

## **DECISION OF THE TRIBUNAL**

### **Reference**

The appellant lodged a reference under section 18 (4) of the Education (Additional Support for Learning) (Scotland) Act 2004 ("the Act") against a decision of The authority ("the authority").

The reference was in respect of the decision dated where the authority refused a placing request made by the appellant under paragraph 1 of Schedule 2 of the Act, for The child to attend School A.

### **1. Summary of the Decision**

The Tribunal confirms the decision of the Authority and refuses the request to place The child at School A.

The Tribunal confirms the decision of the respondents, in exercise of its power under section 19(5) of the 2004 Act. In terms of section 19(5)(a)(i) of the 2004 Act, the Tribunal is satisfied that the ground of refusal specified in paragraph 3(1)(f) and 3(1)(g) of Schedule 2 of the 2004 Act exists. In terms of section 19(5)(a)(ii) of the 2004 Act, the Tribunal was also satisfied that in all the circumstances it is appropriate to confirm the decision.

### **2. Findings of Fact**

1. The child lives with his mother, father and younger sister. He has a close and very supportive family.
2. The child has a specific speech and language disorder; phonological speech difficulties; pragmatic language impairment; sensory difficulties; difficulties in peer interaction; dysphonia; reduced auditory memory; toe walker; and fine motor dyspraxia. His primary problem is pragmatic language impairment.

3. He attends paediatrician Dr A annually. He has been assessed as not being on the Autistic Spectrum. It is intended to carry out a further assessment when he is at S3 level in secondary school.
4. The child has a range of strengths and difficulties. He has specific difficulties with language processing, understanding of non-literal concepts, pragmatic skills and peer interaction. He experiences difficulty with developing his literacy skills; with his working memory; developing his numeracy skills; with his processing speed. He has difficulties with attention, and he has coordination and sensory difficulties.
5. Persons with pragmatic language impairment have problems in social understanding: they lack empathy and do not understand the effects of their behavior on others. The condition emerges more clearly in the later years of primary school when peers become more sophisticated social communicators, and the gap between other children and those with pragmatic language impairment widens.
6. The child has general cognitive ability in the low average range. His verbal comprehension and perceptual reasoning abilities are in the average range. His general working memory abilities are in the low average range, and general processing speed abilities are in the low average range.
7. An independent advocacy worker met with The child on three occasions to take his views for the Tribunal. She obtained views on some restricted issues. He expressed a view that “the other school” (School A) was more friendly.
8. The child was referred to Speech and Language Therapy in 2007 with concerns about his delayed expressive and receptive language skills. He was allocated a nursery placement in Nursery School A, in the education authority’s intensive provision for children with speech, language and communication (SLC) needs. He was placed in the authority’s primary level specialist provision for SLC at Primary School A where he spent primary one and most of primary two. He spent Friday mornings at Primary School B.
9. The child commenced full-time at Primary School B at the start of primary 3. He is now in P7.

10. Primary School B is a mainstream local authority primary school with a roll of 420 pupils. There are sixteen pupils in The child's P7 class. The authority continue to offer a place to The child in Primary School B.
11. The child is due to leave Primary School B at the end of the summer term. He is due to start secondary school in August. The school for the catchment area of his home is School B.
12. No enhanced transition planning has been yet put in place for The child, despite a recommendation by an independent adjudicator that this should start in P6. A meeting of the Additional Support Needs Forum will be attended by Witness D, Head Teacher of Primary School B in February to look at The child's needs and current additional support. All P7 pupils have transition days at secondary school, and The child will have as many transition days as staff consider he needs.
13. In school The child is supported by his class teacher Witness E who had taught him when he was in P4, again for a period in his P6 year, and who has had him in her class throughout P7. Witness E was the Support for Learning teacher at Primary School B. She ran a social skills course of which The child was part from October to December during his P6 year. She took over the P6 class teaching at the end of January when the P6 teacher was absent through sickness. She assisted teaching the class during that teacher's phased return to work, and later that term gave The child some individual support sitting beside him in class. For the last term of P6 she met with The child once a week. She knows The child well.
14. In class The child has a higher desk because of his height, and this helps support his back by ensuring he is sitting upright; he has access to a netbook for extended periods of writing; there are help strategies written on his desk and visual reminders of how, where, with what, and from whom he can seek support; chunked instructions (step by step instructions on his own A4 whiteboard) and social stories for both the classroom and playground. There is a sloping board available. He has a vocabulary book for words he does not understand: Witness E writes the word and the meaning in this book. He has a dictionary on his desk. He has support for learning for writing skills and individual support

