



Decision of the Tribunal

The Reference

1. By application dated 7 July 2020 the appellant lodged a reference under Section 18(1) and 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) against the decision of the respondent to place the child in school C.
2. The reference is in respect of the decision dated 29 May 2020 whereby the respondent refused a placing request made by the appellant under paragraph 1 of schedule 2 of the 2004 Act for her son (“the child”) to attend school B being a school in the home authority (the authority where the child resides).

Decision of the Tribunal

3. The Tribunal confirms the decision of the respondent to refuse a 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 B.
4. The decision of the Tribunal is unanimous.

Process

5. Case management conference calls were held on 14 October 2020 and 17 November 2020. Thereafter the hearing proceeded remotely by way of video conferencing on 26 and 27 January 2021.
6. The bundle consists of 119 pages. Included within the bundle were a Joint Minute of Admissions and an Advocacy Report dated 11 January 2021.
7. The witnesses were heard in the following order for the respondent:
 - (a) Witness A – Headteacher of the school where the appellant wishes to place the child. (referred to as school B)

- (b) Witness B – Principal Teacher of the Language Communication Support Centre (LCSC) at the high school which the Education Authority has identified for the child. (referred to as school C)
- (c) Witness C – Educational Psychologist employed by the respondent.
- (d) Witness D – the Education Officer for the respondent.

For the appellant:

- (a) Witness E – the appellant.

Findings in Fact

The child

- 8. The child is now 12 years old.
- 9. The child has a diagnosis of autism spectrum disorder (ASD) and social and emotional behavioural difficulties.
- 10. The child has additional support needs in terms of the Education (Additional Support for Learning) (Scotland) Act 2004.
- 11. The child attended school A.
- 12. The child worked well in a small group setting.
- 13. The child requires predictability and routine.
- 14. The child can be singular in focus and has had periods of obsession.

Schooling to date of hearing

- 15. The child attended school A within a Language Communication School Centre (LCSC) through his seven years of primary school.
- 16. The child was in a class of 6-7 pupils with one teacher.
- 17. The child's primary school education was interrupted by the Covid pandemic but when he left he was working on Curriculum for Excellence (CfE) 1st level into 2nd level in literacy and numeracy.
- 18. In the session 2019-2020 the child was a school captain. He was involved in out-of-school clubs and came to out-of-hours school events.
- 19. The child is a good listener and is a good communicator.

20. The educational psychologist (witness C) worked with the child in May and June 2017 to help and support the child to understand the difference between fantasy and reality. The child had previously indulged in watching 'YouTube' videos and played games which were based upon violence, evil and wars.
21. [This paragraph has been removed by the Chamber President for reasons of privacy of the child under rule 55(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]
22. The educational psychologist (witness C) continued to work with the child until March 2020.
23. During meetings with the educational psychologist (witness C) in February and March 2020 the child confirmed that he wanted to go to mainstream secondary or LCSC.

School B

24. School B is an additional support needs school where pupils have an increasingly wide range of additional support needs, including more severe and complex needs. There are 58 pupils in what is referred to as secondary school between S1 and S3. Classes catering for pupils with additional support needs arising from moderate learning difficulties have a maximum class size of 10 pupils and those with severe learning difficulties have a maximum class size of 8 pupils. There are currently within S1-S3 five classes of ten pupils with moderate learning difficulties and one class group of 8 pupils with severe learning difficulties. Accordingly this school is at full capacity.
25. There are six classes in the six classrooms with no capacity to expand due to a lack of physical space. A site survey has been completed of the school grounds which has confirmed that there are no ground sites suitable for extension. All accommodation within the school is currently being fully utilised and there are no more adaptations available.
26. School B does not have the core compliment of teaching staff that the school is entitled to and it is difficult to source required teachers that are appropriately trained and experienced in the additional support needs sector.
27. Pupils at school B in S1 are working mainly at early level with some at pre-early level. Some of the pupils are non-verbal and require visual support.
28. The child is able to work independently whilst asking for help. In literacy he is able to write stories. At school B pupils can be non-verbal and do not have the cognitive ability to write stories. They can listen to stories or copy sentences. In numeracy pupils at school B are currently working on numbers up to 10.

