



## **DECISION**

**Date of Birth:** 2012  
**Appeal of:** The Parents  
**Against:** The Local Authority  
**Date of Hearing:** 2023

### **Appeal**

1. The Parents appeal under section 326 of the Education Act 1996 against the contents of a statement of special educational needs (“the Statement”) made by the Local Authority (“the LA”) in January 2023 for their Child. The appeal concerns Parts 2 and 3 of the Statement.

### **Proceeding without a hearing**

2. The Parents had not ticked the box on their appeal form indicating acceptance of a hearing on the papers. However, following the case management of the appeal, both parties had written to the Tribunal asking for the case to be dealt with on the papers. By order of the Tribunal dated November 2023, the oral hearing was vacated, and the appeal was designated to be dealt with on the papers.
3. The Tribunal considered Regulations 4 and 39 of The Education Tribunal for Wales Regulations 2021 before proceeding on the papers. We reviewed the bundle (to page 586) as well as a considerable volume of additional evidence and submissions circulated after the bundle was sent. The latter is listed in Appendix 1 to this decision, and it includes final submissions made by both parties as well as further evidence on the final issues. We decided that we had sufficient information on which to make a fair and just decision and therefore the Tribunal was able to decide the matter without the oral hearing.

### **Background**

4. The Child has a diagnosis of ASD. The Child attended School A for their primary education. Since the Child’s diagnosis in 2018 the Child has received, in various forms, tuition/input using the methodology Applied Behavioural Analysis (“ABA”). This has included a period of what has been described as a “flexi schooling arrangement” with School A and a period when the Child was attending full time with the support of a teaching assistant trained in ABA. ABA consultants have

been going into school, doing observations of the Child.

5. The Child has now transferred into secondary education (the Child is at School B and the intent is that the Child's Statement will shortly be transitioned in the new ALN (additional learning needs) system. During case management various options were considered, including withdrawing the appeal pending the transition and staying the appeal while the Child settled into secondary school. The option the parents choose was to continue with this appeal so that a decision would be made by the Tribunal on the issues in dispute between the parties on the content of the Statement (the key issue being the extent to which ABA should be reflected in the Statement). This appeal, accordingly, does not address the issue of what should appear in Part 4 of the Statement nor what will happen on the transition; it is confined to the issues between the parties on the contents of Parts 2 and 3.

### **Issues**

6. In the light of the legal tests in the Education Act 1996 and the guidance in the in The Special Educational Needs Code of Practice for Wales (the Code") to which the Tribunal must have regard, the following were the matters which the Tribunal identified for consideration:
  - (1) Settling the outstanding issues in respect of the details of the Child's special educational needs which must be contained in Part 2;
  - (2) Settling the outstanding issues in respect of the specification of the special educational provision to be made for the purpose of meeting those needs which must be contained in Part 3.

### **Tribunal's conclusions with reasons**

7. We carefully considered the written evidence submitted to the Tribunal. We considered all of the evidence and only refer to such of the evidence as is relevant to our conclusions. We also took account of the Code and the relevant sections of the Education Act 1996.
8. For the most part we have dealt with the amendments in the order in which they appear, in the final version of the working document which was sent to us, under the headings in which the proposed amendments which the parties had not agreed appeared. We also however have taken note of the parties' final written submissions and incorporated what we made of these where relevant in settling Parts 2 and 3. This is particularly relevant for our conclusions about ABA and flexi-schooling (see below).

9. Our other general comment is that we recognised that the Statement is now out of date as it was written before secondary transfer. At times we have included up to date information where this was necessary to resolve an outstanding issue. What we have not attempted to do is to update the narrative and background information more generally, as this is information which is likely to be amended as part of the transition exercise.

