One Page Profile, which states that the Child should be supported in the following ways:

- I may need movement breaks throughout the day. Allow me to fidget or wear noise cancelling headphones if I need to.
- I need a consistent trusted adult who I can speak to if I am feeling overwhelmed or anxious. I need to have regular check-ins with them. A quiet space will help me calm down
- I like routine. A visual timetable is important Please tell me if something different is going to happen.
- Sometimes I may not want to take part in an out of routine event that may make me feel anxious. Please do not make me participate.
- I need you to tell my parents about things I am doing well and things I may be struggling with.

- Please make the instructions short and clear and chunk them to make them easier to remember. Visual aids are a must.
- Keep reminding me of what is expected to keep me on task. I thrive on praise when I do something well. This will help build my self-esteem
- Please do not tell me off about the presentation of my work as I struggle with writing.
- If I make a mistake tell me discreetly as I get embarrassed easily.
- Please remember I am not trying to be rude but I may say something that you think is wrong or impolite.
- I don't like being touched and like people to explain things calmly to me, shouting hurts my ears and bright lights hurt my eyes.

25. The Headteacher gave evidence to the Tribunal, that every child has a One Page Profile and that this is not unique to the Child. That whilst they often come into class wearing their noise cancelling headphones, they often remove them during lessons.

26. An LA Educational Psychologist, carried out a Phase B consultation with Parent 1 and the School ALNCo on 2nd December 2024 (p.70). The EP states that the School are to make a referral to Occupational Therapy services. When asked, the Headteacher advised that this referral had not taken place and that there was no reason for this. The Appellants confirmed that they had to make the referral themselves due to the inaction from the school and that they are being seen on 14th May 2025.

27. An LA Educational Psychologist, undertook a Phase C assessment of the Child, with their family on 19th February 2025 (p.100-103). Which they state concluded that, their spatial, non-verbal, verbal, spelling and reading skills were all in the 'average' range. That their handwriting is difficult to read, their short-term memory, verbal working memory were at an age appropriate level (assessed in a quiet environment). That their speed of information processing is in the 'average' range.

28. They also stated "All of the Child's scores fall within the low range on the parental assessment, based on their presentation at home. This indicates that the Child needs support from an adult in order to manage the practical, everyday living skills appropriate for their age. Information from the Child's class teacher indicates some strengths in their communication skills within the school setting; this domain measures how well the Child understands, listens and expresses themselves through speech, in addition to reading / writing skills. Their school-

based scores on the daily living skills and socialisation domains are slightly higher than the home setting, but still illustrate notable delays”.

29. The Psychologist concluded that the following next steps/ required actions were to be out in place for the Child, to assist with their needs:

- Visual supports / checklists will assist the Child in remembering task instructions and routines to be followed. It may also help in developing confidence with new tasks.
- Similarly, an individual timetable will help reduce any anxiety about what is coming next during the day and help develop independence skills.
- Regular ‘check ins’ with a trusted adult will continue (the Child cited this as a positive support element)
- A ‘regulation station’ may be set up to enable the Child to manage their Zones of Regulation (feelings/energy/states of alertness) with increasing independence.
- All work should be ‘chunked’ into achievable sections for the Child, with movement breaks where appropriate
- Lego Therapy may be utilised to develop social skills.
- Social skills games or social stories could be used to develop understanding of phrases / sayings
- Sensory circuits may help the Child to regulate and organise their senses in order to prepare for learning.
- The Child will benefit from enhanced transition sessions and further discussion around the support they will need at the High School, considering their views (outlined above) will be conducted

30. The Headteacher was questioned by the Tribunal, as to why the Child’s One Page Profile had not been updated to include the new recommendations set out above. They advised they were unsure, but that it would not be a problem updating it.

31. They were asked whether the Educational Psychologists recommendation had been implemented, they advised that the sensory circuits were not being provided. That a regulation station was not being provided, but that it is the Child's responsibility to let the staff know when they require a movement break. That there is a Winter garden that they can utilise. That they don't see the Child dysregulated in school.
32. They advised that they use visual aids, as the children use Chrome Books as part of their learning, that children have their work chunked.
33. That no Lego therapy has been provided or was being sourced. That these were suggestions not a requirement.
34. In respect of the transition, they advised that this will take place in the Summer term for all children. That in respect of their education, based on their star ranking system, 1 being the lowest and 5 being the highest, they are a 4. That based on their school progress reports, they are progressing well. That they are Vice Chair of the Eco Committee.

Submissions

35. The Respondent made submissions to the Tribunal, re-iterating the submissions as set out in their case statement. That the Child does have ASD, but that this is not ALN. That they do not therefore need an IDP. They stated that they do not have a greater difficulty in learning, that whilst they have a disability, that this does not prevent or hinder them from making the use of facilities for education or training of a kind generally provided for others of the same age in mainstream maintained schools or mainstream FEI.

