



## Additional Support Needs

### DECISION OF THE TRIBUNAL

#### Reference

1. This is a placing request reference, lodged with the Tribunal in December 2019. It is made under section 18(1) and section 18(3)(da)(ii) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**the 2004 Act**). The appellant asks the tribunal to require the respondent to place the child in school A.

#### Decision

2. The tribunal confirms the decision of the respondent to refuse the placing request, in accordance with section 19(4A)(a) of the 2004 Act. The tribunal therefore does not require the respondent to place the child in school A.

#### Process

3. A hearing took place over two days. Prior to the hearing a number of case conference calls took place. Directions were issued to regulate the hearing and pre-hearing process. Following the oral hearing, written submissions were directed, with an opportunity for each party to comment on the submissions of the other before lodging final written submissions with the Tribunal.
4. A joint minute of agreed facts was prepared by the parties' representatives and this can be found at T 38-39 of the bundle.
5. At the outset of the hearing parties agreed that the grounds of refusal upon which the hearing was to proceed were Schedule 2, paragraph 3(1)(b) and 3(1)(g) of the 2004 Act.
6. This was an alteration to the letter dated 8<sup>th</sup> November 2019 refusing the placing request which relied upon grounds upon Schedule 2, paragraph 3(1)(a) and 3(1)(g) of the 2004 Act. Reference was also made to Schedule 2, paragraph 3(1)(b).
7. Before reaching our decision we considered the oral and written evidence and written submissions. A late document was submitted at the request of the tribunal, namely a supplementary statement from witness A (T40-41). This means that the written evidence we considered (the bundle) consists of: T1-41, A1-57 and R1-79.

#### Findings in fact

##### *General Findings*

8. The appellant is the mother of the child, who is eleven years old. The child lives with his parents and six siblings in the family home.
9. The child has been diagnosed with a number of conditions, namely autism spectrum disorder (**'ASD'**), associated social and emotional difficulties, global developmental delay (**'GDD'**), speech delay and dyslexia. The child also suffers from anxiety and has a propensity to self-harm.
10. The child is working towards the end of first level in terms of the curriculum for excellence in literacy and numeracy. He requires assistance with emotional regulation.

11. The child currently attends school B, a school under the management of the respondent. He began his primary seven year in August 2020.
12. The child has delayed learning and requires a high level of support from school staff. He requires to be supported in school in a small group setting for numeracy and literacy. The child actively participates in this group. This small group setting forms the basis of the child's friendship group.
13. Following increased support, the child has made progress in both literacy and numeracy, closing the gap between his chronological age and his reading, spelling and numeracy age significantly.
14. The child can disengage and lose concentration quickly, his speech can at times be indistinct and immature and his fine motor skills cause concern. He finds it more difficult to answer aloud when working with the class as a whole.
15. The child presents with anxiety at home. He is not visibly anxious at school. He has participated in the Let's Introduce Anxiety Management ('LIAM') project at school.
16. Due to difficulties with sleep, the child does not settle at home until late in the evening. Time keeping is a significant issue for the child and he has significant number of late comings, some of which are not recorded as he is in class shortly after the bell.
17. The appellant made a placing request for the child to attend school A. School A is a special school under the management of the respondent.

#### *Findings on the child at school B*

18. School B is a mainstream school which has a specialist provision for pupils with additional support needs.
19. The child is currently being educated as part of a mainstream class. A support assistant spends time within the class to assist the teacher.
20. The child has been supported by educational psychology and a Barnardo's advocate, Speech and Language Therapy and the Skylark Service at different stages of his educational career.
21. His curriculum is adapted and differentiated to suit his needs. He works in a small group for both literacy and numeracy of five and six children respectively. The child participated in a literacy intervention that has assisted in closing the gap between his reading and chronological age.
22. Speech and language therapy were previously involved with the child and have offered some suggestions to the school in relation to how to communicate with the child in an educational setting. The re-referral was refused by speech and language therapy in the summer of this year.
23. The child's educational psychologist (witness C) observed the child in class at school B and attended a review meeting in respect of the child. She has offered feedback and suggestions on the child's educational needs and practices in the class. She has also worked directly with the child on the LIAM project. Educational psychology would ordinarily be involved with a child with additional support needs during primary 6 and primary 7 to assist with preparation for transition to high school. This process has been interrupted by the Covid 19 pandemic.
24. The child appears to cope well in class with his peers. He interacted well when working in his small allocated literacy and numeracy groups prior to March 2020. He is presenting as a quieter boy at the present time.
25. The child was instrumental in developing a quiet area within the school refer to as 'a place 2 be'. He can access this area when required.