## **Part 2**

### Learning and communication

10. Shown under this heading in Part 2 and underlined (i.e., as agreed between the parties) is wording that the Child should attend school full time. This is about provision rather than needs and so was wrongly placed in Part 2, but we have not deleted it in Part 2. Given the history, it is helpful to include this information at the beginning of Part 2. However, it is inconsistent with Part 3 which still included (and not shown as outstanding) a reference to flexi-schooling. Whether this was an error or not we decided that we should address it and deal in our conclusions in relation to Part 3 what we made of the issue of full time as opposed to flexi schooling. This is set out below.
11. The next issue under this heading is a reference to the National Curriculum and use of Welsh. The amendment (which appears as an LA proposed amendment, although there was inconsistent use of the Tribunal's standard key) asks for a reference to the Child not liking Welsh and asking for disapplication. In their school observation of April 2022, one of the ABA consultants said that the Child was struggling in Welsh (and there are other indications of this). However, we also had in evidence a record of a meeting between the parents and LA Educational Psychologist who was the author of the LA's final submissions and the ALNCo from the current school in September 2023 ("the September 2023 report"). The September 2023 report records that the Child was keen to follow the same curriculum and do everything alongside their class and that: "*The Child wants to be part of Welsh and modern foreign languages.*". We incorporated this more recent evidence into Part 2.
12. In the same paragraph is an amendment asking for a reference to the Child struggling in PE. This was supported by the evidence, including the September 2023 report and a note we had in evidence from the Child's current placement dated October 2023 and so we accepted that amendment.
13. Finally, under this heading we made some minor drafting changes and inserted the date of an educational psychologist report (Educational Psychologist June 2019). We considered it relevant for a person reading Part 2 to know the date of

the report. Given the speed with which children can change and develop, we comment that going forward use of the older reports will need consideration. They can be useful where they reflect diagnosis of long-term conditions, but caution should be used in relation to proposed outcomes and ongoing provision from the older reports.

#### Social, Communication and Interaction

14. Under this heading we accepted one reference to the date of a speech and language therapy report (Speech and Language Therapist July 2019).
15. We note that the parties had agreed that the words “and play” should be deleted from this heading; this is relevant to our conclusions about the corresponding provision under Part 3 below.

#### Speech and language development

16. Under this heading we accepted language that noted that the Speech and Language Therapy Report report was a privately commissioned report but considered it unnecessary to keep repeating the date of the report.

#### Motor Development

17. Under this heading there was a proposed deletion of a reference to future OT (occupational therapy) assessment. No rationale was given for this on the working document but in any event reference to a future assessment is not a description of SEN, and so we accepted this deletion.
18. We noted that there were several paragraphs under this heading shown as agreed deletions. Given the inconsistent use of the key, we comment here that we agreed with that deletion. Under the most recent report in evidence, the Child was discharged from the OT service (report Occupational Therapist report following assessments in May and October 2021 (the latter a face-to-face assessment)).

#### Emotional and Behavioural Development

19. Under this heading was a proposed deletion about the Child not having the awareness to respond how they are feeling or the independence and coping capability to make things better. This was potentially duplicative, but we decided that the evidence supports that these matters are both long-term and ongoing. For example, the school visit observation from September 2021 (ABA consultant) shows that increasing the Child’s confidence and promoting independence were the main targets of the Child’s school year (this was at the beginning of Year 5). Another observation in April 2022 also highlights ongoing issues with confidence and independence. The report from School B (document “The Child’s School statement of how the Child has settled – October 2023”)

says this: *“Sometimes school feel the Child seems withdrawn and lacks concentration. The Child needs encouragement and prompting. Seems to avoid adult demand”*. Accordingly, we did not accept this deletion.

20. Also under this heading was a paragraph about the Child’s anxiety having been noted by the ABA consultant. The LA wanted to add a qualification that school had said this “can happen”, and “when observed”. We found this a little obscure. We looked back at a report from the School B which we had in evidence, dated October 2023, but commenting on how the Child was in Year Six. We decided to include a paragraph under this heading from that report commenting on the Child’s well-being.

#### Sensory, Physical and Medical Needs

21. We agreed that a sentence about the Child eating with their hands shown as a deletion here should have been moved to the section about independence.

#### Summary of conclusions about Part 2

22. In addition to the amendments highlighted above, we also accepted the amendments the parties had agreed between them which were shown as underlined. Part 2 with our amendments is set out in Appendix 2 to this decision.