- from a learning support assistant with social skills. He has twenty minutes each day except Friday with touch typing support, or core strength building exercises.
15. witness G, Speech and Language Therapist, is available on a consultative basis to Primary School B. She has known The child since April/May xxxx when he attended a social skills group run by her at Newbattle Medical Centre. He had two assessment appointments with her and a colleague in September xxxx. She attended an Individualised Education Plan (IEP) meeting at school in September xxxx, and met with Witness E as the Support for Learning Teacher in October xxxx. She prepared an Additional Support for Learning (ASL) profile of The child in December xxxx. She attended the school to observe The child on 1 September xxxx.
  16. Witness E spoke with witness G, when she was in school observing The child in class in September xxxx. She met with her in October xxxx before starting the social skills course in The child's P6 year to discuss what work witness G had done with The child, and to discuss strategies to help support The child. She is informed by the ASL profile prepared by witness G on 2 December xxxx in her teaching of The child.
  17. She has not sought advice from witness G during The child's P7 year. witness G will be invited to input into the IEP presently being drafted.
  18. witness G was unable to attend an IEP meeting in respect of The child in March xxxx, but telephoned the school three times asking for feedback from the meeting, and if any SLT input was required for the document. She attended the school to observe The child on 1 September xxxx, with a view to inform SLT involvement in future social skills groups at school. Since then, her contact with the school has been with the Support for Learning teacher, "D", who she has arranged to assist in running a social skills group. She has not been consulted by anyone from the school with regard to The child or his difficulties.
  19. In class, The child is well-supported by Witness E. She makes sure that he understands and concentrates on the task at hand. His behavior is good. He is involved in group work and working with a partner. He contributes to the class discussions. He is working at "level 2 developing" within the Curriculum for

Excellence. Most children would be expected to achieve “level 2 consolidating” by the end of P7.

20. Assessment of The child is carried out by his class teacher and the school has not provided any objective measurement, for example from standardized testing.
21. The child is naïve and immature, more innocent than his peers. The gap between The child’s pragmatic language skills and that of his peers is widening as the other children develop at a rapid rate.
22. The child needs support to become more self-aware and to adapt to different situations. He has difficulties in peer groups and in social setting with his peers. In one to one situations with an adult, The child’s social skills are better.
23. The child has difficulties with social interaction with his class mates and others. He has a friend at home who does not attend his school. He is rarely invited to other children’s social events such as birthday parties.
24. During his years at Primary School B there have been concerns on his parents’ part about incidents involving The child and other pupils and the actions of the school.
25. There was a particular concern about an alleged incident in September xxxx, when the school followed child protection procedures involving police and social work.
26. Despite Witness E being The child’s class teacher, and the member of staff at the school who appears to know him best, she was not involved in discussion around the alleged incident.
27. No-one asked The child about the alleged incident, although other children were questioned.
28. The school failed to contact witness G, far less seek advice from her, although the school leadership should have been aware that The child’s difficulties of pragmatic language impairment were likely to have been a significant factor in the alleged incident. The school failed to contact the educational psychologist, “EP”, or seek advice from her.
29. The child was kept off school by his parents following this alleged incident. On his return to school he was allocated a learning assistant to be with him in the playground and when outwith the classroom setting. The school failed to

contact witness G or “EP”, or seek advice from either of them about the most appropriate way to manage The child’s reintegration into school, to ensure that he understood what had happened, and in particular to support him in unstructured school time. The school leadership failed to appreciate The child’s distress being shadowed by an adult throughout playtime.

