Tribiwnlys Anghenion Addysgol Arbennig Cymru

Special Educational Needs Tribunal for Wales

DECISION

Date of Birth: 2004
Appeal of: The child supported by their Parent
Against Decision of: The Governing Body of the Comprehensive School
Date of hearing: 2021

Persons present:
Parent
Parental Representative – Counsel
RB Representative – School Governor
RB Representative - Headteacher School
Deputy Headteacher – witness
Key Stage 4 wellbeing officer –- witness

A. Claim

1. The child claims that the governing body of the Comprehensive School (RB) as the responsible body discriminated against the child by not offering a place in the school's sixth form.

B. Preliminary Issues

2. The claimant applied for an adjournment of this hearing in March 2021 in order to obtain and file an educational psychology report. The application was refused.

3. This claim was heard remotely.

C. Facts

4. The child was born in 2004. The child is now sixteen and a half years of age. The child is the claimant and is supported by their Parent. This claim is brought under the Equality Act 2010.

5. The remedies sought by the claimant are:

   i. a declaration that the responsible body discriminated against the child

   ii. a direction that the school shall issue an apology for the act of discrimination, which should first be approved by the tribunal

   iii. a direction that the school ensures that such discrimination does not reoccur, for example by requiring them to ensure that school staff are fully trained in managing children with disabilities

D. Tribunal's Decision with Reasons

6. We have carefully considered all the written evidence and submissions presented to the tribunal prior to the hearing and the oral evidence and submissions given at the hearing. We have also considered the provisions of the Equality Act, the guidance to that Act and the case law referred to in this decision. We conclude as follows.

7. The child, the claimant, was a pupil at the Comprehensive School from September 2015 until July 2020. The child had applied to continue their studies in the sixth form at the Comprehensive School from September 2020.

8. The child's application to enter the sixth form was submitted after the closing date but was accepted for consideration by the school. The child was not formally offered a place but was informed that their application would be considered after Easter and in the meantime the child had to improve and thereafter maintain an acceptable attendance record.

9. The child's Parent was notified by the Headteacher, in a letter dated January 2019 that:

   The child has applied to return to us for sixth form next year. Entry into our sixth form requires pupils to abide by the high standards of respect and commitment we expect at the school, in order to ensure that all our pupils can flourish and succeed. A key element of these high standards is good attendance, and it is stipulated in our entry requirements that the school sixth form students are expected to maintain an attendance record of 90%. Currently the child's attendance stands at 79%. This is a cause for concern which has been

highlighted to you in previous written communications from us. We also have real concerns about lateness: the child currently has 29 lates on the school system, adding up to more than 10 hours of learning.
The child's attendance record does not currently demonstrate the ability to adhere to our high standards and so, at this time, the child does not have a guaranteed place in our sixth form. This is a position we will review at Easter, but the child needs to be aware that they will need to improve their attendance in order for us to offer the child a sixth form place. If the child's attendance does not improve during this period, we will not be in a position to offer them a place next year. I suggest that if the child has not already made an application to an alternative institution that does so.

10. The Headteacher also asked that the Parent in that letter to provide written confirmation from the consultant responsible for the child's care if the child suffered from a significant long term medical condition that prevented regular school attendance.

11. In March 2020 the Deputy Headteacher wrote to the Parent by e-mail notifying them that the child's attendance levels had deteriorated and stood at 71% and that the child had 39 lates on the system. The e-mail also reiterated that a final decision on sixth form places was to be made after Easter.

12. The school's senior leadership team met in April 2020 to discuss sixth form applications, with each case addressed on an individual basis. Two criteria were set for pupils who had received initial cause for concern letters to enable them to be admitted to the sixth form, namely:

    i. An improvement in attendance since January, when the first letter was sent, and
    ii. Attendance for the academic year (up to 13th March) to be at least 75%

13. In April 2020 the Headteacher, wrote to the Parent to inform them that:

The child has met neither of these criteria as their overall attendance for the year stands at 72% and is lower that it was in January. The child's lateness to school also stands at 16.5%. It is the decision of the Senior Leadership team that it will be impossible for the child to succeed at A level with this current level of attendance and punctuality. We have been in communication with you regarding the child's attendance over the past two years, the child has been given an opportunity to improve their attendance and has failed to do so.

