

## **DECISION OF THE TRIBUNAL**

### **Reference.**

By application dated March 2017 the Appellant lodged a Reference under section 18(1) and 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004, [as amended by the Education (Additional Support for Learning) (Scotland) Act 2009] (“the Act”) against a decision of (“the Authority”).

The reference is in respect of the decision dated 15<sup>th</sup> February 2017 whereby the Authority refused a placing request made by the Appellant under paragraph 1 of Schedule 2 of the Act, for the child, to attend the requested school, School A.

### **1. The Decision.**

The Tribunal overturn the decision of the Authority to refuse the Placing Request and require the Authority to place the child at School A no later than 22<sup>nd</sup> August 2017 being the commencement of the new school year 2017/2018 and to meet the accompanying fees and other necessary costs.

### **2. Preliminary Issues**

Conference calls were held between May and June 2017. Further documentation was lodged, and the Respondents helpfully lodged Affidavits of their witnesses at the commencement of the hearing with a view to reducing the length of the oral hearing. It was agreed that The child would attend and speak with the Tribunal in order for us to obtain his views. The parties also lodged a Joint Minute of Admissions for the assistance of the Tribunal. Following the conclusion of the evidence parties lodged full written submissions.

### **3. The Evidence**

Documentary evidence was produced in the bundle with papers numbering T1-T28; A1–A293 and R1-R46. During the course of the hearing an additional document was produced. This was admitted and marked A141-A143. In addition to the Affidavit, oral

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and written evidence the Tribunal gave full consideration to the Case Statement for the Appellant and the Response for the Authority and full written submissions from the parties.

Oral evidence for the Respondents was taken from:

Witness A

Witness B

Witness C

Oral evidence for the appellant was taken from:

the Appellant

The child

Witness D

Witness E

#### **4. Findings in Fact**

The parties helpfully prepared and lodged a Joint Minute of Admissions. The Tribunal separately makes the following findings in fact:-

##### **The Child and his Additonal Support Needs**

1. The child, ("The child") is currently 12 years of age. He resides with his mother and younger brother and sister. He has and older sister who is at boarding school.
  2. The child has been diagnosed as suffering from Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD) and social, emotional and behavioural difficulties. (As agreed in Joint Minute).
  3. There is a family history of ADHD – both the Appellant and her mother have a diagnosis of ADHD and Aspergers syndrome. The Appellant's sister has dyspraxia and the Appellant's nephew has Aspergers syndrome and mild Tourette's syndrome. The child's younger brother is undergoing assessment for Autism.
  4. The child presents as defiant, hostile and disobedient. He can have brief periods when his behaviour is calm but these don't last very long. The Appellant took the decision
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to send The child's older sister to boarding school due to The child's violent and aggressive behaviour towards his sister which was having a serious negative impact upon her and her relationship with The child. The child acts in a controlling and aggressive manner towards his younger brother.

5. The child does not respond well to demands being placed upon him. He has no sense of danger and has been involved in incidents that have placed his life in danger. He has become involved in risky behaviour with others which have brought him to the attention of the police.

6. The child can be aggressive, both physically and verbally, to the staff and other pupils in his school. The child uses inappropriate language, seeking to shock. The child struggles to concentrate at school and needs support to focus on the task at hand. The child's reading and writing skills are significantly lower than his peers. The Appellant has consistently raised concerns about his lack of attainment. The child struggles to make and maintain friendships at school.

7. The child had previously been taking medication to address his symptoms of ADHD and ODD. However, the Appellant considered that the side effects of the medication were sufficiently harmful to The child's well-being that she has stopped his medication. The child is presently not on any medication for his ADHD.

8. No formal detailed assessment of The child's additional support needs has been carried out by the Authority. While in P4 at School B, The child was referred to Extended Support for Pupils (ESP) for advice and additional support. The ASN teacher carried out observations and also completed the Boxall Profile to identify any developmental needs. Following this, interventions were put in place to re-establish the school day.

9. The child has been referred to CAMHS. In terms of their letter to The child's GP dated 4th February 2014 (A123) they confirm that The child meets the criteria for ADHD with both parental history, school reports and clinical observation suggesting significant levels of inattention, over-activity and impulsivity which are persistent, pervasive and impairing. The child meets the criteria for a diagnosis of ODD.

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10. In terms of the same letter it was stated that the clinical Nurse Specialist would make an Occupational Therapy referral as it is quite likely that The child also has significant Dyspraxic symptoms. It is not clear what the outcome of that referral was.

11. CAMHS are no longer working with The child, since the Appellant's decision to cease The child's medication.

12. The Appellant instructed a Psychological Assessment Report by Dr. L, Chartered Educational Psychologist. Dr. L issued a report following upon an assessment by her of The child on 30<sup>th</sup> May 2017. (A106 – 122) Dr. L described the tests administered by her and the report describes The child as being a young man with Specific Learning Difficulties (with evidence of dyslexia, dyspraxia and dyscalculia in his profile.) She noted that earlier assessments through CAMHS indicated ADHD (Attention Deficit Disorder with Hyperactivity), PDA (Pathological Demand Avoidance), ODD (Oppositional Defiance Disorder), dyspraxia and unconfirmed autism.

13. Dr. L opined that The child's performance within the learning situation will be adversely affected by an interaction between the following:

- A significant weakness in the are of short term working memory processing memory – this can cause concentration difficulties
- Auditory processing difficulties
- Significant difficulties with tasks requiring fine motor skills, spatial analysis, visual tracking and speed of information processing
- Significantly weak literacy and numeracy skills
- Significant social/emotional difficulties
- He is also light sensitive (The child reported that the use of a yellow overlay over text was more comfortable on his eyes and made the words clearer)

14. In her report Dr. L concludes that The child requires small group- support across all curriculum areas. He should be placed with peers with similar cognitive profiles and additional support needs. Support should be aimed at the development of his literacy and numeracy skills, his processing difficulties, encouraging independence and improving his emotional and social well-being.