30. Although supports of an educational psychologist and Speech and Language Therapist are accessible to the school, the school leadership do not avail themselves fully of this support in respect of The child. In particular the school fails to consult with SALT to support The child appropriately.
31. The draft IEP prepared for The child lacks clear measurable “SMART” targets. There will be further consideration given to measuring his achievement.
32. School A is a school for young people with Specific Language Disorders, Asperger’s Syndrome and Autistic Spectrum Disorders, all of whom experience complex speech, language and communication needs. There are ninety eight pupils on the roll, from age five to nineteen. The classes reflect the English Key Stages of education, with primary school to end of year 6, Key Stage 3 for years 7 to 9, and Key Stage 4 (GCSE level) for years 10 and 11. There is then a sixth form. Class sizes range from four to six.
33. There is a key team system to support each pupil, comprising a qualified tutor, an assigned Speech and Language Therapist (SALT), an assigned Occupational Therapist and at least one teaching assistant. In class, depending on the level, there are between one and three teaching assistants. There are 10.5 full time equivalent SALT each of whom works with a maximum of ten pupils. There is direct SALT teaching in the curriculum areas of English, PSHE and life skills, and if necessary, in some maths lessons, and SALT will jointly plan other curriculum areas. A pupil will have some contact with SALT three times a day.
34. The most recent Ofsted Report for Education was in July 2014, and the school was rated good: pupils met or exceeded national expectation in core subjects.
35. At School A the provision offered would be:

- (i) weekly individual and group Speech and Language Therapy intervention to work on each area of Language and Social Communication described as a need, delivered by the class SALT;
- (ii) two to three hours weekly indirect SALT through joint planning and delivering English, Circle Time, PSHE and Life Skills sessions;
- (iii) teacher and teaching assistant working in class to put in place the programmes, strategies and advice provided by the SALT as part of the plan, and to work on targets appropriate to the classroom;
- (iv) weekly direct individual Occupational Therapy;
- (v) two to three hours of weekly indirect Occupational Therapy through joint planning and delivery of Life Skills;
- (vi) small tutor and teaching group (maximum eight students) taught by a reduced number of teachers;
- (vii) an individual literacy programme planned jointly by the class teacher, the SALT, and specialist dyslexia teacher and delivered by the class teacher and teaching assistants;
- (viii) a calm and quiet teaching and social environment within classrooms and school grounds;
- (ix) a structured and differentiated curriculum, including visual timetables, lesson plans and targets clearly displayed;
- (x) teaching within an environment that caters for the needs of young people with Speech Language and Communication Needs;
- (xi) the provision of a peer group with a similar ability;
- (xii) a highly intensive staffing ratio for unstructured times.

36. School A is in England. There are links with the nearest secondary school, one mile away, where, for example, School A pupils getting ready to go back to mainstream setting access some teaching, and some of the secondary school pupils come for work experience, or some of the younger groups join assembly. There are partnership links with an inner city school, twelve miles away.

37. The school supports the pupil's contact with home. The child would be supported to phone or Skype privately daily. His key worker would have

information from the family of all memorable dates such as birthdays and will support him to send cards or to remind him to mention these on calls home.

38. School A recommend that The child return home on a fortnightly basis to maintain his links with home. His father would intend to travel to collect and return him.
39. The annual costs of The child's attendance at School A would be from around £95,000 to £98,000, not including travel and other incidental costs.
40. The annual cost of a pupil attending the mainstream Primary School B amounts to £4,999.
41. There is suitable provision by the respondents to support The child at Primary School B if used appropriately. Such provision will be available to support The child with transition to secondary school and will be available on an on-going basis at secondary school.
42. All staff at School A are experienced in teaching and caring for children and young persons with speech language and communication disorders. They would understand The child's problems and would provide suitable provision for his additional support needs.
43. The child is part of a loving and caring family who provide a supportive home environment. There are no difficulties in the home environment which would suggest a residential placement would be required. The child's local community is over two hundred and fifty miles from School A. There are significant benefits to the well-being of children and young persons living within their family and being educated in their local environment.
44. A non-residential placement would be suitable for The child, but he does not require a residential placement away from his family and local community.
45. It is not reasonable having regard to the respective suitability and the respective cost of Primary School B and School A to place The child in School A.
46. The authority have a statutory duty to place The child in a mainstream school. The child has the ability and aptitude to remain as a pupil at Primary School B. His place in the class is not incompatible with efficient education of the other children.