Therefore, we are not in a position to offer the child a sixth form place next year.

14. The child has since secured a sixth form place at another School, also in Cardiff and is reported to have settled and to be making progress.

15. The Claimant accordingly alleges that the RB discriminated against them in April 2020 by declining to offer a place in its sixth form without having any regard to their disability.

16. In order to pursue the child's claim, the child must establish that the child has a disability as defined in section 6 Equality Act 2010. The Act defines a disabled person as being a person with a disability, namely a *"physical or mental impairment that has a substantial long-term adverse effect on ability to carry out normal day to day activities".*

17. There are several elements to this definition, namely:

    - A person must have an impairment that is either physical or mental
    - The impairment must have adverse effects that are substantial
    - The substantial adverse effects must be long-term
    - The long-term substantial adverse effects must be effects on normal day to day activities

18. The child claims that their disability arises from a diagnosis of Vasovagal Syncope.

19. The RB does not accept that the child is disabled to the extent that satisfies the definition in section 6 of the Equality Act. Accordingly, as a preliminary issue before considering the claim, the tribunal must decide whether or not the child is entitled to bring a claim.

20. In February 2018, Consultant Paediatrician, diagnosed the child's symptoms as being classical of Vasovagal Syncope which is very common in tall lanky individuals like the child. It is reported to be a condition that usually gets better with time and age. The report of the Consultant Paediatrician records that the child was complaining of dizziness, particularly after standing up from sitting down, and light-headedness at the same time. The child was not reporting any loss of consciousness, but that the episodes had been happening for six to twelve months before the consultation.

21. The bundle contains a letter dated January 2019 written by the Doctor from the Medical Centre which states "*The child has been attending the surgery due to symptoms of dizziness. These symptoms have been investigated and were felt to be Vasovagal episodes, there is no ongoing medical concern. The child has been reviewed by a cardiologist in the past and advised how best to help resolve these symptoms, to avoid them, and reduce their impact when they occur".*

22. In December 2019 the child attended the clinic of the Professor Consultant Cardiologist. Following the consultation, the Professor Consultant Cardiologist reports that '*The child's Parent was in touch with me as the child has been having recurrent episodes of near syncope which have caused understandable distress and concern…….For the last two or three years the child has had episodes of near syncope. These occur in a fairly typical vasovagal type environment and often happens when the child is standing up, or after getting out of bed or after sitting down for long time, for example school assembly. In a typical episode the child's vision goes blank, the child does not feel any pain, the child is not aware of their heart racing but the child feels quite dizzy. The child has not completely lost consciousness. The feelings last for up to 15 minutes'.* The Consultant Cardiologist concludes that 'The child *has almost certainly Vasovagal Syncope'.*

23. The RB accept that the child has a diagnosis of Vasovagal Syncope, and also accept that the symptoms have lasted for a period in excess of twelve months. The RB however do not accept that the effects of the impairment are substantial or that they have an adverse effect on the child's ability to carry out day to day activities.

24. Section 212 (1) EA defines substantial as 'more than minor or trivial'. It follows from this definition that the threshold is not a particularly high one.

25. The question is whether the effect of the impairment is to make it more difficult and/or more time consuming for a person to carry out an activity compared to someone who does not have the impairment, and this causes more than minor or trivial inconvenience.

26. It is regrettable that we heard no evidence from the child themself. There was no written statement from the child either. The child's Parent told the tribunal that the child now lives with the Parent. The Parent testified that the child wakes up almost every other day feeling unwell. It is impossible to get the child out of bed. The child is tearful

and sometimes is physically sick. The child was a promising sportsman but has not played Rugby or Cricket since 2017. The Parent said that the child has recently started an exercise regime at home which has been of assistance to the child.