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15. The report by Dr. L should be seen as a “snapshot” of The child’s condition as it results from one examination of him and does not take into account behaviour or examples of his work over a period of time.

16. The child has additional support needs in terms of Section 1 of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act).

#### History of School Placement

17. The child originally attended at School B. This is a mainstream Primary School. When in P3, The child began displayed challenging behaviours which led to exclusions, with the Appellant being called by the school on a frequent basis throughout P3 and P4, requesting that she take The child home. In his final year there, P4, The child reached Stage 4 on the Authority’s staged intervention framework.

18. The Authority have produced Guidelines on their Staged Intervention Framework. There are 5 stages to that Framework, with the highest being to seek the involvement of the Directorate if it is felt that a residential school or secure care is required. A summary description of the stages is attached in the first appendix.

19. The Appellant made a request for The child to move school while he was in P4. Initially the Appellant made a placing request to School C which was granted but this required to be reviewed as the Appellant had not stated The child’s additional support needs on the application form. While discussions were ongoing the Appellant moved home which brought her into the catchment for School D, which is a resourced school.

#### School D (“School D”)

20. School D is a “resourced school” which means that additional resources are available to the school to meet the needs of the pupils. There are, on average, 15% of pupils in each class that have additional support needs or barriers to learning through either literacy or numeracy. Additional support is available in the classroom from SPSA staff. However, they are not present at all times and are not usually for any one particular child.

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21. The child commenced at School D in the April of his P4. In P5 it was hoped that the male teacher that he had would be a good role model. However, this was not to be and The child continued to struggle. He was described as having a “personality clash” with the teacher. Additional support staff were put into the class that year. However, the additional staff were not there just for the assistance of The child.

22. The Appellant was contacted by the school on a weekly basis during P5 and asked to either calm The child or to take him home. It was not always The child’s disruptive behaviour that could result in him being asked to leave, but also at times when The child was very anxious and needed support to calm down. In P5 The child spent most of his time sitting at the top of the class with his back to the rest of the pupils, or out of class sitting with the Head Teacher, Witness B.

23. Witness B described that The child would bring work with him when sitting in his room, but would look to engage him in conversation as a way of avoiding doing his work.

24. In P6 The child did much better. His new teacher had embraced training in autism and ADHD. The child got on well with this teacher. Even with the improved relationship between The child and his teacher, The child has continued to struggle in class. The Appellant continued to receive calls to take The child out of school, although the calls are much less frequent. The Appellant is concerned that the reduction in frequency is more to do with the fact that she made a placing request for The child when he was in P5, rather than an improvement in his behavior.

25. At the request of the Appellant the same teacher moved with the class up to P7. The child has received much more positive school reports in P6 and P7. In both of these years The child has continued to spend periods of time out of class due to his behaviour. The child can ask for “time out” of the class if he is struggling, or he can be asked to leave the class if his behaviour becomes too disruptive. Small slips are filled in by The child’s teacher when The child has time out of the class. The child’s teacher keeps a record in her diary of these slips. The school does not have a record of how many of the times out of class are as a result of The child asking to leave the class and how many are as a result of him being put out of class. The school does not have a record of the frequency of time out of class or whether there is a pattern to it. Witness B believes that it is happening less

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frequently as The child does not come to his room as often. The child can sometimes sit with other members of the management team during time outs.

26. As well as asking for time out of the class The child is able to ask for “bubble time”. This means that he remains in the classroom but does not participate in the class. There is a small sofa where The child sits. The child often just sits there for extended periods without doing any work. On one occasion he was left to fall asleep there.

27. The child is working through the second level in terms of the Curriculum for Excellence. The child has not yet established the secure element but this is being worked on at school and it is anticipated that he will achieve this at secondary school.

28. The school are willing to explore different strategies with The child. At one point The child went through a stage of being particularly interested in music. He was given access to an ipod and headphones so he could listen to music which allowed him to concentrate better on his work.

29. The main strategies that are in place for The child at School D are that work is “chunked out” into manageable pieces; there are rewards offered when The child achieves a goal; there are SPSA staff available within the classroom and The child is part of a homework club. In order to promote his social skills The child access a social skills group twice weekly supported by an ASN teacher. The child utilises a soft start and soft finish to the day. The child works in small groups with children described as having similar needs in relation to literacy. The child has access to Clicker 7. This is a software programme which supports children with their literacy, reading and writing skills.

30. At one point in P7 The child asked to be placed in a group working at a higher ability level in algebra than he was and this was accommodated and he seemed to cope well.

31. The child has struggled to form and maintain friendships at School D. In P7 he has two or three pupils that he describes as friends. The child has developed an interest in football and this allows him a way of interacting with his peers at breaktimes and lunchtimes.

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32. The child took part in a residential school trip for three days in September 2016 along with his P7 peers. The school would not have allowed him to take part if there had been concerns about his behaviour. He was reported to have done well on the trip and enjoyed it.

33. The child had been given a part in the school play, playing the part of a disruptive child in class. There was an amount of waiting around in rehearsals which The child didn't cope with and the part has now been taken off of him.

34. The child took part in a school trip on Friday 23<sup>rd</sup> June 2017. The child's behaviour was disruptive and he was moved from group to group due to falling out with the other pupils. He got into a fight with another boy. He threw something at a teacher. On the way back to school The child was kicking the back of a teacher's seat and when she turned round he knocked her on the face. While waiting to be collected from school by his father, The child was lying on the office floor. When he returned home the Appellant sought to discipline him by grounding him. The child responded by jumping out of his sister's bedroom window.

#### School E– Specified School

35. The Authority have 8 resourced schools across The authority. The Authority currently have 110 pupils with ADHD across The authority in both primary and secondary settings. School E is one of two additionally resourced secondary schools in the area. The school is situated less than a mile from The child's home.

