

## DECISION

**Date of Birth:** 2015  
**Appeal By:** The Parents  
**Against Decision of:** The Local Authority (LA)  
**Concerning:** The Child  
**Hearing Date:** 2023

### **Persons Present:**

The Parent	<i>Parent</i>
The Parent	<i>Parent</i>
Representative	<i>LA Representative</i>
Senior Educational Psychologist	<i>Witness</i>

### **Appeal**

1. The Parent (the Appellant), appeals under section 70 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (“the 2018 Act”) against the Child’s Individual Development Plan (IDP) issued by the Local Authority (the LA) by letter dated June 2023. The Appellant appeals against the Additional Learning Provision (ALP) in that IDP or the fact that ALP is not in the IDP.

### **Attendance**

2. The Education Tribunal for Wales Regulation 2021 provide the definition of ‘hearing’ in regulation 2 as follows: “hearing” means a hearing before the President, a Chair or the tribunal panel for the purpose of enabling the President, a Chair or the tribunal panel to reach a decision on an appeal, claim, application or any question or matter at which the parties are entitled to attend and be heard and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication. The hearing was conducted by video, because the Tribunal concluded that this was a case that was appropriate for a video hearing. No party objected to holding the hearing in this format. The Parents’ (the Child’s parents) attended the hearing. I refer to them as the Appellants. The LA was represented by the LA Representative and called as a witness, a Senior Educational Psychologist. There were no

connectivity difficulties during the hearing. I intervened a number of times during the Parents' submissions, in order to keep things relevant and focussed. We are satisfied that both parties were able to participate effectively in the hearing.

### **Preliminary matters**

3. We received and considered the appeal bundle of 349 pages (PDF) (up to K65 in "hard copy"). The Appellants had submitted a request to admit late evidence, in respect of what they consider to be a data breach by the Child's school. We did not admit the evidence because it was not relevant to the content of the Child's IDP, which is the sole matter that we need to decide.

### **Background**

4. The Child is 8 years old, attends School A and the Child's IDP was issued on a date in June 23. This describes the Child as having behaviour, emotional and social additional needs (linked to a demand avoidant profile), communication and interaction additional needs (difficulties with communication and friendships); and some sensory, physical and medical additional needs. Of relevance to this Appeal, the Child's IDP records the following ALN: *The Child was born without the ability swallow, with a medical condition called Tracheo-Oesophageal Fistula and Oesophageal Atresia. This was surgically repaired in the first week of the Child's life, but is commonly referred to as "fixed not cured". This is a lifelong condition for which the Child takes daily medication, and may require further surgeries in future, depending on the Child's physical development.* The Child is under the paediatric surgical team in a hospital as well as paediatrics, with current referrals to paediatric dietician, and community wellbeing team. The Child's IDP makes no corresponding ALP for this need.

### **Issues**

5. The sole issue in dispute relates to the ALP that the Child requires to meet their needs arising from the Child's potential difficulties with swallowing. We found the parties' positions on this matter to be rather muddled: the Appellants had not set out clearly in advance why the Child's difficulties to swallow required ALP rather than, say, a health care plan that would be put in place to keep the Child safe in school; nor had they set out clearly the provision that they say the Child requires, but rather referred to a health care plan that they say the school had previously lost and which they (the Appellants) had subsequently found. The LA accepted that the Child's difficulties with swallowing constituted an ALN (which is included in the Child's IDP) but had not made provision for it, because they considered that the Appellants were not clear enough about what they wanted to be included, had not put forward sufficient evidence and considered that the Child's difficulties with swallowing did not prevent or hinder the Child's participation in the Child's education.
6. In discussion in the hearing, the LA acknowledged that because the IDP listed the Child's difficulties with swallowing as an ALN, it should also include ALP to meet that need. The Appellants acknowledged that the previous health care plan (which dates from 2018) does not fully set out the additional provision that they

now ask for.

