

SOCIAL SECURITY ACTS 1975 TO 1986

APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

[ORAL HEARING]

1. Tracey who is now 15 has been profoundly deaf since she was a baby. Fortunately she is a bright girl and she has done her very best to cope with her deafness. She used to go to a special school but since September 1986 she has been at Silver Reed High School, and although communication with others is still a major problem she has made good progress no doubt due to her own efforts and the efforts of the full-time support teacher who attends classes with her. An attendance allowance under section 35 of the Social Security Act 1975 was first awarded to Tracey on 23 February 1981. That was for two years on the basis that she satisfied the day supervision condition. There was a further award, for three years, from 25 March 1983 again because she satisfied the day supervision condition. And from 4 February 1986 the award was continued, for one year, but this time on the basis that Tracey satisfied the day attention condition. A renewal claim was made on her behalf on 18 November 1986 and a medical practitioner on behalf of the attendance allowance board decided she did not qualify. Her mother asked for a review and by a decision dated 4 August 1987 another medical practitioner on behalf of the board (DMP) decided not to revise the previous refusal. Tracey now appeals against that decision. At the hearing of her case, which she did not attend, she was represented, very ably, by Ms S. Robertson of the Disability Alliance. The Secretary of State was represented by Mr N. Butt of the Solicitor's Office of the Department of Social Security.

2. Section 35(1) of the Social Security Act 1975 provides that a person shall be entitled to an attendance allowance if he -

"(a) is so severely disabled physically or mentally that he requires by day from another person either -

(i) frequent attention throughout the day in connection with his bodily functions, or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others, or

(b) is so severely disabled physically or mentally that, by night, he requires from another person either -

(i) prolonged or repeated attention during the night in connection with his bodily functions or

(ii) continual supervision throughout the night in order to avoid substantial danger to himself or others.

In the case of children under the age of 16, the attention or supervision required must also be substantially in excess of that normally required by a child of the same age and sex: regulation 6(2)(c) and (d) of the Social Security (Attendance Allowance) (No 2) Regulations 1975. As one might expect because Tracey had always been so deaf her speaking ability has been much impaired. The medical officer who examined her in connection with the renewal claim in question noted "Some speech but only a few words actually understandable except by parents". And her parents say that quite often Tracey does not understand what they say or they what she says. She has, as I have said, a full-time support teacher at her school. And there is a mass of evidence showing the extra work and effort made by Tracey's parents and her sisters to assist her to overcome her communication problems. There is a good description of this in the letter dated 9 March 1987 from the Centre for the Deaf. They say -

"Tracy's problems stem from communication difficulties, not being able to hear many sounds, both speech and general. She therefore requires a vast amount of extra input from her parents. This means constant explanation and interpretation of information, eg. in conversation, helping with homework and watching television. Deaf children have poor understanding of language and even the simplest sentence may have to be modified for the child to understand. Due to communication difficulties, parents must be available to help their child communicate with other individuals whose inability to communicate creates frustration for the child. If a person is not looking at a deaf child then communication is not possible. This creates another problem in that, unlike other handicapped children, a deaf child cannot be left with a minder because of this problem.

As our ears warn us of danger, to a large extent parents must act as "ears" for their deaf child. Parents are more protective of their deaf child. If the child wishes to attend activities outside the home a parent must accompany the child. This is time consuming and expensive.

I cannot overestimate to amount of supervision and attention that parents of a deaf child have to provide. Deafness does not decrease with age and adolescent deaf children put pressure on their parents to be allowed out more which puts more pressure on the parents, as supervision is always necessary."

Now it has never been in issue in this case and I accept that speaking and hearing are bodily functions for the purposes of section 35(1) of the 1975 Act and that therefore anything required by reason of Tracey's deafness to be done by anyone else in connection with those functions is to be regarded as attention within the meaning of that provision.

