



**DECISION OF THE TRIBUNAL ON PRELIMINARY MATTER**

**Reference**

1. This is a placing request reference. The appellant seeks an order under s.19(4A)(b) of the 2004 Act requiring the respondent to place her son in the Language and Communication Resource at school A ('the specified school'). This decision is issued under rule 28 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2018/366) ('the rules').

**Decision**

2. This reference is dismissed under rule 28(2)(b) of the rules, as it does not fall within the jurisdiction of this Tribunal.

**Process**

3. Following the submission of the reference, the respondent raised a competency issue. The respondent argues, in essence, that the request to place made by the appellant was a request to place the child in the mainstream provision of the specified school. Therefore, the respondent argues, this Tribunal has no jurisdiction since it only has jurisdiction (in cases where request is to place the child in a public school) where the specified school is a special school (s.18(3)(da)(i) referring to schedule 2, para 2(1) of the 2004 Act). The appellant argues that the request was one which sought to place the child in the Language and Communication Resource ('LCR') of the specified school, not its mainstream provision. It was accepted by both parties that the LCR is a special school. The appellant therefore argues that the request is one to place the child in a special school and so this Tribunal does have jurisdiction over this reference.

4. Following an initial conference call, it became clear that certain factual matters required to be resolved in order that a decision on the jurisdiction point could be made. It was agreed that these factual matters could be addressed by the respondent submitting short written statements and any other material in answer to a number of questions. I posed those questions in directions issued in October 2019. The respondent submitted material by November 2019. A further conference call took place, followed by a written reply by the appellant, received in December 2019. I then took time to consider the issue.

5. Although certain factual matters required to be clarified, I have opted not to make any formal findings in fact. The appellant does not dispute the facts relied upon by the respondent; instead the appellant argues that they should be interpreted in a particular way. I refer in the reasons below to the relevant facts in the appropriate places.

## Reasons for the Decision

6. A placing request is any request to place a child which falls within schedule 2, paragraph 2(1) or (2) of the 2004 Act (s. 29(1) and schedule 2, paragraph 2(3) of the 2004 Act). A 'request' is one which is made in writing or in some other permanent form and which contains a statement of the reasons for making the request (s.28(1) of the 2004 Act).

7. In considering which provision the placing request relates to, in my view the correct approach is to consider the evidence objectively. Just as in the case of interpreting a contract, asking each party what they thought was happening at the time would not assist to resolve the matter. Each would, as here, have a different view: the appellant intended the request to be to the LCR, the respondent took it to be a mainstream placing request. In considering the question objectively, the intentions of the parties should, therefore, be ignored. The objective test is: viewed reasonably, and based on the relevant facts, was the placing request one for the LCR or the mainstream provision at the specified school? I now turn to the facts relevant in this case before applying an objective approach. In doing so (and contrary to the appellant's representative's view) I take the view that the burden of proof on this question lies with the appellant, given that this is a jurisdiction point and not one on the merits of a refused placing request. That is the usual approach in relation to jurisdiction issues and I see no reason to depart from that here.

8. It is clear that the appellant made a placing request to the respondent in June 2019. That placing request was refused by the respondent by letter in June 2019, indicating a right of appeal to the Education Appeal Committee. A copy of the placing request was made available to me. The form is a proforma, entitled 'Placing Request Application Form' where the appellant has completed the relevant fields. In the field in part 1 of the form marked 'School Name' the appellant entered the specified school. In box 6 of the form, the appellant has indicated that the child has additional support needs and that a coordinated support plan ('CSP') is under consideration. Also in part 6, the appellant has indicated that the child has a disability. In part 7 of the form, the appellant, on being invited to indicate the reasons for the request, has ticked the boxes marked 'Medical grounds of child' and 'Suitability of particular teaching methods'. In the field seeking supporting information, the appellant has entered: 'I can get the evidence of support sent over in an email'. It appears that the appellant did that, since the respondent accepts that supporting information in the form of a report from Witness A, Principal Clinical Psychologist with the respondent, dated May 2019, was submitted in support of the placing request. That report describes the circumstances of the child's referral to psychological services and the results of a number of tests. The author concludes that the tests indicate that the child would appear to be experiencing significant learning difficulties and that the results may be indicative of an underlying learning disability (see 'Summary' on the penultimate page of the report).

9. It is clear from the evidence that the respondent assumed the placing request was one made in relation to the mainstream provision at the specified school (witness B's statement). Witness B also explains that the same form is used for both mainstream and special school provisions for the respondent. Further, witness C, Depute Headteacher of the specified school confirms in his statement the following facts: all children in the LCR have autism; 22 children in mainstream provision in the specified school have a disability, 19 of those children have autism; 10 children in mainstream classes at the specified school receive assistance with their education from outside the school; on average, 5 children in mainstream the specified school classes have an Individual Education Plan or a Group Education Plan; most of the children in the LCR are there because they are highly distressed by the mainstream environment. Witness D, Head of Service with the respondent states that the

needs indicated in the placing request and witness A's report of May 2019 suggest that LCR provision is not being sought given that the needs indicated are similar to those of many other pupils in the the specified school mainstream setting.

*Viewed reasonably, and based on the relevant facts, was the placing request one for the LCR or the mainstream provision at the specified school?*

10. In my view, the answer to this question is that the placing request was one for the mainstream provision at the specified school. This is for a number of reasons.

11. Firstly, no mention is made of the LCR at the specified school. It is true that the form only asks for the school name, and that is what the appellant provided. However, in my view the respondent was entitled to take the view, unless something else on the form pointed to the LCR, that this was a placing request for the mainstream provision at the specified school. Although I appreciate that the appellant was not legally advised at that point, I have to view the matter objectively.

12. Secondly, the reference to additional support needs and a disability do not point to the LCR, since the evidence suggests that both factors apply to a number of mainstream children in the school. The information that a CSP is under consideration does not point to the LCR either, since that fact does not mean that a CSP will be made and it is clear that a number of children in mainstream education at the specified school have educational plans and external assistance (it is not clear if any have a CSP, but as I say neither did the child in question in this case). I note also that the placing request form records that the child here did not have an Additional Support Plan, while some in mainstream provision at the specified school do.

13. Thirdly, the reference to the 'Suitability of particular teaching methods' does not indicate the LCR either, since that would apply to mainstream children with a disability and/or additional support needs, as indicated by witness D.

14. This means that, on a reasonable and objective view of the placing request (taking account of the relevant facts), the placing request appears to be one for the specified school mainstream provision. I should add that I do not doubt that the appellant intended the request to be for the LCR, but the intention of one party is not the correct test.

15. For these reasons, the Tribunal has no jurisdiction to consider the refusal of this particular placing request, and so this reference must be dismissed.