### **Part 3**

#### General Section at the beginning of Part 3

23. We first looked at a paragraph about input from an ABA consultant and this brings us to the main contentious issue between the parties. The wording as it stands reflected input which was in place up to September 2023, which the LA was content to leave in Part 3 as a reflection of what had happened. The parents were seeking an amendment to extend this to September 2024 which the LA had not agreed. This comprised provision to be delivered by an ABA consultant, including training, attending Annual review and six consultations per year.
24. The evidence in support of the ABA programme includes the various reports and observations from the ABA consultants themselves (the most recent of which is an addendum from one of the ABA Consultants dated October 2023), detailed submissions from the parents and two educational psychology reports (Educational Psychologist) and a more recent report from an ABA Consultant dated October 2022). The Speech and Language Therapist in their speech and language therapy report also supported the ABA programme although interestingly the Speech and Language Therapist said that they did not anticipate the need for 1:1 support (which an ABA programme would usually involve) would be long term as the Speech and Language Therapist expected the Child to make good progress with the therapies the Child requires.

25. What we had to consider was whether the continuation of the ABA elements of provision are now, looking at what the Child needs today and going forward until the next annual review of the Child's Statement (or the transition of the Child's Statement). The two private educational psychologist reports are no longer of significant assistance in this regard. The educational Psychologist's report is now several years out of date and the Educational Psychologist's reference to the need for dedicated 1:1 support at all times is no longer what one of the ABA Consultants is recommending (see below). The ABA Consultant noted the Child's over-reliance on others but also said the Child needed full time ABA with an ABA tutor which is no longer being proposed.
26. Both of these reports have been overtaken by events. In her most recent report, one of the ABA Consultants said that in November 2022, the Child had begun to become more 'self-aware' and started to show signs that the Child was not comfortable with being supported by their 1:1 TA. This led to a change to the classroom arrangements at school with support being provided by a combination of teacher and general classroom TA support to provide differentiated assistance to the Child during certain lessons. One of the ABA Consultants still recommended ongoing ABA consultancy support both at home and at school which in effect is what is being sought in Part 3 now.
27. We were not persuaded that the continuation of the ABA programme (in any form) is currently reasonably required special educational provision for the Child. First, we had concerns about the over-reliance on others which remains a feature of the Child's special educational needs notwithstanding the provision which has been put in place to date. In the submissions which accompanied their appeal the parent said that the ABA intervention had started in 2018. However, the Child was not able to generalise the skills being taught in the Child's ABA sessions into the school environment effectively. There may have been various reasons for this, but it shows that difficulties with generalisation have been there since the ABA programme was first put into effect. A report from an Academic Tutor, dated October 2023 shows that working on specific generalisation tasks remains part of the support the Child needs.
28. We can also see from the September 2023 report that the Child, in their new setting, has limited engagement in teacher directed tasks; the Child still seems to be unable to function without support but at the same time, the Child is now showing signs of not wanting to be given that support.
29. An important piece of evidence about this is the report from School A dated October 2023 already mentioned. Their view was that the ABA observations are having a seriously detrimental effect. One of the ABA Consultants

addressed this in part in their addendum report in which they said that their observations would be conducted discreetly, but the school say that this was not successful. School A also says that the Child did not like going to interventions outside of the class and that the Child had repeated that they did not like being different to everyone else in lessons and did not like having a 1:1 near them at all times. School A also report that the Child attended a social group as one of their ABA targets and did not like to go, preferring to stay in class.

30. This evidence is consistent with the report from School B, which describes the Child as wanting to join in with their peers, as already mentioned in relation to the curriculum issues addressed above. School B also says that the Child does not want to be supported out in the yard or in class and so it was felt that supervision from a distance was the way forward. The parents accepted in their final submissions that the Child does not want to be singled out at school.
31. The Child was assessed in July 2022 by an Educational Psychologist. This was a dynamic assessment; we found it significant that in the use made of drawings (which are pasted into the report) we can see the Child in effect demonstrating their capability when engaging with someone using mediation. We noted that mediated learning approaches are in fact the methodology currently being rolled out in training to teaching assistants in schools such as the one the Child currently attends.
32. We also had, contained in the LA's submissions, a record of involvement by another Educational Psychologist. The Child was known to the Educational Psychologist from a previous consultation and the Educational Psychologist visited the Child at School A in April 2023. This again is consistent with the reports about the Child not wanting to be singled out. An Educational Psychologist records that it will be important to promote a sense of belonging with the Child's class group going forward.
33. We conclude from our analysis of the evidence that it is unlikely that ABA is now either the only or the most effective way of working with the Child. On the contrary, the evidence from School A, an Educational Psychologist and School B suggests that it has run its course. It has not succeeded in overcoming the Child's difficulties with generalisation; we did not see any meaningful role for ABA in the Child's special educational provision at this time. It is not going to promote the sense of belonging which the Educational Psychologist, having conducted a thorough exercise about the Child's own views, recommends.
34. We decided to delete the paragraph about the involvement of the ABA consultant entirely. We saw no purpose to the Statement now reflecting

provision which was in place only up to September 2023.