### 3. Reasons for the Decision

1. The Tribunal heard oral evidence from witnesses for the authority: Witness D, Witness E, witness G and Witness F; and for the appellant: Witness A, Witness B and the appellant. We also heard briefly from The child's father, "father". The documentation comprised the appellant's bundle pages A1 to A433, the authority's bundle pages R1 to R66 and the Tribunal papers, bundle T. We also had a report from an advocacy worker setting out The child's views.
2. We were satisfied that there was sufficient evidence available for the Tribunal to reach a fair decision on the reference.
3. Both solicitors prepared written submissions and these are referred to for their terms.
4. We took into account and considered all the evidence and submissions even when not specifically referred to in this decision.
5. The issues in dispute were (i) whether the authority is able to make provision for the additional support needs of The child in a school other than School A, namely Primary School B; (ii) the respective suitability, for the additional support needs of The child, of the provision available at Primary School B and School A, and the respective cost of the provision; and (iii) that placing The child in School A would breach the requirement in section 15(1) of the Standards in Scotland's Schools etc Act 2000, viz. the duty on the authority to place the child in a mainstream school rather than a special school.
6. Section 19(5) of the Education (Additional Support for Learning) (Scotland) Act 2004 provides:

*"Where the reference relates to a decision referred to in [section 18 (3)(e)] the Tribunal may –*

- a. confirm the decision if satisfied that –*
  - i. one or more of the grounds of refusal specified in paragraph 3(1) or (3) of Schedule 2 exists or exist, and*
  - ii. in all the circumstances it is appropriate to do so;*
- b. overturn the decision and require the education authority to*

*place the child or young person in the school specified in the placing request to which the decision related ...*

7. Paragraph 2(2) of Schedule 2 of the Act provides:

*"Where the parent of a child having additional support needs makes a request to the education authority for the area to which the child belongs to place the child in the school specified in the request, not being a public school but being –*

*(b) a school in England Wales or Northern Ireland the managers of which are willing to admit the child and which is a school making provision wholly or mainly for children ... having additional support needs*

*...*

*it is the duty of the authority, subject to paragraph 3, to meet the fees and other necessary costs of the child's attendance at the specified school."*

8. Paragraph 3(1) of Schedule 2 of the Act provides that this duty does not apply:

*"(f) if all the following conditions apply, namely –*

*(i) the specified school is not a public school;*

*(ii) the authority are able to make provision for the additional support needs of the child in a school (whether or not under their management) other than the specified school;*

*(iii) it is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified special school and in the school referred to in paragraph (ii) to place the child in the specified school;*

*(iv) the authority have offered to place the child in the school referred to in paragraph (ii); or*

*(g) if, where the specified school is a special school, placing the child in the school would breach the requirement in section 15(1) of the 2000 Act."*

9. Section 15(1) of the 2000 Act provides:

*"Where an education authority, in carrying out their duty to provide school education to a child of school age, provide that education in a school,*

*they shall unless one of the circumstances mentioned in subsection (3) below arises in relation to the child provide it in a school other than a special school.”*

10. Section 15(3) of the 2000 Act provides:

*“The circumstances are that to provide education for the child in a school other than a special school:*

*1. would not be suited to the ability or aptitude of the child;*

*(b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or*

*(c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred,*

*and it should be assumed that those circumstances arise only exceptionally.”*

11. There is a two stage test in terms of section 19(5) (a) as set out above: firstly the Tribunal requires to determine if the authority has established any of the circumstances in paragraph 3(1)(f) or (g); then, the Tribunal has to consider whether in all the circumstances it is appropriate to confirm the decision of the authority.