27. The Parent explained that when the child is unwell the child needs to close their eyes and lie flat. The child also implements the strategies recommended by the doctors. The Parent said that the episodes of near syncope last for far longer than the 15 minute timeframe reported by Consultant Cardiologist.

28. It was said by the Parent that the child complains of cloudiness of thought which makes it difficult for the child to concentrate during lessons. The child states that as a result the child is not able to answer questions put to them in class which makes the child feel foolish. The child cannot adopt a strategy of lying down and lifting their legs, as suggested by Consultant Paediatrician, in classroom situations.

29. Whilst the RB accepts that the child has a diagnosis of vasovagal Syncope, they do not accept that the child suffers from anxiety and neither does it accept that the anxiety arises from the vasovagal syncope. Further the RB argues that anxiety cannot be inferred from any of the medical letters contained in the bundle. The RB points out that the school had repeatedly asked the parents for written confirmation from a consultant involved with the child that the condition was such as to have implications for school attendance. Indeed, the RB argues that the letter from The Medical Centre suggests to the contrary, namely that there was no reason why the child should not be able to attend school.

30. The evidence from the school is that the child did not display any issues arising from vasovagal syncope whilst at school and that the school was not aware that this condition had any effect on attendance or performance at school.

31. In short therefore the RB argue that whilst the child may have an impairment it is no more than minor or trivial and does not satisfy the definition of ‘substantial’.

32. There is no disagreement that the child has a condition diagnosed as Vasovagal Syncope. It is also evident that the child has had this condition for in excess of twelve months as established by the medical reports. This condition from which the child appears to have suffered since in or around 2017 is a matter of considerable concern to the child

and the Parent. Both paediatricians, whose reports appear in the bundle, confirm that it is a common condition that is likely to get better as the child gets older. These reports seek to provide the child with some reassurance and to provide the child with strategies to adopt and precautions to take to avoid a Vasovagal Syncope episode. There is then the letter from the Doctor from the Medical Centre which on the one hand indicates that there is no ongoing medical concern, also confirming that the child has been *advised "how best to resolve the symptoms, to avoid them, and reduce their impact when they occur".* Whilst the Doctor from the Medical Centre indicates that the child should be encouraged to maintain routine by attending school, the Doctor from the Medical Centre does acknowledge that the child has attended the surgery on occasions complaining of dizziness now identified as Vasovagal Syncope and that the child should be provided with support and provision where needed if the symptoms were to occur during the school day.

33. Even though we have no direct evidence from the child, the tribunal heard evidence from the child's Parent with whom the child has lived since 2019. The Parent is in a position to report on the child's condition at home especially in the morning and the reports that the Parent receives from the child about the effect that the condition has on the child's engagement in class. Taking into account all the evidence the tribunal is satisfied, on the balance of probabilities, that the effect of the Vasovagal Syncope upon the child is more than minor or trivial and in accordance with statutory definition is therefore substantial.

34. Each individual component of the definition cannot be considered in isolation and accordingly we must also decide whether the child's impairment substantially and adversely affects ability to carry out normal day to day activities. The Equality Act does not define what it considers to be normal day to day activities. In general, these are activities that people do on a regular or daily basis which will include school attendance and study for a person of the child's age. This includes following instructions and being able to engage in lessons. The tribunal accepts the evidence given by the Parent that the child reports that they experiences cloudiness of thought in lessons and that the child has difficulty concentrating, and becomes embarrassed when the child is unable to answer questions in class. The child was regarded as a promising sportsman, having represented the school at rugby and cricket. The child has not however played these sports for some time. Not being able to partake in sporting activities or engaging fully in the child's school lessons constitutes an adverse effect on day to day activities.

35. On the balance of probabilities, the tribunal is satisfied therefore that the child's condition has a substantial adverse effect upon the child's ability to carry out normal day to day activities. The tribunal therefore finds that the child satisfies the definition of disabled in accordance with section 6 of the Equality Act.