3. It is not contended in this case that Tracey satisfies either of the supervision conditions or the night attention condition. In relation to the day attention condition and the previous certificate based on satisfaction of that condition the DMP said (paragraph 2) -

" ... in view of Tracey nearing maturity her needs have decreased since she has become more independent. She is physically well and mentally alert and whilst I accept that her disability of total deafness still exists I find from the evidence that she is now coping better ... "

And at paragraph 3 he said -

" ... In my opinion in the years of their education all congenitally deaf children require substantially more attention than any other children in order to teach communications with others, discipline and the avoidance of danger. A special approach is necessary both at home and at school but generally speaking the disparity in the amount of attention required by a deaf child and a child of the same age who is able to hear

diminishes as they get older. It is not of course possible to say that at any particular age it will no longer be necessary or become less substantial, as abilities vary. The letter from the Silver Reed High School shows that since joining the school Tracey has had a full-time support teacher working with her and this has enabled her to be integrated into 60 per cent of the lessons. I accept that Tracey still requires some attention in connection with the bodily function of communication outside school and the home but any attention she does require is not sufficient to constitute frequent attention throughout the day."

Now the evidence in this case is overwhelmingly to the effect that as Tracey has got older the demands on others in connection with her communication problems have increased. These problems and the extra demands on others are graphically described by Tracey's mother in her letter of 10 March 1987 when she said -

"At home we have to help her with any homework she gets and also try to improve her speech, and vocabulary as much as possible. She is really keen on this so we cannot just say go away when she says how? What for? Why? Whenever we talk to her, everything else has to stop because it needs total concentration. She has to be able to see our mouths and hands and will not talk until she can. Just as importantly we look at her to pick up other clues, apart from speech, that she may be giving with her hand or body. If she is upstairs or outside we do not just shout for her, but have to go and look for her and then touch her so she knows she is wanted for something ... My husband, myself, and my other two children live a life of constantly explaining things or interpreting what is happening on television or round about her ... At the present moment she is at a very critical time in her life, new school, growing up, a time to choose what job to train for, and having to come to terms with the fact that her hearing has got worse. All difficult things even for a normal child, but for somebody who is deaf indescribable. Therefore she needs even more than before, concentrated continued effort from myself and family to enable her to become an independent person, able to exist in this sound orientated world (even fire alarms in buildings are sound warnings not visual). ... The most valuable thing any parent can give a child is their time, but with somebody who is deaf that time has to be every day, all day with the result that it becomes a way of life and it is very hard to explain to someone else what being deaf entails."

I am satisfied that there is no evidence in the papers before me nor in what was before the DMP that would justify his assertion that Tracey's attention needs had decreased. There is evidence that may lead to the conclusion that her supervision needs are less than they were but that is an entirely different matter. And, as Mr Butt came to agree, the sentence which I have underlined in the second passage quoted from the DMP's decision either leaves out of account the huge volume of attention in connection with her communication problems that Tracey needs and gets at home or (Mr Butt having suggested that a different meaning can be obtained if a comma is added after "outside") this very crucial sentence is ambiguous as to its meaning. Furthermore the DMP makes no attempt to explain why he takes the view that the attention required is not sufficient to constitute frequent attention throughout the day. Indeed the attention which, on the evidence, is given to Tracey because of her deafness - from her full-time one to one teacher at school to the full-time effort put in at home - is so massive in extent that, assuming that that attention is not only given but also required which I do not doubt, it seems to me that the decision is to be regarded as perverse. I do not of course disregard the provision to which I have referred which demands that in the case of children under the age of 16 the attention required must also be substantially in excess of that normally required. There is no question in this case that the attention required in connection with Tracey's communication problems is not only required, as it appears, almost every moment of the day but it is of course vastly in excess of what would normally be required by another girl of the same age.

4. The DMP's decision is erroneous in law in the respects to which I have referred.

Tracey's appeal succeeds.

(Signed) R A Sanders
Commissioner

Date: 26 October 1988