36. School E is a small secondary school with a roll of 679 pupils. School E is staffed with 57 teachers, which includes 6 Additional Support Needs teaching staff and 11 SPSAs. The school has teachers with an Inclusive Practice Certificate in ASN who have also attended training on ADHD, Autism Spectrum Disorder, Dyslexia, Social, Emotional & Behavioural Difficulties (SEBD), Restorative Approaches, Trauma and Attachment, GIRFEC, Crisis and Limitation Management (CALM) and Sensory Training. The Principal Teacher ASN is also an accredited Nurture Group Teacher. School and Pupil Support Staff have undergone a range of training including Autism Spectrum Disorder, Dyslexia, Social, Emotional & Behavioural Difficulties, Mental Health, Pyramid Training, Drawing and

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Talking Therapy, Person Centred Planning, Safeguarding, Intensive Interaction, Assertive Discipline and Fresh Start training, De-escalation techniques and Managing Behaviour. Three of the SPSAs have a Higher National Certificate (HNC) in Additional Support Needs. The school is able to ask for additional staff, training or resources at the annual review if they feel that this will be required.

### *Transition from Primary to Secondary School*

37. The Authority commence transition planning from primary to secondary school for pupils in P7. For some pupils with ASN transition planning can start in P6. As part of the transition planning, teachers from the secondary schools would come to the feeder primary schools to meet the pupils. Pupils from the primary schools also visit the secondary school to familiarise themselves with it. If a child has a particular fear about the secondary school, such as a busy lunchtime, then they can be taken up for extra visits to reassure them and make them feel comfortable. There is an exchange of information between the primary and secondary schools about the pupils. Part of the planning includes identifying suitable peers for a child to form friendships with and possibly also the use of a mentor.

38. A Transition Planning Meeting was held in School D on 18 January 2017 with staff from School E. The Appellant was invited to attend. She did not attend and advised that she did not wish to have any contact with the staff regarding School E. Further attempts were made by the Authority to engage with the transition planning which she refused. The Authority had wished to provide The child with enhanced transition planning. This did not take place as the Appellant stated that she did not want The child to take part in transition planning, in particular, that she did not wish The child to be included in the two day transition visits to School E.

39. The present position is that, while there has been an exchange of information between the schools about The child, no transition work or visits have taken place in preparation for The child moving to an The authority secondary School in August 2017. This is stated to be directly as a result of the Appellant stating that she did not want The child involved in any transition planning.

40. If the Placing Request is refused the Authority are confident that they would be able to manage The child's transition to School E. Information about The child has already

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been given to the school and there is a plan for him, especially to manage risk to him around lunchtimes and break times. The Authority would identify a Key Worker for The child, either a class teacher or an ASN teacher, and look to identify suitable peers. He could be given a “buddy”. Support for The child would be “toploaded” during the settling in period and this would be reduced as he was subsequently reviewed and assessed. All of the supports that are currently in place at School D would also be in place for The child at School E. As part of the transition process School E would establish a plan to allow The child to access the support base in accordance with his needs and an appropriate system would be put in place to ensure that this was not abused. Management of the “time out” system would be through his Key Worker. The Authority are confident that The child could be supported at any of their resourced schools. The Authority hope that as School D has been a success for The child during P6 and P7 then this would be continued into School E.

#### **School A – Requested School**

41. SCHOOL A is an independent residential school. The school accepts children between the ages of 11 and 19 and is aimed at those who find mainstream education difficult to access. SCHOOL A specialises in education for pupils with Aspergers/Autistic Spectrum conditions, ADHD, Tourette’s syndrome and Foetal Alcohol Syndrome. Many of the pupils at the school are on the Autistic spectrum.

42. SCHOOL A offers a high staff:pupil ratio with teaching and support staff trained and holding qualifications in Aspergers/Autistic Spectrum conditions, ADHD, Tourette’s syndrome and Foetal Alcohol Syndrome. Pupils at SCHOOL A each have a detailed care plan and an Individualised Education Plan, a Key Worker and a Key teacher.

43. The majority of pupils at SCHOOL A are residential, Monday to Friday, but SCHOOL A can also offer non-residential places. Night staff are on call to deal with any issues that may arise. The school has recently gone through a refurbishment and now the children can each have their own room with an en-suite bathroom.

44. SCHOOL A offers pupils the opportunity to attain ASDAN qualifications, which are life skills based, and more formal qualifications such as National Awards and Highers. The school can offer a range of academic courses including English, Maths, Geography, History, Modern Studies, Computing, Biology, Chemistry and Physics. Class sizes are

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small (with an average of 4 to 6 pupils, classed by ability rather than age) and there is a high staff/pupil ratio. The curriculum is individualised to each child.

45. In addition to academic achievements SCHOOL A also supports and teaches life skills and independence. SCHOOL A offers a number of extra curricular activities both at the school and in the local community. Pupils can take part in The Duke of Edinburgh Award Scheme and can support pupils on to higher education throughout Scotland and has links with various colleges and supports pupils to attend at Open Day events and to make college applications.

46. Initially prospective pupils attend for a short residential period for an assessment of their needs and to assess their suitability for attending at the school. If placed at the school, a more detailed assessment is carried out during an initial six week period and an individualised plan is drawn up for the child, with the co-operation of the child and his or her parents.

47. The child has attended at SCHOOL A in July and September 2016 for an assessment. The child attended initially for a day and then stayed there on a residential basis for three days each time. The child settled quickly into the school and took part in classes. The child shared a bedroom with two other boys and got on well with them. The child described these boys as being his friends. When given the opportunity to speak with his mother each night he declined as he was "too busy" as he was taking part in the extra curricular activities offered by the school. The child took part in a drama group at SCHOOL A. The child has since spoken positively of SCHOOL A and expressed a desire to return there. After his visits there The child told the Appellant "it just felt that I was home, mum".