They know nothing about angles and are dealing with 2D shapes and coin recognition. There is a significant difference with the ability of the child. In numeracy the child is working in addition, subtraction, multiplication and division. He has looked at different types of angles. His understanding of numeracy is significantly beyond that of S1 pupils at school B.

29. School B would not be able to meet the learning or social needs of the child. The child would require a completely separate and individualised programme of work. He would be unable to access whole class learning and would be unable to work cooperatively alongside peers. He would be isolated from his peer group. It would impact on his ability to form relationships.
30. School B can offer a range of vocational experiences and SQA qualifications. The senior phase pupils (beyond S1-S3) work at National 1 and National 2 level. There are only one or two pupils who have ever accessed National 3. Currently there are three pupils in the senior school who are accessing level 2 and there are three S3 pupils who are starting on level 2.
31. At school B in S4-S6 there are life skill classes. Such classes include horticulture and hospitality.
32. School B is not suited to the child.

School C

33. School C's LCSC is part of the mainstream high school. LCSC pupils are attached to mainstream classes and follow a full timetable of subjects within the main school.
34. Mainstream classes have up to 30 pupils. There are three or four LCSC pupils in each mainstream class supported by a member of the LCSC staff. That would be an additional support needs assistant or LCSC teacher.
35. Each LCSC pupil has an individual plan. Some attend primarily mainstream classes but others particularly in S1 work in the LCSC.
36. In school C the LCSC has 47 pupils. There are two bases within the LCSC, one a senior base and one a base for younger pupils. In the LCSC there is a quiet room together with four classrooms.
37. In S1 in the LCSC there are nine students. The LCSC provides skilled work with children with anxieties and coordinates with parents to look at, in particular, friendships, anger issues, anxiety issues etc.
38. The LCSC pupils are supported in a number of ways which include –

- (a) Higher level of adult support in classes;
- (b) An opportunity to avoid busy corridors by leaving classes a few minutes early to move around at quieter times;
- (c) Access to a key worker;
- (d) Support at social times in the smaller LCSC area;
- (e) Access to a quiet room to help manage emotions;
- (f) Visual timetables and notice boards;
- (g) Access to social skills groups as appropriate;
- (h) Advice and support from speech and language therapist and educational psychologist;
- (i) Appropriate planning to ensure support is tailored to meet needs within the mainstream school;
- (j) Regular communication with parents;
- (k) Help to build independence in school.

39. School C does a lot of work with children who are transitioning from smaller class sizes and in particular school A.

40. If the child was not placed at school C and was placed at school B this may affect his motivation and engagement.

Child's views

41. The child has spoken with an advocacy worker by Zoom video call on 11 January 2021. During that interview the child indicated the following: "I like maths, I am good at maths. That is what I remember but it has been so long, like a year, that I have been at school but I remember that I am good at maths. I like art, like paintings, I don't do much art but I like it. There isn't much that I don't like, subject wise".

42. The child has indicated "I've been getting really anxious in social situations where there are other young people around. I will kind of freeze up and start over analysing things". On being asked about returning to school the child indicated "Yes I think it would be a good thing because I would just have to face my anxiety about meeting people head on and deal with it. I am 50/50 on which school I want to be at. I can see good and bad points for both. Like one has a split unit which I think isn't good as I wouldn't get the right support but I have friends there. The other school would give me better support but I am high functioning. I might work at higher levels than most people but not as high a level as mainstream so I think it would be in the middle somewhere. I am not sure what would help me at school".

43. In relation to his future the child indicated "I have had some thoughts on this like being in the police or military or a pilot, I want to be working in the future and making my own money because I know that I will need to know about all of that stuff as I will probably be paying taxes and stuff and have my own house.