26. The child is currently working with a small group of his peers in the mainstream classroom. These peers are at the same academic level as the child. This is an effective and positive peer group.
27. The child struggles significantly with transitions, he has found it particularly difficult returning to school having had an extended time away from school due to the Covid 19 pandemic. At the date of the hearing he had not return to school on a full time basis, he was involved in a phased return and had been notably quieter at school since August 2020.
28. The child has been seeking to avoid attendance at school.
29. Communication between staff and the appellant takes place on a regular basis.

#### *General findings on school A*

30. School A is a stand alone special school under the management of the respondents. The school provides education for children from preschool through secondary 6. School A provides education for children with a wide variety of diverse needs. Many children have complex health and medical needs and are non-verbal. Some have a terminal diagnosis. The curriculum is highly bespoke for each individual child most of whom are working at pre early or early level of the Curriculum for Excellence.
31. There are two places available within primary 7 in the class most closely suited to the child's needs. The class are working at early level or the beginning of level one.
32. The staff at school A have specialist training in educating children with complex additional support needs. Teachers are educated to degree level, most are primary school qualified with only a few teachers capable of teaching to national 5 and higher.
33. All of the pupil support assistants have several years' experience of working with children with additional support needs and have attended relevant training courses.

#### *Findings on school A and the child*

34. The child has not visited school A on a formal basis. He is aware of the school as his younger sister attends. He has viewed a virtual tour of the school.
35. All primary 7 children at school A are not as socially or academically able as the child. The children in attendance at school A are not a suitable peer group for the child. There will be no opportunity for cooperative learning from peers for the child. Each requires an individualised education program ('IEP').

### **Reasons for the Decision**

#### *General remarks on the decision*

36. We accepted the evidence of all of the witnesses as being credible and reliable. We found them all to be open and honest. We benefitted from the provision of witness statements for all of the witnesses. None of the witnesses deviated in any significant way from their witness statements.
37. It is important to note that although particular parts of evidence are referred to in this part of the decision it is not, nor intended to be a rehearsal of the evidence before the tribunal. We have considered all written and oral evidence together with the parties' submissions in reaching our decision and refer only to what we view as the salient points of dispute between the parties in this part of our decision.
38. It is clear that the appellant loves and cares very deeply for her son, and wants what is best for him. We gained the impression that the appellant was honest in all of her

evidence. It is accepted that the child presents quite differently at home and school and that it is not uncommon for children with a similar profile to the child to present quite differently in two different environments, in this case home and school.

39. While the appellant visited school A in relation to her younger daughter's attendance, some two years ago and has had an informal tour of the school while attending for matters connected to her daughters education, she was not formally invited to see the school more recently or particularly with the placing request for this child at the center of her visit.
40. Witness A's has a greater knowledge and understanding of school A, this influences the weight we can attach to that and to the appellant's evidence about the suitability of provision at school A for the child.

#### *General remarks on the legal tests*

41. Where the parent of a child having additional support needs makes a request to an education authority to place the child in the school specified (school A), being a school under their management, it is the duty of the authority to place the child accordingly unless certain exception to this rule can be evidenced by the respondent.
42. We have considered the child's additional support needs in an all-encompassing and 'holistic' way in line with the principles of getting it right for every child with reference to the wellbeing indicators (safe healthy achieving nurtured active respected responsible and included).
43. The appropriate point in time to assess the case is at the date of the hearing. We accept that the onus of establishing the ground of refusal lies with the respondent. We also accept that consideration should be given to the assessment of the child's needs which happened closest to the hearing. We have evidence of such an assessment in the respondent's witnesses' oral and written evidence. We have details of the child's assessment at R57 allowing us to consider the progress the child has made further to direct educational interventions at school B.
44. There was no dispute between the parties on the question of whether the child has additional support needs, as defined in section 1 of the 2004 Act.

#### **Grounds of refusal**

##### *Schedule 2, paragraph 3(1)(b) of the 2004 Act*

45. If the education normally provided at the specified school (school A) is not suited to the age, ability or aptitude of the child the placing request ought to be refused

#### **Age**

46. It is not a matter of dispute that the chronological age of the children with whom the child would be educated at school A is consistent with his chronological age.
47. The child's maturity, ability to cope in the school environment and academic progress are the central issues. These are better dealt with under the headings of ability and aptitude.

