



Additional Support Needs

**DECISION OF THE TRIBUNAL**

FTS/HEC/AR/23/0016

List of witnesses

**For the appellant:**

Occupational Therapist (witness C)

Head of Service school B (witness D)

The appellant

**For the respondent:**

Head Teacher school A (witness A)

Senior Educational Psychologist with the respondent (witness B)

**Reference**

1. This is a placing request reference, lodged with the Tribunal in February 2023. The appellant asks the tribunal to require the respondent place the child in school B.

**Decision**

2. The tribunal overturns the decision of the respondent to refuse the placing request, in accordance with section 19(4A)(b) of the Education (Additional Support for Learning) (Scotland) Act 2004 Act (**2004 Act**). The tribunal therefore requires the respondent to place the child in school B by 15 June 2023, or by such other date as the parties may agree.

**Process**

3. A remote hearing on this reference took place over two days.

4. The written evidence we considered (**the bundle**) consists of: T1-T057; A1-A188 and R1-R107, including three late documents from the appellant (allowed to be added by consent), post-hearing written submissions and the child's most recent school report (R093-095), the latter provided by the respondent at the tribunal's request. A short video clip of the child stating some of his views was lodged by the child's advocacy worker (with no objection from the respondent), and we allowed that into evidence.
5. Before reaching our decision, we fully considered all of the written evidence, the video clip and the oral evidence.
6. We benefitted from learning of the child's views on his pastimes and likes, his education and on each of school A and B. These views come from a number of places in the bundle, including a very helpful independent advocacy report (T09-052). The child stated that he likes swimming and karate and cuddles with his dog (T050). He would like to do maths, science and computing at school (T052).
7. The child is frustrated by not being able to attend school, as he wishes to learn (A059). He has expressed a clear view in favour of attending school B: see the advocacy report at T050-052, where he refers to school B as 'happy and calm', staff there as 'nice and friendly' and 'kind' and that he likes the outdoor areas there (A060). In witness C's report at A101, the child lists six reasons to support his view that school B is the right school for him. In the video clip, the child expresses his view against attending school A very clearly, again providing a number of reasons.

## Findings in Fact

### *General findings*

8. At the time of the hearing, the child was 13 years old.
9. The child has autism spectrum disorder (**ASD**) and significant sensory processing challenges including sensory modulation. He has low muscle tone, hypermobility, dyspraxia and dyslexia. The child experiences high levels of anxiety, demand avoidance and poor mental health.
10. The child has significant sensory integration challenges. These impact on the child's everyday functioning including dressing, writing, physical sports, co-ordination, use of tools, visual skills, emotional regulation and concentration. These challenges have a significant negative impact on the child's ability to learn. The child would gain significantly from occupational therapy input to help with these challenges.
11. Although he presents as articulate and chatty, with a good vocabulary, the child has communication difficulties, including engaging in repetitive and predominantly one-sided conversations. He requires a high level of support with all aspects of learning. He struggles with reading, writing and maths.
12. The child displays extremely rigid thinking, becoming very fixed on certain ideas or topics. This is an aspect of the child's ASD. One example of this rigid thinking is in relation to female pupils: the child feels that they are treated more favourably than male pupils and wishes to attend a boys' school. Another example is the child's refusal to visit

school A or to engage in conversations about school A. The child becomes agitated when the topic of school A is raised. The child has demonstrated a very limited ability to make even small changes in his thinking.

13. The child experiences fixed, negative thoughts about individuals he perceives as having wronged him. Sometimes family members can be the subject of these thoughts. These thoughts can provoke a distressed, physical reaction and are very concerning to professionals working closely with him.
14. The child finds it difficult to make friends. This means that there is a high risk of social isolation.
15. The child receives support from the Child and Adolescent Mental Health Services (**CAMHS**) twice a week due to his anger and anxiety issues. He is being assessed by the Forensic CAMHS service.
16. In December 2022, the managers of school B offered the child a place at their school. One week later, the appellant wrote to the respondent asking that the child be placed in school B. In early February 2023, the respondent wrote to the appellant refusing this request. The respondent has offered to place the child in school A.
17. In August 2021 (the start of his secondary 1 year), the child began attending Communication Support Service (**CSS**), a supported service within a mainstream school. CSS provides a differentiated and flexible curriculum, small group teaching and high levels of targeted support for pupils with social communication needs. Initially, the child settled well into the CSS, and attended some mainstream classes with support.
18. In around October 2021, the child started to display distressed behaviour at school. This behaviour included verbal and physical actions and threats of property damage and of harm to himself, of harm to other pupils and to school staff. It also included expressing dark thoughts. In response to this change, the respondent took the child out of all mainstream classes, providing all of his education in the CSS.
19. In April - May 2022, the child participated in group and individual sessions with the respondent's educational psychology service on cognitive behavioural work. The child's distressed thoughts and behaviour continued, including at the start of the new academic year in August 2022. The respondent's educational psychology service continued working with the child, but changed the nature of the work from 'talking therapy' to physical and sensory-based work. The child responded better to this, and elements of this approach were introduced on a daily basis.
20. In early September 2022, at a multi-agency meeting, the child displayed distressed behaviour. Following an intervention by witness C (who attended this meeting), the child's parents decided to stop the child attending the CSS. He stopped attending mid - September 2022. The child's parents then decided to allow the child to attend CSS again – he returned there at the end of September 2022.
21. Following his return, the child initially coped well. In October 2022, the child, in reacting to seeing another pupil in passing, became very agitated and displayed distressed behaviour which escalated, resulting in injury to two teachers. The child has not returned