You can't get into the military though if you are autistic so it is up to me if I need to prove to people that I can do the job well enough. Getting the right school and the right education is important for my future because I have things that I want to do".

44. The child reported to witness B that he wished to go to school C or a mainstream school. He said that he knows lots of people that go there and he misses them a lot.

General remarks on the oral evidence

45. We accepted as credible and reliable the witnesses A-D. They were all education professionals and gave their evidence in a straightforward manner.
46. The witness E is the appellant. She gave her evidence after witnesses A-D. She was asked having heard the evidence of the other witnesses whether she had changed her opinion in relation to the suitability of school B. She said it had not changed her opinion. Witness E was not prepared to accept any proposal that was put to her. She set out that she did not believe that the child should be encouraged to be competitive.
47. The tribunal's view of her evidence is that she clearly is of the view that what she is doing is in the best interests of the child but has been unable to perhaps see the bigger picture that has been presented. So the tribunal can accept that she is giving her evidence reliably but that she is unable to accept a variety of factors that might have made her consider that school B was the most suitable for her son.

Reasons for decision

48. The legislative framework for the decision is contained within the Education (Additional Support for Learning) (Scotland) Act 2004.
49. The commencement point is section 1
50. 1. Additional support needs
- (i) A child or young person's additional support needs for the purpose 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 benefit from school education provided or to be provided for the child or the young person.

The parties were agreed in terms of the Joint Minute of Agreement that the child has additional support needs

Thereafter section 18 of the Act applies.

(1) Any of the persons specified in subsection (2) may refer to the First-tier Tribunal any decision, failure or information specified in subsection (3) relating to any child or young person for whose school education an education authority are responsible.

(2) The persons referred to in subsection (1) are-

(a) Where the decision, failure or information relates to a child, the parent of the child

(3)(da) a decision of an education authority refusing a placing request made in respect of a child or a young person (including such a decision in respect of a child or young person for whose education the authority refusing the request are not responsible) –

(i) made under subparagraph (1) of paragraph (2) of schedule 2 in relation to a special school or

(ii) made under subparagraph (2) of paragraph 2 of schedule 2 in relation to a school mentioned in paragraph (a) or (b) of that subparagraph.

51. The legislative framework thereafter is set out in schedule 2, paragraphs 2 and 3 of the Education (Additional Support for Learning) (Scotland) Act 2004.

Paragraph 2 of Schedule 2 of the Act states –

(1) 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 in the request, being a school under their management, it is the duty of the authority, subject to paragraph 3, to place the child accordingly.

Paragraph 3 of Schedule 2 of the Act states –

(1) The duty imposed by sub-paragraph (1) ...does not apply-

(a) If placing the child in the specified school would –

(i) make it necessary for the Authority to take an additional teacher into employment.

- (ii) give rise to significant expenditure or extending or otherwise altering the accommodation at or facilities provided in connection with the school.
- (vii) though neither of the tests set out in paragraphs (i) and (ii) is satisfied, have the consequence that the capacity of the school would be exceeded in terms of pupil numbers.

Paragraph 3(1)(b) of schedule 2 of the Act states -

- (a) If the education normally provided at the specified school is not suited to the age, ability or aptitude of the child.

52. Reference is then made to section 19(4A) of the Act_

Where the reference to a decision referred to in subsection 3(da) of that section the First-tier 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.

53. It was also acknowledged by parties that if the Tribunal are satisfied that if one ground of refusal exists, the Tribunal must then go on to consider whether the placement sought by the appellant is, nonetheless, appropriate in all the circumstances.

54. Further the Tribunal acknowledged that the burden of proof is on the respondents to establish that school B is not suited to the child. The appellant does not need to establish that school B is suited to the child.

Ground 1

Schedule 2, paragraph 3(1)(a)(i) - placing the child in the specified school would make it necessary for the Authority to take an additional teacher into employment.