12. Paragraphs 3(1)(f)(i) and (iv) are not in dispute. School A is not a public school, and the authority offer to continue the placement of The child in Primary School B.

13. No precise evidence was provided as to the costs associated with The child's education at Primary School B, but we were advised by Solicitor for the authority that the annual cost per pupil was £4,999. Annual fees for School A for a fortnightly placement, with The child travelling home every second weekend, would be between £95,000 and £98,000. Additional costs would include travel. It was a matter of agreement that the costs of School A and necessary incidental expenses were very substantially more than the costs of Primary School B.

14. The Tribunal considered the evidence before it of the ability of the authority to make provision for The child's additional support needs in Primary School B.

15. The child is well-supported in class by Witness E. Witness D, the head teacher, spoke of seeing The child on a casual basis in class and in the playground.

She had observed him engaging with other children, and making arrangements with others for particular games.

16. witness G provides Speech and Language Therapy. Her services are available on a consultative basis, but it is of concern that the school do not appear to make use of these. Witness E feels confident about her knowledge, and does not feel she needs to consult witness G. However it is of serious concern that witness G had telephoned the school three times in March xxx seeking feedback from an IEP meeting she was unable to attend, with no response, and that she was not invited to the last IEP meeting.
17. In our view it was almost incomprehensible that the school leadership team had not sought advice from the educational psychologist and, in particular, the speech and language therapist to consider how to best support The child in the circumstances surrounding the incident in September xxxx when police and social work were involved in a child protection investigation. The information available to us was that what, if anything, had been said or done by The child toward another child in the playground, was directly related to his social interaction difficulties as a result of his pragmatic language impairment.
18. At Primary School B, Witness E has a good understanding of The child's difficulties in the classroom and is able to support The child in accessing the curriculum.
19. Despite this, it is a serious concern, as noted by Witness A and Witness B, that despite the interventions provided to date for The child, and the support provided by Witness E, The child has not made the academic progress that may be expected of a child of his cognitive ability.
20. There is a statutory duty on the authority to secure that education is directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential.
21. We had significant disquiet about the use of the provision available to The child by the staff at Primary School B. Whilst Witness E is a very competent and experienced teacher and is supporting The child well in class, we considered that the school staff dealing with him did not wholly understand and appreciate

The child's specific problems and that more use should be made of the SALT provision available.

22. We were also concerned at the reliance that was made on Witness E's subjective assessment of his progress, and the lack of clear targets and recording of his progress. A properly documented record of his progress by showing the targets, and how and when these are achieved will better inform those working with The child how best to support his needs.
23. This will be of particular significance in ensuring secondary school staff are fully comprised of The child's abilities and needs on transition to secondary school.
24. Despite our concerns however, we are satisfied that the provision is available, albeit not most beneficially used, and therefore the authority are able to make provision for The child's additional support needs in Primary School B.
25. The provisions of paragraph 3(1)(f)(ii) are satisfied.
26. We proceeded to consider the respective suitability of the two schools.
27. There was a disparity of opinion between witness G and Witness B as to the method of provision of SALT. witness G did not consider that, in The child's case, one to one sessions with SALT were of benefit. In his early years, individual sessions helped with his language impairment, but now his difficulties were mainly pragmatic in nature: he was not able to transfer skills discussed and learnt in individual sessions to social situations. She considered that the best way to manage The child was to support him in natural situations, in school and elsewhere. She described collaborating with the school staff to embed within the school setting the support with his social skills.
28. Witness B considered that The child needed intensive daily individual SALT sessions and to be supported throughout the school day by specialist language teachers, with SALT intervention in planning all aspects of the curriculum, and in his leisure time outwith school. He considered that this would be necessary for many years. He did not consider that any mainstream school would be suitable for The child. He thought he needed a residential setting.
29. With reference to research, he was critical of the consultancy method used by the authority for the provision of SALT.