That they are happy, engaged; they've been on residential school trips, part of the school debating team.

36. The Appellants submitted that that what is set out in his One Page Profile and EP recommendations is ALP

Decision

37. In reaching the following decision, the Tribunal have considered the written and oral evidence, together with the submissions made on behalf of the parties.
38. 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

39. 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

40. 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? (s.2 (2) (a) 2018 Act.

41. The Child's educational and social progress was assessed by the BAS3 and the Vineland and standard national testing. There is a disparity between what the Appellants state is their level of progress and that of the school. It is noted that these assessments were not put before the ALN panel for consideration.

42. Para 2.23 of the Additional Learning Needs Code for Wales 2021 ("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.’

43. 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’

44. Paragraph 2.20 states:

‘Accordingly, when applying the first test (described above) for a child of compulsory school age or a young person, it is not necessary to consider whether a difficulty in learning is significant at that stage, because if it is, the second test (whether it calls for ALP) will be met’

45. In conclusion to the Phase B assessment, the LA EP states that “the Child is experiencing difficulties relating to their diagnosis of Autism; namely emotional regulation, sensory processing, motor skills, organisational skills and communication. It is positive to note that the Child enjoys learning and is making good progress. It is hoped that the implementation of the strategies discussed will reduce anxiety and assist with regulation”

46. The Tribunal conclude that these difficulties do mean that the Child has a greater difficulty in learning than the majority of others of their age.

47. As the Tribunal has concluded that the Child passes the first limb of the test, there is no requirement to consider the second limb. The Tribunal does so for completeness. The second limb asks, does the Child have a disability which

prevents or hinders them from making use of facilities for education? The Child is diagnosed with ASD, so they have a disability; this is not disputed by the Respondent. Unlike most other children of their age, due to their ASD, based on the Respondents own evidence, they are “experiencing difficulties relating to their diagnosis of Autism; namely emotional regulation, sensory processing, motor skills, organisational skills and communication.”

48. The Tribunal conclude at the very least the Child’s disability hinders them from making use of facilities for education. Their emotional regulation and sensory processing makes school life harder for them than for other children of the same age.

Which calls for Additional Learning Provision

49. We now move onto the second test under s.3 of the 2018 Act.

50. The next stage of the definition requires consideration of the question, does the Child’s Additional Learning Needs call for Additional Learning Provision?

51. The Child is receiving interventions/strategies to assist with their learning and in some cases whilst they are not currently receiving the interventions, they have been recommended by the Educational Psychologist. These are set out above.

52. Is the Child’s educational or training provision additional to, or different from, that made generally for others of the same age in mainstream maintained schools in Wales?

54. 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

55. In other words, is the above support set out in the Child’s One Page Profile, Phase B and C assessments, made for an ordinarily developing child of the same age?
56. The Respondents position on this is that the Child does not require ALP, because of the current interventions that are set out in their One Page profile and Phase B and C, as such, are not additional to or different from that made generally for others of the same age in mainstream maintained schools in Wales. In our view (see above), this is the wrong approach and is not consistent with the Respondents’ obligations under the 2018 Act. The correct comparator for these purposes is the provision made for an ordinarily developing child of the same age. It is clear to us that the Child is already receiving ALP. An ordinary developing learner of the same age in a maintained mainstream school would not receive the combination of support that they should be receiving. For example Lego therapy, sensory circuits. This is ALP, so it follows that the Child has a significantly greater difficulty in learning and therefore has ALN.
57. The Respondents have applied the first test too narrowly, they have simply relied on the fact they say that the Child is making good academic progress and is working at age expected at all levels. It is noted that this is disputed by the Appellants. But taken at its highest, if the Child is making good academic progress, this does not mean that they do not experience a greater difficulty in learning than the majority of others of the same age, because of their ASD. The Respondent’s own evidence contained in the Phase B and C assessments

confirms that they require ALP, which demonstrates based on the legal test that they do have greater difficulty.

58. The Tribunal have concluded that the provision as set out for the Child is not provision that is made for an ordinarily developing child of the same age.
59. The Tribunal has therefore concluded that the Child does have ALN and should have an IDP.
60. The Tribunal note the recommendations provided for by the LA Educational Psychologist in the Phase B and C assessments and would advise that these be incorporated into the IDP as ALP.
61. The Tribunal were concerned that given these provisions had been recommended as next steps/required actions in the report dated 19th February 2025, by the LA appointed Educational Psychologist, they have largely been ignored by the school.
62. The Tribunal are further dismayed by the fact that despite the Phase B assessment dated 2nd December 2024 recommending that the School refer the Child to an Occupational Therapist, that this what not done. That the Appellant's had to make their own referral. No explanation was given.
63. These failings are unacceptable and have been to the detriment of the Child.
64. The Tribunal wish the Child all the best for their future and a smooth transition into High School.

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.
2. That an IDP be drafted for the Child.

Dated 2025