

DECISION OF THE TRIBUNAL

Reference

In January 2017 the appellant (“the mother”) lodged a reference under section 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the Act”) against a decision of (“the authority”).

The reference was in respect of the decision dated 16 December 2016 where the authority refused a placing request made by the appellant under paragraph 1 of Schedule 2 of the Act, for The child (born 2002) to attend School A.

1. Summary of the Decision

The Tribunal sets aside the decision of the Respondents dated 16 December 2016 and directs that The child is placed in the School A.

2. Findings of Fact

1. The child is aged fourteen. He has been living with his maternal grandmother and step-grandfather since June 2016. Their home is near to his family home, where his mother, father and eleven year old brother live. He went to live with his grandparents initially for a short period of ‘respite’ and has continued to live there. He sees his parents daily and has meals with them, he spends a lot of time at his family home.
 2. He attended School B. In February 2012 he was referred to CAMHS because of concerns about severe anxiety and a possible underlying social communication difficulty. He underwent a specific assessment for Autism. It was stated in March 2013 that the outcome of the assessment was that they had not been able to conclude whether The child did or did not meet the criteria for an ASD at that time due to high levels of arousal which interfered with his ability to access the social skills he appeared to have.
 3. An additional support needs meeting took place on 2 September 2013 to consider the transition from primary to High School. The factors creating additional support needs were stated to be: *spelling difficulties, slope to write on, slow handwriting; he*
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worries and is anxious; self esteem is low, regarding his own ability in language; poor eating habits in school and other people's houses; sensory issues regarding smells and texture; double jointed in all joints; melatonin for sleep.

4. According to the minute of that meeting, the additional support needs following transition were stated to be: *Support with anxiety; Peer support to help with the move between schools; Access to Guidance Teacher on a drop-in basis; Meeting some of the main supporting adults in school before main transition days; Strategies to relax; Supported group in school; Extra visits before two induction days; Access to spelling aids; Paired reading; Access to boys group.*
 5. It was agreed that staff from School C would work with some staff and then visit High School for extra visits, and that the psychologist from CAHMS would liaise with staff in primary and secondary schools re strategies to help with anxiety. There was no information what work was done in this regard.
 6. The child moved from School B to School C in August 2014.
 7. After an assessment he was identified as dyslexic in November 2014. The assessment report described a range of suggested strategies to be used by staff. These included: *Give him lots of reassurance; Don't put him on the spot, if he know the answer to a question they he will offer the answer; If you are challenging him on (such as behavior), do this discreetly and ensure that he understands what is being asked of him; Give him printed out notes; Be clear with instruction and double check that he understands what is being asked of him; Use a buddy in the class but work this out with him; Give him plenty of 'thinking time' to allow him to process; Break down tasks that are of long length; Give him clear structure for tasks – such as a writing Performa for an essay; Extra time to complete tasks where appropriate; Build on typing skills and speed of typing; Introduce the use of Ivona Minireader; Is likely to require Alternative Assessment Arrangements; If you are giving him corrections/targets to work on in his class work, ensure that you discuss this with him; Homework should be monitored – support to organise the homework by printing out the tasks for him and monitor is work is handed in late.* (These are set out exactly as in the school document and presumably were provided to the staff).
 8. At an additional support meeting on 23 April 2015 his additional support needs were discussed and his needs were set out. These were identical to the suggested strategies noted above, with the addition of *'Use of ICT for written tasks, especially extended pieces writing – individual notebook is being sources and will be available*
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for The child to use in all classes' and "Must have printed out notes'. (Again these are set out exactly as in the school document and presumably provided to staff).