7. In order to move things forward, in the absence of more specific evidence (the Appellants have refused the LA access to the Child's medical records and have not provided updated, relevant evidence themselves), we identified the discharge letter of a date in July 21 of a Specialist Speech and Language Therapist and the Eating and Drinking Plan prepared by the Specialist Speech and Language Therapist in 2018 as a potential basis for describing the relevant ALP. With some caveats, the parties agreed that this provided an appropriate way forward.
8. It is clear to us that the parties have different views and, to a certain extent, a degree of frustration with each other about what they perceive to be shortcomings in each other's approach. The LA considers that the Appellants did not raise this matter as part of the preparation of the IDP, even though there were detailed discussions about the rest of the plan. The LA also considers that the Appellants have not made clear what they want. For their part, the Appellants consider that the LA should have known what was required. It is not our role to judge this particular point and so we do not dwell on it. Nor did we allow the parties to spend too much time on this in the hearing. In our view, it is surprising and somewhat disappointing that the parties were not able to agree on a resolution of this discrete issue, given that agreement had been reached on the rest of the IDP and that, following a relatively short discussion in the hearing, there was a good deal of common ground amongst them about this.

### **Evidence and conclusions with reasons**

9. We have carefully considered the written evidence and the evidence given and submissions made in the hearing. We refer below to the evidence that we consider to be particularly relevant. We take account of the relevant sections of the 2018 Act, the Education Tribunal for Wales Regulations 2014 and the Additional Learning Needs Code for Wales 2021 ("the Code"). We remind ourselves of the following:
  - a. The Child's IDP must include a description of both the Child's ALNs and the ALP that they call for.
  - b. Not all medical conditions will be considered as ALNs. The question to consider is whether the medical condition has a significant impact on a child or young person's experiences and on the way they function in school.
  - c. There will be instances where a child with a medical condition does not have a learning difficulty or disability that calls for ALP. According to the Code, the arrangements to be made in such circumstances are addressed in the Welsh Government's statutory guidance on Supporting Learners with Healthcare Needs.
10. Although the bundle is relatively lengthy, the relevant evidence in relation to the particular point that we must determine is limited, rather dated and of limited relevance:
  - a. We note the Appellants' dissatisfaction with how the Child's school has supported the Child in this respect, having allegedly lost the previously agreed Healthcare Plan. Much of the Appellants' evidence goes to that

point, but it does not really clarify the provision that they say is called for.

- b. We discussed that Healthcare plan in the hearing (the Appellants have since found it and have included it in their evidence). We note that it was agreed in March 2018, almost 5 ½ years ago, and that its content is very brief (e.g. The child must sit quietly at break times). We do not consider that, by itself, to be a suitable or reliable guide to the provision that the Child now needs in this respect.
- c. We also note the Appellants' evidence that there have been incidents of the Child choking in class, e.g. The Child choked on a piece of Babybel cheese on a date in February 23 and the Child was also given toast to eat on one occasion, when the Child should not have been. It is because of past failures to support the Child appropriately that the Appellants now say that the IDP should contain detailed provision about who should provide this support to the Child, who should have oversight of it (they suggest that it should be the DECLO) and how often it should be reviewed.
- d. The Appellants referred to the Child's difficulties with swallowing being exacerbated by co-morbidity with ASD and ADHD. If the Child has, indeed, been diagnosed with one or both of these conditions, then that has not been supported by written evidence or considered within the context of the rest of the material provided in the bundle.
- e. It was common ground between the parties that the Child's school is currently providing the Child with a ½ hour 1:1 support at lunch times to help the Child with their eating and to ensure that the Child is safe. This is in addition to the 20 hours 1:1 identified in the Child's IDP to meet the child's other needs.
- f. The Eating and Drinking Profile discharge letter of a date in July 21 of the Specialist Speech and Language Therapist is now relatively dated, but sets out the support that the Child needs. This is largely consistent with the Eating and Drinking Profile prepared by the Specialist Speech and Language Therapist in 2018 and which is the basis on which the school is currently supporting the Child.

11. In light of all of this, our analysis of the matter is as follows:

- a. It is common ground that the Child's difficulties with swallowing constitute an ALN. Although this is primarily a medical condition, we also consider it to be a learning difficulty because it risks hindering the Child's access to learning without a degree of support and because it is, in itself, a physical need that the Child must learn to deal with independently as the Child grows up.
- b. We are satisfied, therefore, that this ALN calls for ALP. Given the limited evidence available, we refer to the discharge letter of the Specialist Speech and Language Therapist which sets out in fairly broad terms the provision that the Child requires. This is largely consistent with the provision that School A is already making for the Child, following the Eating and Drinking Profile. It is clear, therefore, that both the specialist SAL Therapist and the School consider it appropriate to make additional provision for the Child.