36. Having made such a finding the tribunal must consider whether or not there is a causal link between the condition and the child's poor attendance at school. In this regard we have considered the decision in the case of **Hall v Chief Constable of West Yorkshire [2015] IRLR 893** which is discussed with approval in the Employment Appeal Tribunal case of **Risby v London Borough of Waltham Forrest (UKE80/0318/15/DM)**, to which the tribunal was referred by the Parental Representative – Counsel in their closing submissions. It is established by these cases that there is no requirement for there to be a direct link between a claimant's disability and the conduct giving rise to the claim for discrimination. All that has to be established is that the claimant's conduct arises in consequence of the child's disability, and it need not necessarily be the main or sole cause of the claimant's conduct.

37. The Parental Representative – Counsel, on behalf of the Claimant argues that there only needs to be some link between the child's disability and lack of attendance. It is clearly not possible to establish that the vasovagal syncope was the cause of all or even most of the absences, but the child's disability does not need to be the reason for all or even most of the absences. On the basis of the law as set out in the case of **Hall v Chief Constable of West Yorkshire** and confirmed by **Risby v London Borough of Waltham Forrest** the tribunal accepts this argument, namely that Vasovagal Syncope was on the balance of probabilities the cause of some of the child's absences, combined with other causes, which impacted on school attendance. On this basis, the tribunal is satisfied on the balance of probability that there is sufficient causal connection between some of the child's absences and the child's Vasovagal Syncope.

38. The RB argues that even if the disability was the cause or one of the causes of lack of attendance, then the school made more than sufficient reasonable adjustments to encourage and assist the child to attend school and to complete work.

39. The tenor of the correspondence between the Parent and the school was not helpful, in circumstances when the school were making every effort to be of assistance.

40. We heard evidence from the Deputy Headteacher and the Key Stage 4 Wellbeing Officer at the school, of the steps taken to provide the child with support and opportunities to attend school. The Deputy Headteacher and the Key Stage 4 Wellbeing Officer at the school engaged with both parents despite some hostility at times from the Parent. The assistance provided is set out in the case statement as follows:

(a) Following receipt of the letter from the Doctor from the Medical Centre in January 2019, the school liaised with the child and the child's Parents to discuss what support could be provided
(b) The child was offered home tuition in February 2019 which the child refused.
(c) The child attended the Revolve provision with the aim of reintegrating at school
(d) Work was taken home for the child
(e) The child's progress was monitored and reviewed
(f) Regular updates were provided to the child's parents; at one stage weekly emails about the child's attendance and progress were provided to the Parent
(g) The child was under the care of the wellbeing officer and the deputy head
(h) Arrangements were made to enable the child to report to the Key Stage 4 room if the child felt unwell
(i) The child was provided with a 'time out' card to enable the child to leave class if he felt unwell
(j) Trained staff and first aiders were always on hand to assist if the child was feeling unwell
(k) Policies were applied flexibly to take into account the child's individual circumstances
(l) The child's individual circumstances were taken into account when considering whether the child should be admitted into the sixth form

41. The tribunal certainly commends the school on the efforts made to assist the child and the child's family. Reasonable adjustments were clearly made with a view to assisting the child in attending school regularly and completing school work.

42. However, the reasonable adjustments made do not address the child's focus of the claim, namely the decision to refuse entry into the sixth form based upon the child's level of attendance. The Claimant alleges that the RB discriminated against the child on the basis of the 'provision, criterion or practice' that was adopted for the sixth form selection. The Claimant avers that the same criteria was applied to them as to all the other candidates as evidenced by the letter of April 2021. The Claimant avers that the reasonable adjustment that should have been made was to have deducted certain absences from the attendance calculation. The reasonable adjustments made by the school in an effort to secure the child's attendance at school are therefore irrelevant for the purposes of this claim. In its case statement and as set out above in para 40(l) the RB avers that the child's personal circumstances were taken into account when considering whether the child should be admitted into the sixth form. However, there is no evidence that this is the case and the decision appear to have been based on the criteria set out in the refusal letter of April.