#### **Ability**

48. The ordinary meaning of ability is a possession of the means or skill to do something. In the absence of legal authority to the contrary the ordinary meaning of statutory provision is appropriate. This is narrower than achievement.
49. The appellant submits that “without an up to date assessment as to where [the child] currently sits academically there is no evidence to support school A not being suited to [his] ability.” This is not accepted. Assessment details were provided and clear evidence was presented that the child continued to work at the end of first level of the curriculum for excellence. We were advised that all children in the child’s class were being reassessed following the lengthy break from school but there is no evidence that there had been significant regression in the child. There is no evidence that the assessments previously undertaken and presented to us were irrelevant. The disparity between that which the child has attained and the level at which the children at school A are attaining is vast. The child would therefore not have an academic peer group should he attend school A. Although there was some evidence that the child can have problems with retention there was no evidence that the child is struggling with the consolidation work he is currently undertaking.
50. The term ‘individual learner’ was used in evidence as negative from the respondents point of view to describe the child being the only person of his age at his particular stage of the Curriculum for Excellence and the disparity between his academic ability and achievement and that of the children at school A. The appellant submits that this would not necessarily be a negative thing for the child as it reflects the principles established through GIRFEC and recognises that every child has their own strengths and weaknesses. We disagree, preferring the respondent’s evidence in relation to the positive effect of peer group working and co-operative learning. That is not to say that each child should not have their own learning objectives and outcomes on an individual basis.
51. If the child was able to access mainstream classes from school A then it is highly likely that he would require to do so alone without a class friend due to the lack of an appropriate peer group.
52. Witness A described school A as providing ‘a highly bespoke individual curriculum for children’. The child is currently part of a working group at school B where he copes well academically. The child is making progress and growing in confidence. Learning alone is not appropriate for this child.
53. School A is not suited to the child’s ability.

### **Aptitude**

54. The ordinary meaning of aptitude is a natural ability to do something. This ties with the respondent’s responsibility to ensure learners reach their full potential.
55. The child receives a high level of support in all areas at school B (A17). He benefits from this support. He does not require the level of support provided at school A which can be as much as an adult 2:1 ratio. Such a high level of support could have a negative effect on the child’s ability to develop independence. The high ratio required by his potential peers may also detract from his learning needs.
56. He is said to communicate fairly well in general but in a small group really comes to life and engages much more confidently (A11). Small group settings are positive for the child and provided to the child, however, availability of a wider peer group is also important for this child. This is not available to the child at school A.
57. Whilst the child is behind other children of his age, he is not behind his own peer group academically. He benefits from a friendship group. His friends are an effective

peer group and the child benefits from that socially and academically in the form of co-operative learning. He benefits from access to a wider and more advanced peer group for the purpose of co-operative learning as discussed in evidence by witness B and C. This is an important facet in relation to the child reaching his potential.

58. School A is not suited to the child's aptitude.

### **Schedule 2, paragraph 3(1)(g) of the 2004 Act**

*Where the specified school (School A) is a special school, placing the child in school A would breach the requirement in section 15(1) of the Standards in School etc Act 2000.*

59. That is to say an education authority, carrying out their duty to provide school education to a child shall provide it in a school other than a special school. This is a positive duty and the child requires to be educated in a mainstream environment *unless* (i) School B would not be suited to the age, ability or aptitude of the child; (ii) educating the child at school B would be incompatible with the provision of efficient education for the children with whom the child would be educated or (iii) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred. In the event that these exceptions do not arise the placing request ought to be refused, it is presumed that these circumstances arise only exceptionally.

### ***Age, ability and aptitude, school B***

#### **Age**

60. It is not a matter of dispute that the chronological age of the children with whom the child is educated is consistent with his chronological age. The child has one particular close friend (child J) in his primary seven class with whom he spends time out with school. This friendship belongs to a larger group of friends within the primary 7 class room. This is the same group of friends with whom the child works in his literacy and numeracy class group. There was some conflict in evidence about the extent of this friendship group. We accepted the respondent's evidence that the child was able to engage as part of this group at school in the absence of child J. The respondent's evidence was preferred in this respect as witness B and C were able to speak to this effective peer group. The appellant was only able to discuss the friendship group in general terms she does not see the children interact in class, in the playground or at lunch. There was evidence that the child spends time with friend's at break and lunch, these friendships are important.

61. The child's maturity, ability to cope school environment and academic progress are the central issues. These are better dealt with under the head of ability and aptitude.