35. A related point here is about whether the Child needs a flexi timetable so that part of the Child's education can remain the ABA programme at home. In their final submissions the parents said that what they were seeking were "extra provisions" to be tagged onto the end of the school day in a safe environment at home. This indicates that the reference to a flexi timetable is no longer an issue, but we decided that we should address this. On this point we accepted the evidence from School A; although not asked specifically about what had happened in Year 5, they chose to add in a sentence about the detrimental effect of the flexi timetable the Child had at that time. Given our conclusions about the lack of persuasive evidence supporting ongoing ABA as reasonably required special educational provision, there is no rationale for a flexi timetable whether this is provision at home during the school day or provision delivered at home in the evenings and weekends. We accordingly deleted the reference to flexi schooling.
36. Also under this heading we removed some references to the ABA consultant which had become redundant. We also looked at a paragraph about support staff being given information by the ABA consultant which the LA has accepted in part (although not the requirement for observations). We concluded this was also redundant.
37. The LA had agreed to having seven meetings a year with all of the professionals advising to attend. This we included but we removed a reference the parents were seeking to the ABA consultant having to attend these meetings. It is not practical or appropriate to make the attendance of a particular professional a requirement at those meetings.

#### Learning and Cognition

38. We did not accept the proposed addition of the word "fluency" in the section about literacy. No rationale was given for this change; possibly this was added as it is ABA language but we found that this was complicating what should just be a clear reference to developing literacy skills as the original statement wording. We did remove the word "early" which suggested that the Child is at an earlier stage in their literacy than the evidence indicates.
39. We deleted a sentence about fidget toys which was duplicative of a later, more helpful general sentence about the Child having access to sensory objects to improve concentration during whole class teaching.
40. Finally, under this heading we deleted a superfluous reference to the seven meetings which is correctly placed where it first appeared.



### Social Communication and Interaction

41. We deleted the word “play” from this heading to reflect Part 2.
42. We simplified this section which was out of date with reference to “play”; we retained the reference to twice weekly sessions but described these as “interventions to develop social skills” so that the form and content can be devised by the current setting in the light of the Child’s current presentation.
43. Under this heading we kept in the reference to access to a quiet area but added the words “if needed” because the School B’s report says that the Child is able to go to the playground and the Child chooses to go out on the yard at break and lunch rather than access the support network of the club. In addition, for the same reason, we considered that the words “with adult support” were not necessary.

### Speech and Language Development

44. Under this heading we amended the wording so that the provision is more focused on the Child’s identified pragmatic language needs, which are not disputed. We accepted the reference added by the LA to support from the specialist teaching team within the local authority.

### Motor Development

45. Under this heading we removed some old examples of activities to strengthen fine motor skills which reflected primary situations.
46. We noted the deletion of detailed information from an older report about OT (this was shown as agreed) and deleted the following paragraphs which had become redundant without them and a redundant “also” which was a reference back to a deleted paragraph.
47. We accepted an amendment to language about use of a slant board, adopting the words “access to”. We would not usually accept this type of amendment as it makes the provision less effective, but in this case, it is access to the board which is needed, rather than making this something which has to be used. This, we considered suitable for the Child at this time when the Child is trying to fit in with this mainstream class and not be “singled out”.

### Summary of conclusions about Part 3

48. In addition to the amendments highlighted above, we also accepted the amendments the parties had agreed between them which were shown as underlined. Part 3 with our amendments is set out in Appendix 2 to this decision.

## **Order**

The Appeal is allowed.

The Local Authority is to amend the statement of special educational needs of the Child by deleting Parts 2 and 3 and replacing them with the Parts 2 and 3 set out in Appendix 2 to this decision.

**Dated November 2023**