43. The school sixth form admission policy is included in the bundle. It sets out the academic requirements and also states *"as well as the academic requirements listed below, pupils will only be admitted to the sixth form if they have demonstrated attitudes, behaviours and approaches to study that suggests an ability to benefit from the programmes available*". It is accepted by the RB that the child's academic attainments and predicted grades as assessed by the school met the criteria for entry into the sixth form notwithstanding the frequent absences.

44. The issue of concern to the school is the child's non-attendance over a significant period, the child's yearly attendance figures being recorded as follows:

2015/16 (year 7)	98.9%
2016/17 (year 8)	88.9%
2017/18 (year 9)	82.3%
2018/19 (year 10)	63.3%
2019/20 (year 11)	56.8%

45. As from the end of March 2020 when all schools were closed due to the national lockdown, every pupil was marked as having a 100% attendance record.

46. The school certainly made a reasonable adjustment in allowing the child to submit their application for sixth form entry after the closing

date. The Headteacher then wrote to the Parent in January indicating that the child's attendance record at that stage did not "currently demonstrates the ability to adhere to our high standards and so, at this time, the child does not have a guaranteed place in our sixth form". The letter recorded the child's attendance for the year to date at 79%.

47. The Senior Leadership team met in April 2020. The Headteacher then wrote again to the Parent in April 2020 to inform them of the decision not to offer the child a place, the Headteacher sets out the criteria followed by the school in allocating sixth form places:

"It was decided that pupils who had received initial cause for concern letters would be admitted to our sixth form if they had met the following criteria:

- An improvement in attendance since January, when the first letter was sent
- Attendance for the academic year (up to the 13th March) was at least 75% "

48. The Headteacher's letter records that the child had failed to meet either criteria as the child's overall attendance for the year then stood at 72% and was accordingly lower than in January. The letter states "It is the decision of the Senior Leadership team that it would be impossible for the child to succeed at A level with the current level of attendance and punctuality. We have been in communication with you regarding the child's attendance over the past two years, the child has been given an opportunity to improve attendance and has failed to do so".

49. The Claimant argues that a reasonable adjustment that the school should have made was to have deducted certain periods of absences from the overall attendance calculation. For instance, it was acknowledged that the child had missed significant periods at school, firstly due to an ear operation and again when a further medical procedure was undertaken at the beginning of 2020. The child was off school for significant periods when attending hospital for these operations and the subsequent period of recuperation.

50. It is unclear how the school calculates the attendance record, as the percentage attendance figure fluctuates significantly over a short period of time.

51. The Claimant argues that the school had been notified by the Parent that some absences from school were due to the impact of the

Vasovagal Syncope and in addition that they had been informed about the child's operations. This is evidenced by the correspondence contained in the bundle. However, in light of the poor relationship between the school and the Parent, the school were dismissive of the Parent's concerns.

52. Certainly, there could have been more constructive communication between the Parent and the school, and indeed some information such as a copy the report of Consultant Paediatrician could have been provided at an earlier stage. However, it is clear from the bundle that the information about the child's Vasovagal Syncope was conveyed to the school on more than one occasion. In response the school requested evidence in the form of a letter/report from the consultant responsible for the child's care. The Claimant argues that this set an unreasonably high evidential burden for the family in such a short space of time. The Parental Representative – Counsel, argues on behalf of the Claimant that it was unrealistic to expect the family to produce a consultant's letter, given the circumstances of the lockdown and the pressures on the NHS. In short therefore the Parental Representative – Counsel argues that the school should have drawn on the information that they had been told. Accordingly, had the Senior Leadership team considered the child's case on an individual basis, a reasonable adjustment could have been made discounting the time lost as a result of two operations. Allied to this the school were maintaining that the child would be unlikely to succeed academically because of poor attendance. However, the evidence suggests that even with the child's poor attendance the child had been succeeding academically and achieving more than the required standard. In short therefore the school had no evidence that the child couldn't achieve academically. As indicated previously it was accepted by the school that purely on the basis of the child's academic record then the child was entitled to a sixth-form place.