55. The witness A in her evidence confirmed that in S1-S3 of school B they were already at full capacity. There are 58 pupils and six classrooms. There are five classrooms of 10 pupils and one of 8 pupils. This is the maximum number that they can accommodate.

56. The appellant's position was that this witness had not been able to advise what the maximum physical capacity was of each room at school B and whether another child could be accommodated and that accordingly they had not established that another child could not be placed at the school and be taught in the existing S1 class.

57. This was disputed by the respondents who set out that the school already did not have its core complement of teaching staff and that there were difficulties in obtaining appropriately trained teachers for such a school.

58. The appellant referred to the case of *East Lothian Council, Petitioner 2008 CSOH 137*. The reference in that case is to a case involving the Education (Scotland) Act 1980. The appellant's position was that should a decision be to place the child within school B this would not count towards the maximum class size and no additional teacher would be required to be employed by the education authority.

59. However this argument fails to take into account the issues arising from children with additional support needs and maximum class sizes. There are reasons that maximum class sizes of pupils are set for children with additional support needs. In the instance of school B they are at full capacity. Accordingly for the child to be placed at that school would require there to be an additional teacher employed. That in itself makes out the ground.

Accordingly the tribunal have upheld this ground of refusal.

Ground 2

Schedule 2 paragraph 3(1)(a)(ii) - placing the child in the specified school would give rise to significant expenditure or extending or otherwise altering the accommodation at or facilities provided in connection with the school.

60. The appellant's position is that the ground of refusal has not been established and that the respondents did not establish that the school building would require to be amended or extended to take an additional child. The respondents dispute this.

61. Evidence was led from both witness A and witness D that the respondents had investigated whether they could add accommodation within the school grounds but that had been deemed as being unsuitable. There was no other option. The classrooms that are currently provided are full. It has to be remembered that in terms of these classrooms there are children who require wheelchair access.

62. This evidence was accepted by the tribunal. The evidence is that S1-S3 is full in terms of pupils. There is no other room available. There was simply nowhere to extend into or alter in terms of the facilities.

Accordingly the tribunal have upheld this ground of refusal

Ground 3

Schedule 2, paragraph 3(1)(a)(vii) – though neither of the tests set out in paragraphs (i) and (ii) is satisfied, have the consequence that the capacity of the school would be exceeded in terms of pupil numbers.

63. Again the appellant's position was that this ground of refusal had not been established and referred to the case of *Parents of Child J v Dumfries and Galloway Council – 2015 WL6757800*. That case concerned the refusal of placing request, the original action proceeding under the Education (Scotland) Act 1980 but having been amended to an appeal under the 2004 Act. In that case the Sheriff allowed the appeal. There were particular circumstances in that case in the background namely that the child had been attending nursery classes at the school to which the pursuers sought to have him placed and that his older brother was already at the school and that his sister attended the local high school.

64. In this case the school is at full capacity. In particular it is at full capacity within S1-S3. There is no ability to further expand into the external physical spaces. Likewise the classes themselves cannot be further adapted. Accordingly the capacity of the school would be extended in terms of pupil numbers.

Accordingly the tribunal have upheld this ground of refusal

Ground 4

Schedule 2, paragraph 3(1)(b) – if the education normally provided at the specified school is not suited to the age, ability or aptitude of the child.

65. The appellants made reference to the cases of *M v Aberdeenshire Council 2008 SLT (Sh Ct) 126* and to the case of *The City of Edinburgh Council v Mrs M D N [2011] CSIH 13*.

66. In *M v Aberdeenshire Council* reference is made to the following paragraphs at page 126 namely "I consider that the proper time for assessing whether the conditions contained in para 3(1)(f) are met or not met is, for the purpose of an appeal to the Sheriff, the date on which the hearing proceeds". That is not disputed.