to the CSS (or to education anywhere) since then. The respondent agrees with the child's parents' decision not to allow the child to return to the CSS.

22. The respondent then worked with the child's parents to identify an alternative school placement. A number of options were identified, but were regarded as not suitable. The respondent then recommended school A.
23. The latest school progress report for the child was prepared in November 2022. By that time, the child was working at Curriculum for Excellence (**CfE**) level 1 for English, level 2 for Art, Home Economics, and Mathematics, level 3 for Drama, Information Technology, Modern Studies, Physical Education and Religious Studies and level 4 for Science.

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

24. School A is an independent school for children with social, behavioural and emotional difficulties, including children with ASD. The school roll stands at 48. Seven of these pupils have ASD.
25. School A pupils have access to outdoor recreational space within the school grounds as well as extensive nearby rural public space.
26. If the child were to attend school A in academic year in 2022-2023, he would be in class 1. This class would consist of a total of six pupils (including the child), 4 pupils with ASD and two with other needs. The ages of the other pupils would be: 17, 13, 15, 15 and 16. One (the 17 year old) is female, the others are male.
27. From academic year 2023-2024, the child's classmates in class 1 would be aged 13, 15, 15 and 16 (the 17 year old is due to leave school at the end of academic year 2022-2023). All would be male. The 13 year old pupil will be working at CfE level 2-3, the other pupils will be working at National 3 or 4 level, higher than level 4.
28. Witness A decided that school A would be suitable for the child following a telephone call in around October or early November 2022 with witness B that lasted around 10-15 minutes. At that point, witness A had not seen any documentation about the child.
29. The child's mother attended school A for a tour in around late November 2022. The child has refused to visit school A.

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

30. School B is an independent school that provides care and education for children and young people aged 5-18 years. The pupils at school B have a range of additional support needs, including autism.
31. School B holds an accreditation from the National Autistic Society (**NAS**). That accreditation was last renewed following an assessment by the NAS in October 2022. The most recent accreditation certificate was issued by the NAS in 2023.

32. In October or November 2022, the child's parents visited school B. They looked around and asked questions. During this visit, they provided information to witness D on the child's difficulties and his barriers to education.
33. In around October or November 2022, the child visited school B with his parents and sister. They spent around 90 minutes in the school. The child had a tour, met teaching and support staff and peers and asked questions. The child visited the teaching and residential spaces at school B. The visit was positive for the child. He chatted freely and expressed no negative thoughts about school B during the visit.
34. The offer of a place for the child at school B was underpinned by a clear understanding of the child's needs and how they could be met within that school's environment.
35. On attending school B, the child would join a class with 4 other pupils. All of those pupils have an ASD diagnosis. Three of these pupils are aged 13, the other is aged 14. Three of those pupils are at working within CfE level 3 (which is where they should be according to age). The fourth pupil has recently joined school B, and is a bit behind the others in terms of educational level, but is making fast progress.
36. In around December 2022, witness D had a telephone discussion with an educational psychologist working for the respondent. This call was about the child and the possibility of him attending school B. The call lasted around 5 minutes. This was the only contact between the respondent and school B about the child.
37. The child would attend school B as a residential pupil. He would be collected by school transport on Monday morning of each school week, arriving at school B for lunch. He would stay at school B's residential facility until Friday after lunch, when he would return home. School B provides a car for transport, and a maximum of 3 other pupils from the local area would be in the car with the child. The driver would be a member of staff from the support/care staff group whom the child would know.
38. School B residential pupils and staff have all their meals together and there is a strong emphasis on healthy eating and positive behaviours at meal times. Children are also supported to develop their independence skills, through choosing menus, keeping their rooms tidy and helping with light domestic tasks.
39. Being a residential pupil could benefit the child in terms of social inclusion and help him to develop independence. The residential element of the child's attendance at school B would reduce the number of transitions for the child. The child struggles with transitions. The staff who work in the residential part of school B also work in the school, ensuring consistency.
40. An occupational therapist (**OT**) is due to imminently begin employment at school B. The OT will work in school B for 3 days per week. One of those days will be spent by the OT engaged in planning and staff training. The other two days will be spent by the OT working directly with pupils. The OT has already carried out an environmental audit of school B, resulting in changes to the school sensory environment to make it lower arousal. The child is likely to benefit from a low arousal environment.
41. School B pupils have access to a psychotherapist/counsellor who works 1-1 with pupils and acts as a sounding board for families.

