



Additional Support Needs

**DETERMINATION BY THE TRIBUNAL OF A PRELIMINARY MATTER**

FTS/HEC/AR/23/0136

**Reference**

1. This is a reference in which the appellant seeks to overturn the respondent's decision to refuse the appellant's placing request.
2. The reference is made under s.18 of the Education (Additional Support for Learning)(Scotland) Act 2004 (**the 2004 Act**).

**Decision**

3. I dismiss the reference under rules 22 and 28(2)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (SSI 2017/366) (**the rules**) since this Tribunal has no jurisdiction to decide it.

**Process**

4. The appellant lodged the reference in July 2023. The appellant is unrepresented.
5. A preliminary matter relating to the jurisdiction of the Tribunal arises under rule 22 of the rules, namely whether or not a placing request under the 2004 Act was made.
6. Following a case management call (**CMC**) in October 2023, the respondent lodged written submissions on this matter and a further CMC took place in November 2023. The appellant submitted further documents and then both parties confirmed that they are content for me to make a decision on the basis of the written evidence available to me. That course of action seems appropriate given the material I have.
7. Since the appellant is unrepresented and the point that arises is a legal question, I carefully considered whether or not she was at a disadvantage compared with the respondent which is legally represented. I had regard, in particular, to rule 2(2)(c) of the rules, which is about ensuring equal footing procedurally. I am satisfied that the appellant is on an equal footing procedurally. She has made detailed arguments with reference to the relevant parts of the 2004 Act. She has submitted relevant documents. The facts in this case are clear, and I am satisfied that no additional steps were needed to allow the appellant to put her case. This is particularly so given that the relevant test has been considered in detail in an earlier case (see below).
8. In reaching my decision, I had regard to the up to date bundle, consisting of T001-048; A001-006 and R001-015.

## Findings in Fact

9. The appellant is the mother of the child. The child is 14 years old.
10. In April 2023, the appellant wrote to the respondent requesting that the child is given a place in school A. Detailed reasons for that request were contained in the request document (**the request**).
11. School A is a school which caters for pupils for whom education in a mainstream environment is not suitable. It is not managed by the respondent.
12. The respondent replied to the appellant's request by letter dated July 2023. In that letter, the respondent indicated that the request was not a valid placing request.
13. School A only offers permanent places to prospective pupils following completion of a successful trial placement. Such a trial placement is only offered when two conditions are met. These are: (1) where school staff, having reviewed background papers relating to the child, such as planning meeting minutes, school reports and specialist health and education reports, decide that they can meet the needs of the prospective pupil; and (2) the local education authority has confirmed to school A that it has agreed to fund the trial placement.
14. A place is currently available for the child in school A.

## Reasons for the Decision

### *The preliminary matter*

15. The preliminary matter consists of a single question: was the request made by the appellant to the respondent in April 2023 a placing request under the 2004 Act? If it was, that request was deemed to have been refused on 21 June 2023, meaning that the appellant's reference lodged on 20 July 2023 would be a valid one falling within the jurisdiction of this Tribunal.
16. A placing request is one made under Schedule 2, paragraph 2(1) or (2) of the 2004 Act (2004 Act, Schedule 2, paragraph 2(3)). Given my finding in fact at paragraph 11 above (taken from the appellant's quotation from school A's website in the request at T021, top of the page), school A is a 'special school' under the definition of that term in s.29(1) of the 2004 Act and is not managed by the respondent. This is not in dispute. It follows that Schedule 2, paragraph 2(2) applies.
17. Since Schedule 2, paragraph 2(2) of the 2004 Act applies, in order to be a placing request, the managers of the school specified in the request must be 'willing to admit' the child (Schedule 2, paragraph (2)(a): paragraphs 2(2)(b) and (c) being clearly inapplicable in this case).
18. The respondent argues that this condition is not met, and therefore that the request dated 20 April 2023 is not a placing request under the 2004 Act.

19. I should add that there are some additional requirements for a 'request' under the 2004 Act set out in s.28. These are that the request is in writing and contains a statement of the reasons for making it. There is no doubt that the request of 20 April 2023 satisfies these conditions. The only question is whether the 'willing to admit' requirement applies.

#### *Meaning of 'willing to admit'*

20. The respondent relies on a previous published decision from this jurisdiction, reference ASNTS\_D\_09\_2015\_30.09.14. In that case, the legal member considered the phrase 'willing to admit', and what it means. The legal member concludes that an offer of a place is not required in order that the 'willing to admit' test is met and explains that this is clear from the wording used and from a practical perspective (see paragraphs 10 and 11 of the decision). This conclusion is correct for the reasons stated.

21. The legal member goes on to set out the correct meaning of 'willing to admit' which is that the school must be willing in principle to admit the child. The respondent urges me to adopt that meaning here. I agree that this is the correct meaning of the test, again for the reasons adopted by the legal member in that decision.

22. The legal member goes on to conclude that the 'willing to admit' requirement was not met in that case since the school indicated that while it believed it could meet the child's needs, that would be subject to a formal assessment. The legal member took the view that a suitability assessment is a 'sufficiently significant' condition to mean that where that had not taken place, the school could not be said to be willing in principle to admit the child (paragraph 12 of the decision). I agree with the approach of the legal member in that case, for the reasons outlined in the decision.

#### *Application of the 'willing to admit' test*

23. Applying that approach, I conclude that the managers of school A are not, on the evidence available, willing to admit the child. I accept the appellant's argument that they are not unwilling to admit the child, in the sense that they have not refused to admit the child. However, a positive willingness to admit (meaning a willingness to do so in principle) is needed for the relevant condition to be met.

24. In order to be a valid placing request, the tests for one have to be met at the time the request was made: that is implicit from the wording at Schedule 2, paragraph 2(2) of the 2004 Act, which is framed by reference to the time of the original request. Here, even by November 2023, over 6 months after the placing request was made, no assessment of whether school A can meet the needs of the child has taken place: see the e-mail from school A staff dated November 2023, at A006, 4<sup>th</sup> and 5<sup>th</sup> paragraphs, the latter quoted by the appellant in her submission at A002, paragraph 9.

25. This means that school A had not, by the time the request was made on 20 April 2023, carried out an assessment whereby they concluded that the school could meet the child's needs. At the time when the placing request was made, school A staff had not, therefore, decided that they are willing, in principle, to meet the child's needs. They had not, then, indicated a willingness to admit the child. This means that the appellant's request is not a placing request under the 2004 Act. This Tribunal therefore does not have jurisdiction to consider a reference to overturn that request under s.18(3)(da) of the 2004 Act. The reference must, therefore, be dismissed.

*Additional comments*

26. The comments in this section do not form part of the reasons for the decision in this case. These are optional comments, which are designed purely for the assistance of the parties and other relevant bodies.
27. The other conditions imposed by school A (the requirement for a funded trial place and the need for a successful trial) do not seem to me to be conditions that would have prevented the 'willing to admit' test being met. Once a decision is made, in principle, that a child may be admitted to a school for whatever purpose, there exists a willingness to admit under Schedule 2, paragraph 2(2)(a). The status of the placement and how it is funded are practical matters, not matters of principle.
28. I would urge the managers of special schools to consider how their admission processes operate in conjunction with the legal requirements of the 2004 Act. This would, in future, avoid a situation arising (as here) where a parent is urged by a school to make a placing request under the 2004 Act when the conditions for making one do not exist.