67. Further "I can understand that the Local Authority will not be able to determine whether or not they can or will meet a particular need until they have determined what these needs are. The determination should, in my opinion, have been by the time Mrs Hughes as education officer had to take the first decision on the application for a placement and thereafter should have been available for consideration by the Appeal Committee referred to in para 5(1) of the schedule". Again this is not disputed.

68. In the case of *The City of Edinburgh Council v Mrs M D N* it is again acknowledged that when looking at a child's additional support needs "These needs require to be stated in a more general, all-encompassing and indeed "holistic" way rather than by endeavouring to separate out "educational support" on the one hand and "social work support" on the other".

Age

69. Neither party made particular reference to the issue of age. The child was of an age to have entered the senior school of either school B or school C.

Ability

70. Given this word its ordinary natural meaning "ability" refers to current capability.

71. Witness C spoke in her evidence to the child whilst at school A working at 1st level of CfE.

72. The Getting it Right for Me (GIRFME) document dated November 2019 for the child whilst in primary 7 and at school A described the child as attending the LCSC provision and confirmed as follows "This extends to difficulties with reading and spelling where he has some functionality difficulties and is currently working successfully at first level for both and touching on the second level for some aspects for challenge and growth".

73. In addition his Learner Report from school A dated April 2020 describes in terms of literacy the child's CfE level as 1st into 2nd and in terms of numeracy and mathematics 1st into 2nd.

74. Further in the Transfer of Information Summary Form from school A for session 2019/2020 the child was described as ".....is independently capable but is able to ask for help if and when he needs it". ".....is a good listener and he is considerate and will weigh things up that he has heard". ".....the child is a good communicator and uses speech as his primary communication medium". "He has been a school captain this year and thoroughly enjoyed the responsibility and challenge that has brought and attended every event, being a super role model". ".....is involved in out of school clubs and is okay not being in control of his own space at home all of the time. He will come to out of hours school events and is more than able to be a contributing and valuable member of the local community and society".

75. The appellant's view was that the child's ability was not the same as being described by witness C or indeed as was set out in the documents referred to. She said that the child had made little progress up until the end of primary 5 and could not read or write until then. She was of the view that he had a difficulty with comprehension. He did not take things in nor could he understand

things. He had major gaps in his learning. He was simply not at the same level as his peers.

76. The tribunal preferred the evidence of witness C and the supporting documentation. There was an acknowledgement that the child had not been in school since March 2020 during the current pandemic and that the offer of homework had not been taken up by the appellant. However he was displaying an ability to learn at first level and then towards second level.

School B

77. School B is the school at which the appellant would wish the child placed. As was described by witness A the pupils in S1 are working at mainly early level with some at pre-early level. This is at a level significantly below that of the child. The child would require a completely separately and individualised programme of work. This means that the child would be unable to access whole class learning and would be unable to work cooperatively alongside peers. This could result in the child being isolated from his peer group. In addition working at an individualised programme could result in a lack of pace and challenge for the child.

School C

78. At school C the level at which the child was working would be supported within a mainstream secondary curriculum. Accordingly in terms of the child's ability he is suited to school C and not suited to school B.

Aptitude

79. Aptitude can be described with its ordinary and natural meaning as referring to potential (natural) capability.
80. The child is someone who wants to achieve. In his own statement he set out that he had thoughts on being in the police or military or a pilot. He wants to be working in the future and making money because he knows that he will need it as he will be paying taxes and have his own house. He wanted to get the right school and the right education as it was important for his future. He had told witness C that he wanted to go to mainstream secondary or school C.
81. As his Learner Report document from April 2020 from school A described he was someone that "can work independently". He is "encouraged to give things a go which he is more than willing". "He can participate in group discussions offering interesting ideas and thoughts and show good comprehension". He is able to achieve and wishes to achieve.

School B

82. At school B in what are described as the senior phase (S4-S6) there are offered a range of vocational experiences and SQA qualifications. The school do not provide SQA qualifications at National 4 and 5. All senior phase pupils work at National 1 and National 2.