30. He was critical of The child's present school in their failure to set measurable targets, and to evidence his achievements and progress in a consistent record.
31. Witness A criticized the education authority in the extent of their assessments of The child being made on the basis of observation rather than standardized assessments. He commented that if standardized assessments were carried out, it would be clear whether or not the child was making the expected progress. After carrying out a range of objective assessments, he concluded that The child had cognitive ability in the average range, but was not making the progress which would be expected of someone of his cognitive ability. He considered that, with this cognitive ability, there was no reason for The child not to attain GCSE or A Level and proceed to further education.
32. Witness A noted that at face value The child was a quiet boy, that in class he would "stay below the radar" and that on observation one would not pick up on the extent of his additional support needs.
33. He was of the opinion that The child's educational needs were unlikely to be met at a mainstream school where he was likely to be increasingly separated from his peers and made increasingly dependent on adults to support him. He considered The child required staff suitably qualified and experienced in supporting children with language disorders, together with a learning environment suitably adapted to meet those needs.
34. He considered that the placement at School A would best meet The child's needs. As a residential placement, he thought it arguably better for him in the long-term to have to leave his family and local community than remain and fail socially and academically in the local mainstream school.
35. The child's parents described their decision to seek a residential placement after having visited and been impressed with the provision available for The child at School A.
36. The staff at School A are all experienced in educating children and young people with speech, language and communication difficulties. They would all understand The child's difficulties, and there would be access to SALT input in every aspect of the curriculum and within his daily life in a "waking day" environment.

37. Although both Witness B and Witness A supported the residential placement, it appeared to us from their evidence that their main concern was the specialist language and communication provision during the school day as being of particular benefit to The child. There was evidence that there may be direct SALT involvement in the evenings, and residential care staff were experienced in young people with language and communication impairment. In unstructured time there was a high staff/student ratio.
38. However there was no suggestion that there were any issues in The child's home that necessitated a residential placement, or any suggestion that The child's parents were unable to support him in domestic life skills. It appeared to us that the reason such a placement was sought was only due to the distance between the school and The child's home.
39. That transition and the removal of The child from his home environment may cause difficulties for him have been addressed in the recommendation of the deputy head teacher of School A that The child return home every second weekend.
40. We were satisfied that School A would be able to provide The child with education suitable for his additional support needs.
41. However, weighing and balancing on the one hand, the suitability of Primary School B, if the supports of educational psychologist and speech and language therapist are appropriately used, and on the other, the suitability of the residential placement at School A, we concluded that attendance at a school in his local community, living at home with his family, and having access to post-school education and training in his local environment, was more suitable for The child than a residential placement in England.
42. We reach this conclusion with continuing concern that, as The child moves in future months to secondary school, the authority must ensure that all those who will be involved with him are fully informed, trained and aware of his specific needs. In particular we would expect that there would need to be significant input from SALT to train the staff at secondary school and probably input with The child himself to prepare him for the very different experience of secondary

school. We have been much concerned by the lack of transition planning to date, and the school's failure to fulfill their duties in this respect.

43. In our view, the evidence does not support the need for The child to have a residential placement, and accordingly, when weighing the suitability of each school, we have determined that Primary School B is more suitable for The child than School A. When weighting the respective costs of the two schools, School A is significantly more expensive.
44. We therefore find that the terms of paragraph 3(1)(f)(iii) are met. It is not reasonable that The child is placed at School A.
- 45.30. We required to consider the exceptions set out in section 15(3) of the 2000 Act, before deciding if paragraph 3(1)(g) applied.
46. We are satisfied that there is a duty on the authority to educate the child in mainstream school. We are thus required to consider if any of the exceptions in section 15(3) apply.
47. We have concluded that Primary School B is suitable for the ability and aptitude of The child. He is working at a level somewhat lower than most children of his age and stage, but within the parameters of the Curriculum for Excellence. There was no evidence to suggest that it was incompatible with the provision of efficient education for the others educated with him.
48. The exceptions in section 15(30 of the 2000 Act are not met.
49. Having reached these conclusions, and having regard to the second stage of the test set out in section 19(5)(a) of the Act, in all the circumstances, it is appropriate to confirm the decision of the authority to refuse the placing request.