53. The RB's position is that the school made adjustments which were over and above what could have been considered as reasonable adjustments. The school were not provided with all the information and could only be expected to work with the information they were told at the time. The RB Representative – School Governor, pointed to the medical report from the GP that suggested that the child could attend school. In addition, the Parent alleged that a second letter had been delivered to the school from the GP when there was no trace of the school having received this second letter. This second letter does not appear in the bundle either therefore the issue remains a mystery. It could be that the Parent was referring to a second letter from the

Consultant Cardiologist as there are two letters from them in the bundle bearing the same date. However, this issue does not assist the tribunal and has no bearing on the decision. In addition, there was no correspondence from the family to say that they were unable to get the medical evidence required.

54. The RB argues that it is right and proper for the school to have a policy for sixth form placement. It is a proportionate means of achieving a legitimate end. Resources are used properly to ensure that public resources are used appropriately. Providing a sixth form place to a student who was not attending or likely to achieve would not be an acceptable use of state funds.

55. Whilst the tribunal has already indicated that it recognises that the RB went out of its way to make reasonable adjustments to assist the child in attending school, the focus of this decision has to be upon the school's decision not to offer the child a sixth form place and the criteria applied when making this decision.

56. In this case the school has adopted a similar policy to all aspiring sixth form pupils who had received an initial cause for concern letter. The tribunal is satisfied that the school was aware of the reasons for the two significant periods of absences for the child, in that he had undergone surgical procedures. Furthermore, little or no weight appears to have been paid to the fact that the child's predicted grades were sufficient to meet the academic criteria, notwithstanding the child's poor attendance.

57. The tribunal accepts the Claimant's argument that an adjustment should have been made when applying the sixth form admission policy to the child. It would have been appropriate in the circumstances as submitted by the Parental Representative – Counsel to have deducted periods of absences from the overall calculation, in light of the fact that the child's academic potential met the necessary criteria.

58. The provision, criterion or practice adopted by the school resulted in the same is that the same criteria being applied to all pupils seeking a sixth form place who had received letters of concern. As a result, it placed a child with a disability, at particular disadvantage compared to a child who is not disabled.

59. In addition, it is noted pupils have no means to appeal against the decision of the Senior Leadership team not to offer a sixth form place. The Headteacher acknowledged this, indicating that pupils and their

parents could lodge a complaint. However, that is not the same has having the right to appeal against a decision.

60. No reasonable adjustment was accordingly made when the decision was taken not to offer the child a sixth form place, with the result that the child was disadvantaged. It is accepted that the decision had a huge impact on the child, with the result that the child had to change schools.

61. The tribunal accepts that the school must be mindful of the use of public resources. However, in this particular case the decision not to offer a place was not a proportionate means of achieving a legitimate end as the same policy was applied to all without a making a reasonable adjustment to a pupil, who meets the definition of 'disabled' under the Equality Act.

62. The tribunal therefore finds that the RB had discriminated against the child in the manner in which a 'provision criteria or practice' has been applied.

63. The remedies sought by the Claimant are set out earlier in this decision and include providing an apology and a direction that the school undergoes training to recognise disability under the Equality Act.

64. The tribunal concludes that it is appropriate to offer the child an apology which should be sent to the child in the following terms by the Chair of the Governing Body, *"I apologise that the Governing Body discriminated against you in relation to your application for a place in the sixth form at the Comprehensive School. We were wrong to only take into account your attendance record rather than to also consider your academic attainments, which at the time were at a level to allow for sixth form entry."*

65. We consider that the RB should also review the admissions policy so that clear information is provided with regard to the admission criteria and also to provide for an appeals process against a refusal to admit. In addition, it is essential that all school policies are cross referenced to an Equality Act impact assessment. This should be done in time for consideration of sixth form application admissions for the academic year commencing in September 2022.

66. The tribunal makes no order in relation to provision of training, given that the finding of discrimination arises out of the application of a

provision criteria or practice. The school had on the whole made reasonable adjustments.

ORDER: Claim allowed

Dated May 2021

Chair