9. These support strategies were set out in the pupil overview which was available to all teachers.
 10. Following the ASN meeting The child had an Individualised Education Plan prepared.
 11. At an additional support meeting on 25 September 2015 further factors creating additional support needs were identified. These were *'Has found getting himself organized for school difficult therefore is often dependent in getting a lift to school from his parents; Has found specific areas of conflict difficult to move on from; Is finding it extremely difficult to recognize positives and can be very fixated on the negatives. This can be the case for both school and home; Struggling to complete homework given'.*
 12. During S1 The child suffered bullying and abuse from other pupils. He was reluctant to go to school. His parents had a meeting with the Deputy Head and Principal Guidance Teacher on 1 July 2015. Supports such as attendance at lunch time and break time groups and homework club were discussed.
 13. The notebook/laptop referred to at the meeting of 23 April 2015 to be provided for The child was identified at the end of August 2015. It became available in October just before the holiday It was found that there were technical issues which needed to be resolved, and it was removed from him. It was subsequently suggested that his parents apply for charitable funds to buy a laptop for him to use at school.
 14. A Community Link Worker was allocated to The child to provide support. The child met with him twice. He decided he did not wish to work with him further. He chose not to use the interval drop in. He did not wish to attend a lunchtime homework session with a support for learning staff member.
 15. Throughout S2 The child was reluctant to go to school. It had been agreed that he could miss the registration group at the start of the day because he found this difficult, and go straight to his class, some ten minutes after the start of the school day. He was often late. At times he refused to go to school.
 16. His behavior at home was causing considerable concern to his parents. They were concerned about his reluctance to go to school and they made their concerns known to the school. On at least two occasions he left the school premises during the day. His parents were concerned about his safety.
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17. In the summer term of 2016 The child's attendance at school declined in the period around the timetable change for subjects to be studied in S3 and S4.
 18. The child was re-referred for an Autism assessment in 2015 and on 25 May 2016 he was a diagnosis of Autism Spectrum Disorder, "*similar to what would previously have been described as Asperger's Syndrome*". His challenges were noted: *using non verbal communication such as gestures and eye contact; directing facial expressions to use communicatively; understanding emotions; lack of motivation to initiate interaction; reduced creative thinking.*
 19. At a meeting on 16 June 2016 with the Principal Guidance teacher, The child and his father, it was discussed that he would have a reduced timetable of subjects.
 20. When the new school term began in August 2016, The child attended for one day. He has not been at school since then.
 21. The school sent work home for The child. Very little work was completed and returned. In March 2017 it was agreed that The child would have one to one support with a pupil support assistant known to him. These sessions were arranged at the community connect building. The sessions were increased from weekly for one hour to twice a week. The focus is on numeracy and literacy. He is doing English, maths and biology. The child likes and has a good relationship with the support assistant.
 22. School C is a mainstream secondary school, with a secure, purpose built enhanced provision small group facility to meet the needs of young people with significant educational difficulties.
 23. It offers a wide and comprehensive curriculum encompassing the full range of SQA levels. The school can offer alternative curriculum opportunities including local community based supports and opportunities. Work placements can be arranged in line with pupil's particular interests.
 24. In the enhanced provision class sizes are up to eight pupils with a class teacher and at least one pupil support assistant. A significant proportion of the pupils have ASD. There are four classes, based on a pupil's ability. If The child were to be taught in the enhanced provision he would be placed in a senior class of S3 and S4 working towards National qualifications. The class would access the mainstream subjects above National 3 and be taught in their small group. A blended approach would have some teaching in the enhanced provision and some teaching in mainstream.
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25. Attempts were made by SCHOOL C to meet The child's additional support needs in S1 and S2. These were not successful insofar as The child has refused to attend school since August 2016. It is likely that the cumulative nature of the issues experienced by The child were not fully understood by the school.
 26. The staff at School C have considered potential options for The child to re-engage with education at school. These range from a return to school on a full-time basis in the enhanced provision, to return to mainstream with support. They have also considered a gradual build up of engagement with The child starting from the current arrangement whereby he has two sessions weekly with a support for learning assistant working on numeracy and literacy. Consideration has been given to the possibility of work-placement and other community-based provision.
 27. No assessment has been made of The child's current educational needs. Witness A had prepared a report for the ASN panel dealing with the placing request, but this was not an assessment of his needs.
 28. Discussions with The child, his parents and school staff, along with input from CAMHS and other professionals will inform the plan for The child's education at School C.
 29. The child attended School A for assessment. He visited on four days, one initial visit and then three days when he attended throughout the school day. He took part in classes and ate lunch there. He engaged in the work in class. He was comfortable in the dining-room. He has been offered a place at the school.
 30. The School A specialises in education for young people with Asperger's/Autistic Spectrum Disorder and social, emotional and communication difficulties. It supports young people with a range of additional support needs who have been unable to flourish within mainstream education. The majority of students have a diagnosis of a condition which has created barriers to their social, emotional and educational development. It is accredited by the National Autistic Society. Class sizes are small with up to five in a class, and a school role of less than thirty.
 31. It provides a wide range of educational opportunities and qualifications including SQA to Advanced Higher level. It provides a range of outside education opportunities from horticulture, chicken and bee keeping to expeditions to Duke of Edinburgh Award.
 32. The School A can meet The child's additional support needs.
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33. Although School C have an enhanced provision for pupils with additional support needs, and have been successful in meeting the needs of other pupils with a similar profile to The child, there have been problems in the past and The child has refused to consider returning to the school.
34. There has been no current assessment of The child's additional support needs and no clear plan how it is intended to make provision for these needs.
35. The authority are not able to make provision for The child's additional support needs at School C at this stage.
36. The costs of the School A are very significantly higher than the costs of attendance at School C which are effectively zero.
37. The School A is more suitable for the provision of The child's additional support needs than School C. It is reasonable for him to be placed there.