- c. Both parties agreed that the Specialist Speech and Language Therapist's recommendations should be incorporated into the Child's IDP. The Appellants suggested that more detail was needed, in respect of, for example, oversight, confirmation of who would supervise the Child and review. We agree that some degree of specification is required (which we understand to be largely consistent with what currently happens). But we do not want to be over prescriptive or disproportionate in our approach. The IDP should be a useful and practical document for the benefit of the Child, the Child's family and those professionals working with them.
12. Given that analysis, we order the LA to revise part 2 of the Child's IDP to add the following additional learning provision:
- Intended Outcome: For the Child to develop their independence in eating safely*
- ALP to be provided:*
- All staff to be made aware of the Child's needs in respect of the Child's difficulties with swallowing.*
- 30 minutes 1:1 support during lunchtime. Supervision from staff at other times when the Child may eat (such as break times, school trips or events such as school parties). The purpose of this 1:1 support and other adult supervision is to:*
- Provide verbal prompts for the Child not to be too distracted by the environment; not to overfill the Child's mouth; to chew their food well; to swallow before re-filling their mouth; and to take small sips of fluid during the Child's meal, particularly if the food is dry;*
  - To monitor the Child's ability to chew a wide range of textures; and*
  - To make sure that the Child does not swallow large lumps of food or choking/having "stickies".*
- Rationale for the ALP listed above: To support the Child in identifying good eating practices to avoid risks associated with the Child's difficulties in swallowing.*
13. This wording reflects what we consider to be the educational or training aspects of the recommendations from the Specialist Speech and Language Therapist in their discharge letter and the Eating and Drinking Plan. We have not included all of the things that were discussed.
- a. We have not specified that the Child may only eat food prepared by the Child's parents. We do not consider that to be necessary for education and training purposes and we do not, in any case, have the power to order the Appellants to prepare food for the Child.
  - b. We have specified 1:1 support only during lunch times. For other times when the Child may eat or be offered food, we consider that general staff supervision is sufficient. We have not been prescriptive about who should provide this support to the Child, who should monitor it or when it should be reviewed. We have, though, specified that all staff should be made aware of these needs, and that will include the person supporting the Child at lunch time and staff supervising the Child at other times. We consider that to be sufficient.

- c. In terms of the support that the Child requires if the Child does choke, we do not consider that to be provision relating to education or training. It is medical care that may be required in consequence of the Child's medical condition and, as such, falls to be dealt with under the Welsh Government guidance on Supporting Learners with Healthcare Needs. It will primarily be for School A to ensure that there is an appropriate health plan in place for the Child.
14. We acknowledge the Appellants' concerns about whether the provision that we specify will, in fact, be put in place. We remind them that it will be for the LA to ensure that this provision is made under section 14(10) of the 2018 Act. Furthermore, the matter can be kept under review and the IDP can be revisited if appropriate (section 23 of the 2018 Act).

### **Final comments**

15. As noted above, we are disappointed that the parties were not able to agree this rather simple matter without recourse to the Tribunal. We are surprised that the Appellants, whilst asking for additional provision to be included in the IDP, have not given their consent for relevant medical evidence to be shared with the LA. We also note, with some concern, that the Appellants appeared to suggest that the Child may have received further diagnoses, but that this information has not been shared with the LA. We remind the Appellants that as a party to an Appeal they are under a duty to help the Tribunal further the overriding objective of dealing with cases fairly and justly. This includes providing relevant evidence to support their position in the Appeal. We strongly encourage the Appellants to work closely with the LA as the Child grows up, including sharing relevant medical evidence, so as to ensure that the Child's needs can be identified and the appropriate provision put in place for the Child. We wish the Child and the family well.

### **Order**

16. The Appeal is **upheld** and the LA must revise the Child's IDP to include the additions specified above.

**Dated December 2023**