48. At present the pupils at SCHOOL A are all older than The child. Witness D, the School Head, described that they looked after The child during his time there. After the summer, there will be younger children coming into the school which will provide The child with a suitable peer group.

49. During The child's stays at SCHOOL A he was assessed by the whole team to identify his needs and assess if a place could be offered to him. If the Placing request is

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granted then he would go through the full assessment during his initial six weeks at the school and a detailed plan drawn up for him. Arrangements would be made for teaching staff to meet with The child during the school summer holidays to discuss the school with him and to allow him to familiarise himself with them in advance of him starting there.

50. SCHOOL A have offered The child a place at the school with immediate effect.

#### *Views of the Parent*

51. The Appellant, describes The child as a bright boy who can be very creative. However, she has struggled for a number of years with his defiant and oppositional behaviour. There has been a clear adverse effect on the whole family. The child's father has limited contact with him. Her marriage to The child's step-father was adversely impacted by The child's behaviour. She is now with a new partner who provides her with support but who also struggles with The child. She required to take the difficult decision to send her eldest child to boarding school in order to protect her from The child's aggressive and controlling behaviour and the negative impact this was having on his sister's feelings towards him. She is aware that The child now acts in a similar way to her youngest son who himself is exhibiting autistic traits. The child seems to have taken well to the birth of his sister but there is a likelihood that she will also be impacted by his behaviour.

52. The Appellant described that The child can have brief periods of calm when his behaviour appears to have improved. However, most of the time he is challenging, difficult to engage and resistant to demands being placed upon him. There are daily fights over issues such as getting dressed for school, eating and not running away.

53. The Appellant described The child as having no awareness of risk or a sense of danger and gave examples of at least one occasion when The child's lack of awareness placed the life of both himself and his younger brother in danger.

54. The child struggles to make or maintain friendships. The Appellant was clearly upset as she described how not one child could be persuaded to come to The child's birthday party. The Appellant highlighted a number of occasions when The child has come to the attention of the police due to incidents in the community. To date The child has been let off with warnings but she is concerned that in later years he will end up in the

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justice system. She gave examples of The child becoming involved in risky behaviour such as smashing windows and being dared to steal, or jump on cars. The most recent incident occurred on 1<sup>st</sup> June 2017 when The child was encouraged by others from his school to drink a quantity of vodka. Some of the group were so concerned for The child that they came to his home and spoke with The child's sister who was home and babysitting for her siblings. The child was later found soaking, confused and distressed. He was taken to hospital but didn't require treatment as he had already been sick. The school did investigate by speaking with all of the children involved. While the school cannot be held responsible for incidents that occur outwith school hours it does raise concerns with the Tribunal that the incident involved young people from The child's school who are aware of his vulnerabilities and highlights his risk from his peers.

55. The Appellant's view is that both schools attended by The child have struggled with his behaviour. She had been called frequently to remove The child from school and additionally would be asked to come to the school so that she could receive reports of how bad his behaviour had been. The Appellant described The child's time in P5 as "awful". The Appellant considers that The child's teacher in P6 and P7 was a massive improvement. However, after a honeymoon period, The child began pushing boundaries once more and his teacher has continued to struggle to manage his behaviour and The child is still failing to achieve academically. She believes that The child has spent long periods out of class and out of learning. While the school accept that there are gaps in The child's learning, the Appellant believes that they are wrongly still ascribing this to his time at School B rather than accepting that he is struggling.

56. The Appellant feels that she has not been listened to by the school. She stated that each time that she meets with the school for Parents Nights or formal meetings she asks them to carry out an assessment of The child but they don't do this. She is concerned about his ongoing lack of academic progress and his isolation from his peers. She arranged for her own assessment of The child as this has not been done by the Authority.

57. The Appellant has tried The child with a number of ADHD medications. She advises that these had adverse effects on him: making him sick; making his stomach ache; giving him headaches and preventing him from eating. This caused him to suffer drastic weight loss. The medication has also caused him difficulty in sleeping; to hear voices, to

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be paranoid; to become suicidal and to self-harm. She has chosen to stop his medication as a result. The Appellant advised that at one point the school would ask her to take The child home if they believed that he was not on medication.

58. The Appellant described that she felt that she had good communication and relations with the school up until the point when she put in the placing request. She believes that from that point the school no longer contacted her as often when The child was proving difficult in class.

59. The Appellant does not accept that The child's behaviour at school has improved. The school are more likely to punish him than manage him. The child suffers from low self-esteem feels like he is a "bad boy" and he feels excluded. As an example of this, she spoke about how all of the pupils, including The child, had been given a part in the school play. However, because of The child's behaviour, his part had been taken off of him. After the recent unsuccessful trip the school again reinforced that the part had been taken off The child as a punishment for his behaviour. The child had been given the part of a cheeky boy who is sent out of class! This caused the Tribunal concern that this reinforces what The child feels is expected of him and feeds into his low self-esteem.

60. The Appellant did not want The child to take part in the transition planning to School E because she felt strongly that she did not want The child to attend there. She had asked The child if he wanted to visit School E and he was adamant that he would not go. She is concerned that The child will not get on well in a larger secondary school and will not cope with changing classes and teachers. She has visited with a few of the schools in The authority, including School E. Her visits did nothing to change her mind. She had also sought the views of other parents who had children there with ADHD or other additional support needs and was not reassured by their responses.

61. The Appellant attended at SCHOOL A with The child when he went for his assessment. The child felt happy and comfortable there. He has been on three overnight stays for an assessment and trial before being offered a place. She described that The child had been happy there and had made two good friends. Arrangements had been made for her to speak with The child on the phone each night but he chose not to because he was too busy! After the assessment The child talked about SCHOOL A daily and how

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much he loved it. He loved being in the class and didn't want to come home. The child told the Appellant "it just felt like I was home, mum." This made the Appellant sad that he did not "feel at home" when at home with her. However, it demonstrated to her that at SCHOOL A The child felt accepted and included, that he could be part of the class rather than being sent out to a base or to sit in another teacher's room. She received a positive report of The child from SCHOOL A which was something that she felt she had not had before.