School B LCSC

83. The school offers inclusion for all LCSC pupils and the pupils follow a mainstream curriculum in class delivered by subject specialists.

84. School C would be suited to the aptitude of the child as opposed to school B.

85. The ground of refusal is upheld.

Appropriateness

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 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 B.

87. In considering the question we must take account of all of the circumstances consisting of those which are relevant to the consideration of the ground of refusal as well as any other circumstances which arise in the evidence and submissions.

88. Taking a general view we have reached the conclusion that school B is not suited to the ability or aptitude of the child. There would have to be good reasons for us nevertheless to place the child there.

Wishes of the child

89. The child was clear when speaking with witness C that he wished to attend mainstream school or specifically school C. He said that he knows lots of people that go there and misses them a lot. In his views given through the advocacy worker he did acknowledge that he had been getting really anxious in social situations where there are young people around and when asked about whether he was ready to go back to school he said that he thought it would be a good thing because he would just have to face his anxieties about meeting people head on and deal with them. He said that he was "50/50" on which school he wants to be at. He said that one has a split unit which he thinks isn't as good as he wouldn't get the right support but he has friends there. The other school would give him better support but he is high functioning. He says he might work at higher levels than most people but not as high level as

mainstream so he thinks he would be in the middle somewhere and not sure which would help him at school. However he did make reference to wishing a career. In school C at the LCSC the child would in fact be more than supported in terms of support within the classroom and within the LCSC area itself and other support such as speech and language therapy and educational psychologists. So there is a significant level of support from school C which the child may not have been aware of. Taking that into account school C would seem again to be more suited.

90. [This paragraph and its sub-heading has been removed by the Chamber President for reasons of privacy of the child under rule 55(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]

Communication at school

91. Witness E was concerned that in terms of communication the child will not communicate his feelings at school. However contained within the GIRFME document it was noted that the child can monopolise his key adult's time by seeking attention to talk about the things he is interested in, and at times this can be constant. Witness C also confirmed that in terms of adult contact he would discuss with adults things that bothered him and he would seek her out as well as others. He would say things like "Can we have a chat today". Again witness C was of the view that such issues can be dealt with at school C.

Interaction with peers

92. It was noted that the child can see things from his own point of view and finds it difficult to comprehend that others can be hurt by words that are spoken to them. He can find it difficult to interact with others. If other pupils were not speaking to him he would become worried about this. Witness E believes that the child would try to hide this from peers as he was aware he was different. She believes that he would develop his social circle at school B. However witness C was clear that because his peer group at school B would be academically, socially and emotionally in a different place to him it would affect his ability to form social skills which in turn affects friendships. The same could not be said at school C where he would be in a similar setting to many. At social times he could go into a mixed playground or be on his own. Again she was of the view that the LCSC was entirely appropriate for him.

Courses taught at school B

93. Witness E was impressed by the lifeskill classes taught at school B. She believes that these skills would allow him to be able to “maybe work or live by himself”. Witness E’s assessment of the child’s abilities is significantly less than that of witness C who believes that school B would simply not challenge him enough. Nor would it support him in terms of his own goals in life. It was noteworthy that the child’s own goals in life were significantly in excess of school B. The child had previously expressed to witness C that he was sometimes “bored” with the level of work provided to him by school A. Again this suggested that school C was more appropriate than school B.

Witness E and her approach to School B and School C

94. Witness E had never taken the child to school C. This is despite the child knowing other pupils that have gone to school C. Witness E had taken the child to school B and she had formed the view that this was a school that the child should go to. Witness E was not prepared to accept any of the evidence that had been provided by the other witnesses in the hearing about the suitability and appropriateness of school C. This could be described as a missed opportunity by witness E. Had she visited school C and the LCSC provision she may have had an opportunity to reflect on what could be offered by school C as opposed to school B.

Conclusions of appropriateness

95. Taking all these points together it is appropriate in all the circumstances to confirm the respondent’s decision to refuse the placing request.