3. Reasons for the Decision

1. The Tribunal heard oral evidence from witnesses for the authority: Witness B and Witness A; and for the appellant: Witness C, Witness D and the appellant. The documentation comprised the appellant's bundle pages A1 to A131, the authority's bundle pages R1 to R285 and the Tribunal papers, bundle T1 to T73.
 2. The child came in the morning of the second day, and spoke with the Tribunal members in private. A summary of what was said was shared with the parties.
 3. We were satisfied that there was sufficient evidence available for the Tribunal to reach a fair decision on the reference.
 4. Both solicitors prepared written submissions and these are referred to for their terms.
 5. We took into account and considered all the evidence and submissions even when not specifically referred to in this decision.
 6. 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 the School A, namely School C; and (ii) the respective suitability, for the additional support needs of The child, of the provision available at School C and the School A, and the respective cost of the provision.
 7. It was confirmed by Representative for authority that the authority did not rely on the secondary ground of refusal set out in the decision letter dated 16 December 2016 in terms of paragraph 3(1)(g) of Schedule 2 of the 2004 Act that placing The child
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in the 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.

8. 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 by such time as the Tribunal may require ...

9. 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 –

(a) a special school the managers of which are willing to admit the child

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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."

10. 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;*
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iv. (iv) the authority have offered to place the child in the school referred to in paragraph (ii);

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), 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. The School A is not a public school, and the authority has allocated The child a place at School C where he is currently enrolled.
 13. The costs identified by the authority of The child's placement at School C was nil as the authority could meet his needs with existing resources, and transport costs were nil as he resided within the catchment area. The annual fees for the School A were £42,320 for the years 2017/2018, and transport costs would be between £3,385 to £11,115 per annum depending on the particular needs and contract. The costs of the School A and necessary incidental expenses were very substantially higher.
 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 School C.
 15. Witness B has been Deputy Head of SCHOOL C since around the summer term of 2015. He adopted his affidavit and answered questions put to him. He spoke to the report at pages R39 to R77. This had been prepared by him, the Principal Support for Learning Teacher and the Principal Guidance teacher, with support from the education authority. Section 4 of the Report, from R52, describes The child's needs and the supports put in place.
 16. During the transition to SCHOOL C the school were provided with information from the primary school. He had been screened for dyslexia but there was no formal diagnosis. His problem with anxiety was identified.
 17. From the pastoral notes it is clear that there were concerns from the parents in the first term of S1. Although it was stated that all teachers had knowledge of the pupil overview, the concerns of teachers as noted in November and December 2014 were of bullying on the part of The child. It would seem that until the dyslexia assessment, the suggested strategies described at paragraph 3.7 above were not provided to the subject teachers.
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18. By the third term, the parents were reporting concerns of incidents during class. However his school report in February 2015 was good and there was a view that he had settled well and was engaging positively. He was working at an appropriate level for his age and stage.
 19. During the course of the S1 year he was extracted from Drama and in place he had one to one sessions in the Support for Learning Department to develop his social communication skills. He had weekly sessions with the Principal Teacher, Support for Learning. There was support in class for English, Maths, Science, HE and Tech for twelve periods a week.
 20. These continued in S2, and in addition he was extracted from Modern Languages to attend a core skills group with a focus on literacy numeracy and health and well-being. Arrangements were made to allow him to miss the registration class, and go into school ten minutes after the other pupils. He was allocated a community link worker and given access to interval drop to try to deal with his problems with peers and difficulties at lunch time and break.
 21. The plans and arrangements were in place but The child did not engage with the community link worker. His anxieties increased. He became more reluctant to go to school. It was noted by Dr N in her letter of 1 November 2016 (A111) that The child told her that he felt overwhelmed in the secondary school setting. He felt he could not cope with the amount of people and the sense of being potentially overlooked by teachers.
 22. The autism diagnosis was made in May 2016. A meeting arranged to discuss the Child's Plan in June 2016 had to be postponed to 25 August 2016, after the start of the new term. By that time The child had refused to return to SCHOOL C.
 23. Since The child has been out of school, he has had work sent out for him to complete at home. From March 2017 he has met with a support for learning assistant, initially weekly, and then twice weekly. He has a good relationship with her.
 24. Since he has been out of school, The child has been able to manage his anxiety to the extent that he has been able to go to a supermarket with his family, and has been able to go to the cinema with his father. He had been taken with his grandfather to work on a shoot as a beater, and had been able to attend a shoot on his own with people who he did not know.
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25. Witness B described the options that may be available for The child to re-engage with education at School C, and these are set out at pages R66 to R68, as a result of discussions between him, the Principal Teacher Support for Learning, and the Principal Guidance Teacher. These ranged from The child being taught full-time in the enhanced provision, to being taught in mainstream with support. It was probable that there would be a blended approach.
26. He indicated that they would take advice from CAMHS and other professionals in making the plans for The child. It is likely that they would start with the positive relationship he has with the support for learning assistant and build from there. There would be a bespoke plan based on his interests and what things worked for him.
27. At a meeting on 2 February 2017 attended by the Deputy Head Teacher, Principal Teacher Guidance, Principal Teacher Support for Learning and two educational psychologists, there was discussion of a potential plan, none of the suggestions included receiving education within the school setting.
28. Although there has been some consideration of possible options for The child, these are all theoretical and there has been no assessment of his current needs. He has not been observed or assessed by a qualified teacher since he ceased school attendance.
29. The authority had instructed Witness A to prepare a report. She is the Autism Lead Officer for the authority and has a background in health. She concluded that The child should continue his education at SCHOOL C, but not within the mainstream setting.
30. The child has been adamant that he will not return to SCHOOL C. He told us that he would not even pass the school if it was the lunch hour and other pupils were there.
31. Representative for appellant referred us to M v Aberdeenshire Council 2008 SLT (Sh Ct) 126 as a useful guide to the correct approach to be taken by the Tribunal. It was submitted that in considering if the authority was able to make provision for the additional support needs of the The child, that had to be determined at the date of the hearing.
32. We concluded that without a full dynamic assessment of The child's current needs, it cannot be said that the authority can meet The child's additional support needs at School C. Although the provision is there for pupils with additional support needs,
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and the school have been successful with positive outcomes for pupils with similar profiles to The child, there has been no assessment of his needs at this stage, taking into account his rigidity of thought and his determined expressed statement that he will not return to School C.