62. The Appellant believes that SCHOOL A is the best place for The child as it will provide him with the right support and peer group and give him the best chance to engage with education and have achievements to be proud of.

#### *Views of the Child*

63. We had originally arranged to speak with The child on the morning of 23<sup>rd</sup> June 2017 but this was rearranged as he was to take part in a school trip. The child attended and was able to speak with us on the morning of 26<sup>th</sup> June, supported by his grandmother. The child came across as a bright young man who was able to express himself and his views.

64. The child told us about School D –

He hates school. The teachers are mean and the work is hard.

He had three friends, then corrected himself to say he had two friends. He described that one of his friends used to sit next to him in maths and give him the answers – the wrong answers. He would cheat and use a calculator in maths when he was stuck.

He talked about a "good day" and a "not so good day". On a good day – he would be ready to learn and would complete five pieces of work and only get moved once. Work would include maths, big writing, language and French. The "least worse" of these was maths.

65. On a not so good day he would get have 5 minutes taken off golden time; he would a blue card to get sent to the big teacher; he would get shouted at; he would get sent out and get sent home. Witness B didn't shout at him often but when he did he was very loud.

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66. The child does not have many good days, with the last being months ago. He gets sent out a lot because he has bad days. He stated that he does have a card that he can use to leave the class but also that his teacher doesn't like him to use it.

67. The child admitted that when the teacher is giving instruction to the class he doesn't listen. When he then asks the teacher to explain the lesson to him he is "shouted at". The teacher shouts at him and give him a headache and make him angry. He starts arguing with the teacher and that makes him angry.

68. He is aware that there is another pupil in his class who has learning difficulties and The child stated that she has someone sitting with her to help her. He advised that there is no additional adult in the class to help him if he needs it.

69. The child told us about "bubble time" [which is when he needs time out]. He remains in the classroom but goes and sits on a double seat [or a sofa]. He tries to keep quiet so that the teacher will forget about him. He sits and gets bored. He stated that on one occasion while using bubble time he fell asleep in the class, not because he was tired but because he just wanted to get through the day.

70. The child told us that he isn't learning anything. He struggles to understand the lessons and feels that often he is just starting to understand the concept and then the class moves on to something new.

71. The child told us about the school trip he attended on 23<sup>rd</sup> June 2107. He didn't enjoy the trip at all. He had been "chucked out" of groups because other pupils said he was annoying them. He was kept moving because "people think I'm weird".

72. The child told us about SCHOOL A. He thought it was the best school in the world. "It made me feel smart". He felt safe there and that the work was easier to finish. The child said that he did all of the work and told us about hunting for pictures on the walls all round school.

73. The child made two friends at SCHOOL A and told us about them. When sharing a room with them, they had a light sabre battle in the middle of the night without getting

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caught, then went straight to sleep. He enjoyed playing football at SCHOOL A as it was in the woods with real goals. At School D, he played football with the other boys but felt that they often kept the ball to themselves and wouldn't pass to him.

74. When asked about how he would feel if he was away from his family during the week, The child stated that he would still have the weekends with them and that this time would be more special. He enjoys watching movies with his family, eating with them and also likes playing football in the park with his mother's partner.

#### *Cost to the Authority of School E*

75. The additional cost to the Authority of providing for The child's additional support needs within School E are nil. No additional staffing or accommodation would be required and The child's needs would be met from within the resources of the school. The child would be able to walk to and from school so there would be no transport costs. We were not provided with any details of the Authority's Children and Families Services budget for 2015/2016 to allow us to put the respective costs into any kind of perspective. In their submissions the Authority state that cost is not a primary factor in their opposition to the placing request.

#### *Cost to the Authority of School A*

76. The cost to the Authority of placing The child at SCHOOL A on a residential basis, Monday to Friday, is approximately £57,398 per annum. Initially there would be provided one to one support, at a cost of £22 per hour. It was not possible to say how long this would be required during the assessment period. Witness D advised that if deemed that one to one support was not necessary then it would be withdrawn. If it were to be required for the full assessment period then this would add £4,851 (6 weeks x 36.75 hours x £22). If additional night staff were required for The child, especially during the settling in period then there would be additional cost for that. The Appellant advised that she would be willing to arrange to transport The child to and from the school. Accordingly, the total cost to the Authority would therefore, after the initial assessment, be at least £57,398 per annum.

#### *Availability of Place at School A*

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77. If the placing request is granted, the requested school, SCHOOL A, would be able to offer a residential place to The child.

## **6. *Reasons for the Decision***

78. The Tribunal found the witnesses to be credible and reliable. We considered all of the evidence and we were satisfied that there was sufficient evidence available for the Tribunal to reach a fair decision on the reference.

79. Firstly the Tribunal considered the statutory provisions of the Act relevant to this Reference.

Section 19(5) of the Act provides:

"Where the reference relates to a decision referred to in subsection (3) (e) of that section, 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 –
  - (i) place the child or young person in the school specified in the placing request to which the decision related, and
  - (ii) make such amendments to the co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require..."

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...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."

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

- (f) if all the following conditions apply, namely –
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- (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, and
- (iv) the authority have offered to place the child in the school referred to in paragraph (ii).

80. In the circumstances of this case, in terms of paragraph 2(2) set out above, the Authority is required to meet the fees and other necessary costs of the child's attendance at the Requested School unless one or more of the circumstances in paragraph 3(f) is established.

81. 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); Secondly the Tribunal has to consider whether in all the circumstances it is appropriate to confirm the decision of the authority.

82. Para 3(1) (f) (i) and (iv) are not in dispute. SCHOOL A is not a public school and the Authority have offered to place The child in School E, or any of the supported schools in The authority under their management.