62. School B is suited to the child's age.

#### **Ability**

63. Whereas achievement and progress may be viewed as markers of a successful placement, the two concepts are quite different. Ability cannot be measured in relation to achievement only.

64. The appellant correctly refers in submissions to wellbeing concerns having been raised by School A. The child is described as needing 'support in controlling his emotions' (A7) and having, 'additional emotional needs which are linked to his

anxiety' (A34). There are indicators in relation to lateness and attendance that suggest school is not going as well as it could be for the child at present. The views of the child clearly indicate some unhappiness at school. Witness C was highly concerned about the child's thoughts and feelings around school and intended to work with school and the child to improve matters for the child. We have considered all of this evidence together with the many positive statements in relation to the child progressing, working well as part of a small group and participating in class activities as well as his larger contribution to school.

65. We consider the approach of School B to be sufficient to deliver an adequate and efficient education to the child. It would be unrealistic to expect that the child have no difficulties in school, by that we refer to any school environment. The school are reacting and adapting to difficulties that arise and working with the child and family with enhanced transition to have the child return to school full time.
66. There was reference in evidence to self-harming behaviours, commencing in December 2017 as a result of anxiety and/or school avoidance. This evidence was somewhat clouded. Reference was made to the child intending to scald himself with hot water, however, it was explained by the appellant that the child does not experience temperature as she would. There was reference to causing his nose to bleed but also a referral to ear nose and throat which indicate some physical cause.
67. The Appellant clarified in her evidence that some of these incidents were historical and that the previous Depute Head, had been involved in dealing with particular incidents.
68. There is some evidence that the child has difficulty retaining information (A20). This concern is repeated in the pupil profile at R50, where, 'retaining information previously learned' is listed as a factor affecting his learning. The child receives small group and 1:1 support at school B (A45.) He is consolidating his work and making good progress in spite of these difficulties.
69. He prefers the company of peers who he can relate to and have similar additional support needs and benefits from this existing working group. This is not sufficient argument to suggest that the child should be educated only with those who have significant additional support needs.
70. The child is currently unable to manage to attend school on a full-time basis. This is a concern but is not surprising given the profile of the child, difficulties in transition and the extended time away from school. He is now described as a 'very' quiet boy. This must be considered in all the circumstances. The child's attendance at school had been previously very good. It appears that the child's difficulty in returning to school full time arises from his difficulty in transitioning from having an extended period (five months) at home to now expecting the child to return full time to school. We heard from witness C that many children across the authority were having difficulty adapting to the return to school.
71. The child is aware of the gap between himself and his peers. He describes being frustrated at school and does not feel that his teachers understand him. The child is however part of a group all working at the same level. He is said to sit in the middle of this group and progress is evidenced. Witness C was asked about this and advised that this was an area of concern that should be worked on. The tribunal concur. It appears turns that the child's perception is negative but the evidence supports the mainstream environment being effective in educating the child.
72. The child's interaction with staff, building the place 2 be and the buddying work the child undertakes illustrates growing confidence, inclusion and respect.

73. Witness C, Educational Psychologist confirmed in her evidence that the child's academic progress is significant. R43 evidences his reading age closed by 18 months in four months.
74. There is reference in the papers to a difficulty retaining information and this is a factor of concern requiring ongoing consolidation work. In the view of the educational psychologist the child has demonstrated that he is able to retain information and she recalled that he had demonstrated great knowledge regarding his own special interests during their discussions. The child has made progress and continues to progress, which indicates that the correct approach is being taken in respect of his learning without the requirement to attend a special school.
75. School B is suited to the child's ability.

### **Aptitude**

76. Witness A in evidence spoke to statistics available indicating that around 25% of pupils attending school B have not reached Level 2 by the time they commence secondary school with 20% across the authority. Witness A confirmed that these figures were not distorted by a high number of children from special schools and that many of the children at this level are currently being educated in mainstream provision.
77. The aptitude of the child is in line with 25% of children in attendance at School B and 20% of children across the education authority.
78. The child is currently in an effective working group with a significant number of children from his primary seven class (5 in literacy and 4 in numeracy from a group of 27).
79. School B is suited to the child's aptitude. This part of the test is not satisfied.

### ***Incompatible with the provision of efficient education of children at school B***

80. This test recognises the rights of children and young people more broadly in education and generally relates to behaviours arising from additional support needs. There was no evidence placed before the tribunal to suggest that educating the child in school B would be incompatible with the provision of efficient education of children at school B.
81. This part of the test is not satisfied.