## **Reasons for the Decision**

42. The parties agree that the child has additional support needs, as defined in section 1 of the 2004 Act. We agree, as supported by our findings in fact at paragraphs 9-14 above.
43. The appropriate point in time for consideration of the evidence is at the date of the hearing: the law is clear on this. The burden of establishing that the respondent's decision should be confirmed falls on the respondent.
44. On the evidence, a few points are worth noting. Witness A has not met the child, nor had he viewed any documents relating to the child's education prior to confirming the offer of a place at school A. We gained the impression from witness A's evidence that he does not know the child or his difficulties well. During witness A's oral evidence, a break was necessary to allow him to read witness C's report. By contrast, witnesses C and D are very familiar with the child and his needs (especially witness C). This affected the weight we placed on the evidence of each of witnesses A, C and D, and this is reflected in some of our conclusions on relevant issues. The appellant was clear and balanced in his evidence.

### **The ground of refusal: respective cost and suitability**

45. The respondent argued that one ground of refusal of the placing request exists. The ground in question is found in the 2004 Act, Schedule 2, paragraph 3(1)(f). That ground has four component parts. In order to conclude that the ground of refusal exists, we must be satisfied that all four parts of the ground of refusal apply.
46. The parties agree that two of the four parts of the ground of refusal apply. These are: (a) that school B is not a public school (Schedule 2, paragraph 3(1)(f)(i)); and (b) that the respondent has offered the child a place in school A (Schedule 2, paragraph 3(f)(ii)). It is clear from the evidence that these two parts of the ground of refusal apply. We will now turn to the remaining two parts. Their application is in dispute between the parties.

### *The ability of the respondent to make provision for the additional support needs of the child in school A (2004 Act Schedule 2, paragraph 3(1)(f)(ii))*

47. The appellant argues that the respondent is not able make provision for the additional support needs of the child in school A. The respondent argues that it is so able. We prefer the appellant's position.
48. We are satisfied that, were the child able to attend school A, the provision there would meet the additional support needs of the child. That is clear from the findings in fact 24 to 29, applying those to the additional support needs of the child as set out in findings in fact at paragraphs 9-14.
49. The child has indicated very strongly that he does not wish to attend school A. He refuses to visit that school. He has stated a clear preference for school B. The respondent argues that the views of the child on school preference cannot be determinative, since this would cut across the tests set out in the 2004 Act. We agree with this view. The child's view is not determinative, it is a factor to be taken into account.

It is not unusual for a decision to be made by the Tribunal on a placing request reference that goes against the wishes of the child.

50. However, here the child has not only stated a preference, he has adopted a rigidity of thought on the question of school preference. Witness B conceded in her evidence that persuading the child to attend school A would be a 'real challenge' since once the child has an idea, it is very difficult to shift. Witness A also accepted that this would be a challenge. Witnesses A and B explained that a gradual approach would be taken to trying to persuade the child to attend school A. Witness A indicated that the plan would be to start by showing the child school A's outdoor spaces and move on from there. Witness B confirmed that she has not yet spoken to the child about attending school A.
51. While we do not doubt that witnesses A and B and the respondent generally would engage in a gradual process to attempt to change the child's mind, we are not persuaded that there is a real prospect of success of persuading the child to attend school A. Witness C explained that the child has the strongest rigidity of thinking she has ever seen in her 31-year career. She expressed some significant skepticism about the prospect of persuading the child to visit or attend school A, referring to the need to 'carry him to the car' such was his strength of feeling on the matter. Witness C also stated that she had tried to persuade the child to visit school A, and despite the child knowing and trusting her judgment, she was unable to persuade him to do so. The respondent has not led evidence from which we can infer that even a gradual approach would work. The argument that it might is speculative. The process has not begun, nor has any discussion between the respondent and the child about this taken place. It is very likely that the child will simply continue to refuse to visit school A or attend as a pupil there.
52. It is obvious that in order for the respondent to be able to make provision for the additional support needs of the child at school A, they will have to succeed in persuading him to attend. We are not convinced that they will manage to do so. On this basis alone, this part of the ground of refusal does not apply.
53. We stress that this is far removed from a situation where the child's view is determinative even of this part of the ground of refusal. We are basing our conclusion on the strength of the child's view, evidence of his rigidity of thinking (as part of his ASD) and a lack of evidence from which we can infer that an attempt to persuade him to attend school A will bear fruit. The respondent bears the burden of proof, but has failed to reach it.