83. Accordingly, in order to uphold the decision of the Authority, we have to be satisfied that the Authority are able to make provision for The child's additional support needs in School E; or that it is not reasonable, having regard to both the respective suitability and the respective cost to the Authority of the schools, to place The child in SCHOOL A. If we are satisfied on either or both of these grounds then we require to uphold the decision of the Authority.

84. In order for the Tribunal to be satisfied that the Authority can make provision for The child's additional support needs at School E, we have firstly to be satisfied that they are

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fully aware of his additional support needs and barriers to learning (“ASN”). Secondly, we would require to be satisfied that School E can meet those needs. The position of the Authority is that whatever supports that The child is currently receiving at School D can also be provided at School E. Accordingly, thirdly, we require to be satisfied that the Authority are currently meeting his ASN at School D.

#### Identification of The child's ASN

85. Criticism is made by the Appellant of the Authority that they have not assessed The child's needs or have a clear plan for his education. In considering all of the evidence we do accept that this is the case.

86. The evidence before us is to the effect that up until at least P4 The child was considered to be a child with social, emotional and behavioural difficulties issues rather than one with additional support needs. Following a referral to CAMHS in January 2014 it was identified that The child met the criteria for ADHD(over-activity) and ODD (A123).

87. A child with ADHD hyperactive-impulsive type has most or all of the following symptoms, excluding situations where these symptoms are better explained by another psychiatric or medical condition.

- Fidget and squirm in their seats
- Talk nonstop
- Dash around, touching or playing with anything and everything in sight
- Have trouble sitting still during dinner, school, doing homework, and story time
- Be constantly in motion
- Have difficulty doing quiet tasks or activities
- Be very impatient
- Blur out inappropriate comments, show their emotions without restraint, and act without regard for consequences
- Have difficulty waiting for things they want or waiting their turns in games
- Often interrupt conversations or others' activities

In children, ADHD occurs with other disorders about two thirds of the time. Some commonly associated conditions include:

- Learning disabilities have been found to occur in about 20–30% of children with ADHD. Learning disabilities can include developmental speech and language disorders and academic skills disorders. ADHD, however, is not considered a learning disability, but it very frequently causes academic difficulties.

Reference [https://en.wikipedia.org/wiki/Attention\\_deficit\\_hyperactivity\\_disorder](https://en.wikipedia.org/wiki/Attention_deficit_hyperactivity_disorder)

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For additional information on the guidelines from NHS Scotland see the following:  
<http://www.sign.ac.uk/assets/sign112.pdf>

88. The Authority have accepted this diagnosis but not carried out any formal assessment of their own to identify whether there are any additional academic difficulties arising from The child's diagnosis or to create a management plan for him in an educational setting.

89. The Authority did involve the Educational Psychologist, B, in September 2013 when she completed an Integrated Assessment as part of the Authority's Staged Intervention Framework. In December 2013, she was invited to speak at the Planning Meeting. Her Event Diary (A254) shows that she was involved in the stage 4 meeting in March 2014. By August 2014 The child was "settled in School D" and her involvement was closed. From the evidence it would appear that B's involvement in 2014 was aimed more at assessing and supporting The child's emotional and social needs. There was further involvement by B in 2016 and in the notes of meetings held it is noted that the Appellant was raising her concerns about The child's lack of self-esteem and lack of academic progress.

90. It was stated by Witness B that on The child's arrival at School D an assessment of his needs was made by his class teacher (the same teacher with whom The child is being described as having a "personality clash"), an ASN teacher and himself. He also stated that The child's P6 teacher was in contact with the Educational Psychologist, B, to put in place strategies to assist with The child's learning. Witness C stated that it would be for The child's teachers to assess if his needs were being met within the school and to ask for additional resources if they felt that these were needed. However, it is the opinion of the Tribunal that while the teachers views would be an integral part of an assessment of The child and his needs, he should have been referred for a specialist assessment by a child and adolescent mental health clinician or paediatrician with a specialist interest in ADHD. (See section 4 of the Guidelines from NHS Scotland)

91. ADHD in and of itself does not cause difficulties with reading and writing but often comes along with learning difficulties. The detailed assessment carried out by Dr. L identifies The child as being within his age range for cognitive abilities but borderline or low average for reading/writing and also identifies him as having dyslexia, dyscalcula and

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dyspraxia as well as ADHD and ODD. While we do consider this report with some caution, being only a “snapshot” of The child and based on one consultation, in the absence of any competing assessment by the Authority, we accept it as most likely giving a fair assessment of The child’s abilities and barriers to learning. The Authority do not go so far as to admit that The child has dyslexia, although he is now being provided with a dyslexia toolkit and has the use of Clicker 7, a programme to aid spelling

*S3(1)(f)(ii) Ability of the Authority to meet the needs of The child at School E*

92. For the Authority, we found that Witness C was knowledgeable of the provision offered by The authority, as a whole. All of The authority’s secondary schools are resourced. Teaching and non teaching staff for ASN are allocated to schools within The authority on a yearly basis and are allocated depending on the continuing or emerging needs of each school. Witness C stated that their secondary schools are able to successfully meet the needs of the children with ADHD who already attend at these schools. She was very confident that The child could attend at any of their supported schools and that his needs would also be met. This is a very broad statement to make. We cannot make any comment on whether the needs of these other children are being met and can only make a decision on whether we are satisfied that The child’s particular educational ASN needs will be met.

93. School E is a resourced mainstream secondary school with a high level of teaching and support staff with training in additional support needs, including ADHD. We were not provided with any detail specifically about the supports that School E would have in place for The child as it was the position of the Authority that transition planning had not taken place at the request of the Appellant and so, no plan for The child at School E was yet in place.

94. The Authority were confident that the supports and strategies that were in place in School D could also be provided at School E. However, The child is not simply changing primary schools but is moving from a primary to a secondary school setting and this is bound to provide him with additional challenges that were not present in his primary school. Also, his teacher, with whom he has done so well in P6 and P7, will obviously no longer be with him.