### **Unreasonable public expenditure**

82. What is reasonable public expenditure is subject to varying interpretation. Resources should be used efficiently and effectively in line with the education authority's responsibilities. There was no evidence that the child has cost or will incur cost that may be described as unreasonable public expenditure.
83. This part of the test is not satisfied.
84. Although we have found that placing the child at school A would breach the requirement in section 15(1) of the Standards in School etc Act 2000 that decision is in relation to the current position and should not be interpreted as providing a view on the suitability of placing the child in a mainstream secondary going forward.
85. We carefully noted the appellant's concerns over incidents and difficulties at school B. We accept that there have been issues in areas particularly displays of anxiety at home, these difficulties maybe inevitable for a child with needs such as the child in this case. What is important is that systems and practices are in place to reduce the



risk of issues developing, and to deal with them when they occur. We are satisfied that this is occurring.

### **Appropriateness in all of circumstances - 2004 Act, section 19(4A)(a)(ii)**

86. Having concluded that a ground of refusal exists, we require to consider whether, nonetheless, it is appropriate in all of the circumstances to confirm the decision to refuse the appellant's placing request, or whether we should overturn the decision and place the child in school A.
87. In considering this question, we must take account of all of the circumstances, including those which are relevant to the consideration of the ground of refusal, as well as any other circumstances which are not.

#### *General classroom environment at school B*

88. It is clear to us that the child is being educated in an appropriate environment in school B. He is being taught alongside children with similar educational needs. The other children in the class are overall more able than the child, but this is an advantage. The staff involved in the classroom teaching are suitably qualified. The child was overall settled and happy in school prior to March 2020. The difficulties that he is currently experiencing must be considered against the unsettling time away from school for an extended period due to the Covid 19 pandemic and the difficulties the child has with transition and change. Attendance prior to March 2020 was good.

#### *Academic progress at school B*

89. There is ample evidence to indicate that the child is making adequate academic progress at school B, given his age, ability and aptitude. It is clear that a number of appropriate targets are being set and that he is meeting these. A more transparent plan shared with parents and on going review and update would be preferable to allow the child's parents to identify this progress easily. The appellant expressed concerns that the child was not progressing academically. Testing (found at R11) confirm that the child has significantly closed the gap between his 'academic performance age' in various areas and his chronological age.

#### *Specialist input at school B*

90. The child, teaching and support staff are assisted by the input of speech and language and educational psychology expertise. This advice is put into practice by staff, enhancing the child's ability to learn and cope in school. Input is not at such a level at present to require a co-ordinated support plan.

#### *91. Transitions at school B*

92. Transitions are clearly an issue for the child. It is not reasonable to expect every transition to be smooth and uneventful; what is important is that appropriate action is taken and that any problematic transition events are handled appropriately. Whereas clear structured planning for transition; transition back to school following Covid and planning going forward to secondary would be beneficial and preferable. We are not satisfied that this is so lacking that it justifies overturning the respondent's decision.

93. Evidence which is of particular value in considering this question is that of witnesses B and C. They know the child and they have experience of observing the child in school B. Witness A had first hand knowledge of the provision at school A.
94. We accept that the appellant knows the child better than anyone and we closely considered her views on the respective suitability question. Of most value to us in the task we have to perform is evidence of the provision available at the two schools from professionals who have direct experience of the respective schools.
95. We placed particular weight on the evidence of witness A in relation to school A.
96. It is clear from the evidence that the provision for the additional support needs of the child at school B is suitable. Provision there is not perfect in every respect, but it is overall very good, and it is clear that the child is progressing academically.
97. We note from the evidence that the child struggles with transitions. The transition to school A would be very difficult for the child. He would be attending a new school, with different facilities, staff, pupils and education. This is another factor which influences us.
98. In considering the evidence as a whole, we are satisfied that the refusal of the placing request should be confirmed. The respondent has behaved reasonably in deciding that adequate provision could be made for the child at school B. It is clear that reasonable educational progress is being made and that the child has been reasonably happy at school B. It is inevitable that time will be required to allow the child to settle.
99. We have considered these points in our respective suitability examination, and we refer to that part of our decision. We consider them (along with all of the other evidence) here in the context of the much wider test of appropriateness. We have decided that it would not be appropriate to place the child in a school where the educational provision is not as suited to him as it is at the school he currently attends. The uncertainty of the transition to school A is also a concern to us.