*Reasonableness of placing the child in school B having regard to respective suitability and respective cost (2004 Act Schedule 2, paragraph 3(1)(f)(iii).*

54. Given our conclusion that the part of the ground of refusal in paragraph 3(1)(f)(ii) of Schedule 2 of the 2004 Act does not apply (paragraphs 47-53 above), we do not need to address the part in paragraph 3(1)(f)(iii) of that schedule. This is the part that involves a comparison between school A and B on suitability to meet the child's additional support needs, and on the cost of doing so, against an overall reasonableness test. Since this part of the ground of refusal was argued, we will state our views, in brief.
55. On respective suitability, it is clear to us that in a number of important respects, school B is more suitable than school A for providing for the child's additional support needs:

- a. The child is unlikely to attend school A (see paragraphs 47-53 above), while he is very keen to attend school B. The child has provided clear reasons for his preference;
- b. Staff at school B have a detailed understanding of the child's needs; staff at school A do not (see findings in fact 28, 32-34 and 36, as well as school B's offer letter at T025-038). Having a good understanding of the child's needs makes it more likely that these will effectively be met;
- c. School B holds an autism accreditation; school A does not. This does not mean that school A cannot provide for the needs of autistic pupils, but it does offer independent verification of the expertise and resources of school B in this area. This was the approach taken by the Tribunal in the decision reference ASN\_D\_26\_08\_2020 paragraph 145, and we endorse this approach;
- d. Psychotherapist/counsellor access for pupils at school B is not available to school A pupils. The child has mental health issues (including rigid negative thoughts) that merit weekly CAMHS input (see the findings in fact in paragraphs 12, 13 and 15 above), making this facility of some importance to the child's mental health and therefore to his ability to learn;
- e. The age range of the pupils who will be in the child's school B class is closer to the child's age than is the case with the equivalent class in school A (see the findings in fact at paragraphs 26, 27 and 35);
- f. School B is a school for boys only, and the child is currently very fixated on the difference between boys and girls, while school A is a mixed gender school (see the findings in fact at paragraph 12);
- g. The CfE learning level of the pupils who would be in the child's school B class is closer to that of the child compared to the learning level of the equivalent pupils in school A (see the findings in fact at paragraphs 23, 27 and 35);
- h. The child would attend school B on a residential basis, allowing him to benefit in a range of ways which do not apply (to the same extent) to school A (see findings in fact at paragraphs 37-39). Concerns expressed around the possible impact of the child living away from his family for part of each school week (voiced by witness B) are speculative; and
- i. Given the child's significant sensory challenges (see findings in fact at paragraphs 9,10 and 40), he would benefit from the opportunity of regular on-site direct OT input in school B, a resource not available at school A.

56. There are other points of comparison, but those considered above are the main ones. On the other points of comparison, there are no significant differences between the provision that would be available for the child's additional support needs in school A and school B.

57. On respective cost, the respondent explains that it would cost £46,600 per year (including transport) more for the additional support needs of the child to be met at school B than it would at school A. This is not in dispute. We agree with the respondent's view



that information on its overall school budget is not necessary for us to consider the respective cost matter. The correct question is whether the enhanced suitability of school B (as we have found exists) is justified by the additional cost of provision there (see Lord Glennie in *S v Edinburgh City Council* 2007 Fam LR 2, paragraph 23, Outer House, approved by the Inner House in *B v Glasgow City Council* 2014 SC 209 at paragraph 19).

58. The respondent has failed to establish that it is not reasonable, having regard to respective suitability and the £46,600 per year cost gap, to place the child in school B. That additional cost for school B is justified since, as we conclude above, the evidence suggests that the respondent would be unable to persuade the child to attend school A. This would leave the child with no educational provision at all, and would perpetuate the situation that has existed since October 2022. Even if the child would be likely to attend school A, the points of comparison discussed at paragraph 55 above go to the very heart of the provision required to meet the child's additional support needs. The benefits of the child's attendance at school B justifies the additional cost.
59. Since only two of the four parts of the ground of refusal apply, the ground of refusal relied upon by the respondent does not exist. This means that we must overturn the respondent's decision to refuse the placing request and order the respondent to place the child in school B. We have chosen a date in the near future (within 7 days of the issue of this decision), given the child's prolonged absence from education in the current academic year, and given that there are only a few weeks of the academic year left. This may allow the child to engage in a transition process in the limited time left before the summer break.