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95. The Appellant is concerned that The child will struggle to cope at a school the size of School E. The Authority's position is that this is one of their smaller secondary schools. Additionally, The child has coped better at School D, a larger primary school than than his original primary school, School B. Accordingly, they are confident that he will cope at School E, a bigger school again. In our view, this approach fails to take into account the important difference that School D is a resourced Primary School and School B was not.

#### Provision at School D

96. The child does not have an Individual Education Plan.

The child does not have an individualised plan on how to manage his behavior

There is no Education Psychology Report from the Authority and no evidence of assessment and planning around the concerns raised regarding The child's possible dyslexia or dyspraxia.

The child does have some supports for his learning, for example, the use of Clicker 7, use of the support staff, when they are available, and working in small groups in numeracy and literacy.

97. The main strategies to deal with The child's disruptive behaviour appears to be to take him out of the class, either as a "time out" that he could ask for, or to send him out of the class to sit with a member of the management team. "Bubble time" involves The child remaining in class but not taking part in education. When his behaviour becomes particularly difficult to manage, the Appellant is asked to remove him from the school altogether.

98. We are concerned that there is no formal record of the frequency of "time out" being used or a breakdown of whether the time out is as a result of The child choosing it or it being imposed by the teacher. There is no formal record of how often The child is taken home by the Appellant. The impression of Witness B is that it is becoming less frequent, but there is also evidence that is continuing to happen during P7, when The child is stated to be coping better.

99. The child's use of the time out strategy has reduced in P6 and P7. Witness B was of the view that this was due to the restorative and nurturing approach that are in place. There is no measurement of whether or how the strategies put in place by the school to

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support The child's social and emotional issues are successful. The school relies on the class teacher to make that assessment based on her own notes in her teacher's diary, to which Witness B, the Headmaster, does not have access. The lack of evidence of strategies to manage behaviour other than "time out" and "bubble time" do not seem to be supporting The child's access to learning or overcoming his barriers to learning.

100. We are concerned that there appears to be an element of blame for his behaviour being placed on The child by the school. His very difficult time in P5 is stated to be a "personality clash" with his teacher rather than his struggle to cope in a larger school and before new strategies were put in place. Such blame is fair on neither The child nor his teacher. His "gaps in learning" are blamed on his time in his previous school rather than on ongoing difficulties associated with his ADHD. In his P7 school Report it is stated "The child responds well to praise and is capable of behaving appropriately, but he can sometimes make the wrong choices. The child has shown that he can apply himself to learning but the extent to which he engages with teaching inputs can vary". This again appears to place the onus on The child.

101. We are concerned that the school do not always have a full recognition of the support that The child requires. An example of this is The child's part in the school play. It is concerning that he was given the part of a cheeky boy who gets sent out of class. This reinforces to The child his "role" in the school. It was accepted by Witness B that there would be some waiting around during the rehearsals but no mention of any strategies that the school had put in place to help The child cope with this. When he failed and became disruptive The child was sent away from the rehearsals and ultimately his part was taken off him as a punishment. This taking away his part in the school play as a punishment was used again when he failed to cope with the school trip.

102. The Authority blame the Appellant for the fact that no transition planning has been carried out. However, the evidence of the Appellant was that she did not want The child to take part in the transition planning or to attend at School E. This does not absolve the Authority from their responsibility to make plans for The child, especially in light of their opposition to the placing request. If there had been clear plans and strategies that were shown to be measurably successful at School D then these could have been a basis for

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the transition planning to School E with or without The child's involvement. The lack of these do not inspire confidence that transition could be successfully managed quickly.

103. The position of the Authority was that **if** the decision of this Tribunal is to uphold their refusal of the Placing Request **then** they would take steps to commence transition planning. We were referred by the Appellant to the case of M v Aberdeenshire Council 2008 SLT(Sh Ct)126, which is clear authority that the latest time that the Authority must have in place all appropriate plans is the date of the hearing of the appeal, rather than waiting until the outcome of the appeal to make their plans. Accordingly, even if we were satisfied that the strategies and supports at School D were sufficient to fully support The child's additional support needs and even if we were satisfied that the same strategies and supports would be available at School E, the lack of transition planning means that we cannot be satisfied that the same strategies and supports would be successful in this new setting.

104. The Tribunal considered whether, on the evidence before us we were satisfied of the ability of the Authority to make provision for The child's additional support needs in School E, and we have concluded that we were not satisfied that they could. Para 3(1)(f)(ii) accordingly is not satisfied.

105. The issue then for the Tribunal was, accordingly, in terms of paragraph 3(1)(f)(iii) to consider whether or not it is 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 SCHOOL A and in the school referred to in paragraph (ii), to place the child in SCHOOL A.

#### [Respective Suitability and Respective Costs](#)

106. With regard to the respective suitability of the two schools, so far as provision of education specific to The child, we had no information about the provision at School E to allow us to compare the two schools.

107. SCHOOL A is a school which makes provision for children who are unable, for reasons of their additional support needs, to access mainstream education. SCHOOL A offer teaching and support staff with a high level of training in many conditions including

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ADHD and ODD. They carry out detailed assessments of each individual child and offer small class sizes with peers of similar learning abilities and individualise curriculums. They foster a sense of acceptance and inclusion. Being a residential school they do have the advantage of being able to offer a range of activities which go to support not just educational needs but also social and emotional needs and to build resilience for transition from school to the adult world. They have met with The child and carried out an initial assessment and on the strength of that, have offered him a place there. While there may be a risk that at SCHOOL A The child may be oversupported, we are satisfied that SCHOOL A are able to make provision for The child's additional support needs and that, in the circumstances, it would be reasonable to place him there.