33. Accordingly the provisions of paragraph 3(f)(ii) are not met.
 34. Although this finding is sufficient to allow the appeal, we proceeded to consider the provisions of paragraph 3(f)(iii), the respective suitability of the two schools and respective costs.
 35. There is no doubt that the costs of the School A are far greater than those of SCHOOL C. Were it only a matter of cost, we would have to conclude that the placing request be refused. However we also have to address the question of '*suitability*'.
 36. On starting at School A, The child would be subject to a six week assessment to identify his needs and barriers to learning and individualising the provision available to assess his needs. This would be commenced immediately at the start of the new school term in August 2017.
 37. The child told us that he thought that the School A had a bearable amount of people, and that the teachers were understanding and supportive. He understood that he needed qualifications for his future, and he wanted an education. He had been observed to settle into the environment when he attended for assessment, despite his anxiety. He will be able to start attendance and be able to access education at School A at the beginning of the school year while the assessments are being undertaken.
 38. If he were to continue his education at School C, no plans could be put in place until the term starts in August. There will require to be discussion with other professionals including CAMHS, and identification of community based supports. Given his anxiety, his rigid thinking, and his refusal to return to School C, it is likely to take a considerable amount of time before he would be able to access any more than the current provision of twice weekly sessions with the pupil support assistant.
 39. The child has missed the whole of the third year of his secondary education. At his age and stage it is of the highest importance that he is re-engaged with appropriate education as soon as possible. If he is not to attend the school campus it is likely that he would continue initially with the sessions he currently has with the pupil support teacher. The minutes of the meeting on 2 February 2017 noted that he
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could potentially achieve National 4 qualifications outwith school, but involvement with school would be required. There was discussion of work placement. These were only vague suggestions. There was no time-scale.

40. It appeared to us that The child's potential opportunities would be limited if the focus was on work placement. Although he is interested in game-keeping, and has enjoyed work as a beater and was engaged in the rifle club, he told us he did not necessarily see that type of job as his future.

41. It is in his interests that he has the chance to obtain educational qualifications to enable him to access a wide range of opportunities.

42. We concluded that the School A is more suitable for The child than School C as it is likely that he will be able to engage from the start of term and be part of the school community whilst the assessments are carried out. He will have the opportunity to study for National qualifications and highers. It is unlikely that he will be in a position to achieve his potential for qualifications if he were required to remain enrolled at School C.