108. With regard to the respective costs, it is clear that there would be a substantial additional cost each year to the Authority if The child were to attend at SCHOOL A. We were not provided with details of the Authority's Education budget to allow the figures to be put into context. The position of the Authority was that cost was not the primary factor in opposing the placing request. If our decision had been that we were satisfied that School E could meet The child's needs, then it is likely that we would have found that the difference in the respective costs, coupled with the fact that it would be preferable to keep The child with his family and local community, would have meant that we would have supported the Authority's decision to refuse the placing request. However, as we were not satisfied, then we consider that it is reasonable that the Authority be required to be responsible for the cost of placing The child at SCHOOL A.

109. We then go on to consider the second stage of the test set out in section 19(5)(a) of the Act, namely if, in all the circumstances, the decision of the authority to refuse the placing request is reasonable.

### Conclusion

110. We consider that the Authority have failed to satisfy us that they are able to make provision at School E and accordingly, in all of the circumstances we consider that it is reasonable to overturn the decision of the Authority and to order the Authority to place The

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child at School A no later than the new term commencing on 22<sup>nd</sup> August 2017 and to meet the accompanying fees and other necessary costs.

**For all of the stated reasons, the appeal is upheld.**

## Appendix 1

Practice Guidelines that set out their Staged Intervention Framework.

The guidelines provide information on the five stages. Extracts from the guidelines are contained in Appendix 1 attached. as follows:

### Stage 1      Universal Provision

The first stage involves Health and Education staff working together with parents or carers and the child or young person to ensure that the universal needs of children are met. All staff should be aware of the needs of children to remain Safe, Healthy, Active, Nurtured, Achieving, Respected, Responsible and Included (S.H.A.N.A.R.R.I.).

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Where there is concern about a child's well-being, this should be shared with the Named Person for the child. The Named Person is expected to initiate an assessment of need, based upon the 'my world triangle' and the eight indicators of well-being. Identified needs will either be met from within the existing service or where an additional service(s) is/are required, the case should progress to Stage 2.

## Stage 2 Making Connections

Following the Initial Assessment undertaken by the Named Person – where an additional service(s) is required from within Health, Education or the Voluntary sector - then contact should be made directly. For example, School and Family Support Service, Educational Psychology Service, School Medical Services(WEB). At this stage, a copy of the Initial Assessment should be shared. Where appropriate a Stage 2 meeting should be held and any agreed support should be written into the Child's Plan. This Plan should be regularly monitored and reviewed, with dates identified to do this. The Named Person check list should be considered in assisting the Named Person to decide whether an Integrated Assessment and/or Child's Planning Meeting is required. Where the Named Person identifies that the child has some additional needs, they should consider using the range of services available across The authority and partners to meet the needs of the child.

## Stage 3 Child's Planning Meeting

The Child's Planning Meeting will take place when the Named Person identifies, through the initiation of the Integrated Assessment, that in order to meet the child's needs, a number of services may need to become involved. An Integrated Assessment and Child's Plan presents a process for professionals to bring together their specialist knowledge and experiences into a clearer, holistic picture of the child, their family and their community.

The Child's/Young Person's Plan is not a static document. It is a living, dynamic document, which layers details, information and responses to a child's concerns over time. This includes the assessment, which is updated during the involvement with the child/young person and the agreed actions and desired outcomes for the child.

## Stage 4 Advice and Intervention

Where further intervention is identified, then the Integrated Assessment and Child/Young Person's Plan should be progressed to Stage 4 by the Lead Professional. The outcome of Stage 4 may be:

- The provision of a range of extended support for the child/young person.
- Advice regarding revisiting earlier stages of the process for further assessment or intervention as required.
- Advice and support based on good practice.

## Stage 5 Joint Directorate

When the Stage 4 identifies the need for additional or out of authority resources such as Residential School or Secure Care then this decision will require sanction by Directors or Heads of Services on an individual case-by-case basis. Senior Health Managers are also involved as necessary. This process is to ensure that every child receives the structure

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and support necessary to maintain and meet their needs in their local community if at all possible.

<https://archive.theauthority.gov.uk/girfec/GIR%20Practice%20Guidelines%20-%202007.09.11.pdf>

## Appendix 2 Statutory Provision.

### **Education (Scotland 1980**

Section 28 states that Pupils are to be educated in accordance with the wishes of their parents.

(1) In the exercise and performance of their powers and duties under this Act, the Secretary of State and education authorities shall have regard to the general principle that, so far as is compatible with the provision of suitable instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents

### **Education (Additional Support For Learning )(Scotland) Act 2004, as amended**

Section 1 of the Education (Additional Support for Learning)(Scotland) Act 2004 states:

1(1) A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support, to the child or young person to the school education provided or to be provided for the child or young person.

1(2) In subsection (1), the reference to school education includes, in particular, such education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential.

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The 2009 Act came into force on 14<sup>th</sup> November 2010 and accordingly, the amendments therein apply as at the time of this hearing. The amendment to the Act is shown in italics.

1(3) In this Act, “additional support” means-

(a) in relation to a prescribed pre-school child, a child of school age or a young person receiving school education, provision (*whether or not educational provision*) which is additional to, or otherwise different from, the educational provision made generally for children or, as the case may be, young persons of the same age in schools (other than special schools) under the management of the education authority *responsible for the school education of the child or young person, or in the case where there is no such authority, the education authority* for the area to which the child or young person belongs.

Section 19(5) of the Act provides:

"Where the reference relates to a decision referred to in subsection (3) (e) of that section, 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
  - (i) place the child or young person in the school specified in the placing request to which the decision related, and
  - (ii) make such amendments to the co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require..."

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...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."
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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, and
  - (iv) the authority have offered to place the child in the school referred to in paragraph (ii).

In terms of paragraph 2(2) set out above, the authority is required to meet the fees and other necessary costs of the child's attendance at the Requested School unless one of the circumstances in paragraph 3(f) is established.

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