



DECISION OF THE TRIBUNAL

Reference.

By application dated August 2017 ("the appellant") lodged a Reference under section 18(1) and 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004, [as amended by the Education (Additional Support for Learning) (Scotland) Act 2009] ("the Act") against a decision of ("the respondent").

The reference is in respect of the decision dated June 2017 whereby the respondent refused a placing request made by the appellant under paragraph 1 of Schedule 2 of the Act, for the child to attend the requested school, School A. He currently attends at School B, the specified school.

1. The Decision.

The tribunal confirms the decision of the respondent to refuse the placing request, in terms of section 19(4A)(a) of the Act, being (firstly) satisfied that one or more grounds of the refusal specified in paragraph 3(1) of Schedule 2 of the Act exists, and (secondly) that in all the circumstances it is appropriate to do so.

The decision of the tribunal is unanimous.

2. Preliminary Issues

Conference calls were held in October and November 2017 and a direction was issued instructing that an Advocacy Worker be appointed to obtain the views of the child, as the parties were in agreement that it would not be appropriate to have the child attend at the hearing. Guidance was given to the Advocacy worker, in that direction as to the nature of the questions to be put to the child. Parties were directed to prepare and lodge a Joint Minute of Agreed Facts and written witness statements to be lodged in advance of the hearing. Parties were encouraged to prepare outline written submissions to be lodged at the hearing.

The appellant had also submitted a disability discrimination claim and a direction was issued conjoining the said claim and this reference, with evidence and submissions in respect of both matters to be considered at the same evidential hearing. A separate decision in respect of the said claim shall be issued.

Prior to the commencement of the hearing the appellant was allowed to withdraw documents from the bundle (written evidence). During the course of the hearing the respondent indicated that they held a Behaviour Plan and a Risk Assessment for The child and the appellant requested sight of the same. These documents were lodged prior to the conclusion of the hearing, and were accepted into the bundle.

Following the conclusion of the second day of evidence the appellant sought to introduce email correspondence between the appellant and the respondent's witness, Witness C. This was refused on the basis that the documents referred to were dated some time before the hearing and were clearly in the possession of the appellant since that time, and the witness for the respondent who was referred to in the email had concluded giving her evidence and had not been given the opportunity to comment on the said additional evidence and that it would not be appropriate or practicable to call her back to comment on the same.

3. The Evidence

Documentary evidence was produced in a bundle with papers T1-T32; A1–A155 and R1-R63, including the additional papers lodged. As the claim was being considered at the same time, we were able to refer to both bundles, where the information was relevant to the placing request. In addition to the oral and written evidence the tribunal gave full consideration to the Case Statement for the appellant and the Response for the respondent. The tribunal also had the benefit of written and oral submissions from the parties.

Oral evidence for the respondent was taken from:

Witness B, Education Manager, respondent Area.

Witness B, Head Teacher, School B.

Witness C, Acting Depute Head Teacher, School B.

Oral evidence for the appellant was taken from:

The appellant and mother of the child (accompanied by the father).

Witness D, Depute Head of Education, School A

The child did not attend during the hearing but the tribunal had the opportunity to consider a report from the Advocacy Service providing his views. The Advocacy Worker was only able to meet with the child shortly before the hearing and the report, dated December 2017, was tendered during the course of the hearing (T33-T35).

4. Findings in Fact

The Child

1. The child, is aged 9 years of age. He normally resides with his parents, the appellant and her husband. The child has a sister, who attends at a residential dance school in Glasgow, and a brother, who attends at a different school to the

child. His father is in full time employment and his mother is in part time employment, being the main carer for the child. The appellant gave evidence that recently that they had obtained an additional place of residence where she and the child's siblings now resided and that the father remained in the family home with the child.

2. The child presented with poor health around 9 weeks of age, with feeding difficulties, stomach and bowel problems and a poor immune system. He was prone to regular chest infections, breathing difficulties, unknown allergies and multiple childhood illnesses. Despite this, the child continued to meet all his milestones with no concerns other than medical. The child continues to suffer from ill health on a cyclical basis, enjoying approximately 3 months of good health followed by a dip in health, with various health issues presenting.
3. At around 11 months of age the child lost all ability to speak and began making noises instead. He was diagnosed with Autism Spectrum Disorder when aged 3 in April 2012. The child was originally enrolled at a mainstream nursery but was moved to a nursery which was able to provide specialist one to one support. He received in-house speech and language input and had support from an educational psychologist. With this support he was able to access the curriculum and his communication skills improved. The child has Additional Support Needs in terms of Section 1 of the Education (Additional Support for Learning)(Scotland) Act 2004.

Additional Support Needs

4. The child has been diagnosed with Autism Spectrum Disorder, sensory impairment, a learning disability, poor communication skills and physical disability. He has joint hypermobility and suffers from sore legs daily. He cannot always regulate his body temperature, resulting in overheating. This can impact upon his behaviour either in the form of aggression or absence seizure which manifests itself as a blank, vacant expression and failure to respond to others. The child has a tendency to overeat. The child needs frequent monitoring during the night as he has difficulty breathing on occasions, particularly during his bouts of ill health when he is unable to wake

himself and put his head in the appropriate position to clear his airways and regulate his breathing. He has been prescribed melatonin as a sleep aid and this induces heavy sleep but this can mean that he cannot rouse himself if he is sick or needs to go to the toilet. At home the appellant and her husband take turns to stay with the child until he falls asleep and they generally sleep with the child through the night.

5. A report by S, Educational Psychologist, dated May 2017 (R43-R47) identifies that The child has difficulties with change and unexpected but common challenges; difficulty responding to situations with the appropriate level of emotion; difficulty describing and labelling emotions; and difficulty with self-regulation.
6. The same report describes that the child can approach a relatively new task with appropriate levels of enthusiasm and confidence; communicate with peers with good language skills appropriately during a child guided structured task; cope well with a reasonable amount of challenge; listen to and offer opinion to peers; assert himself and seek support appropriately; cope with making a mistake with minimal reassurance; and persist with a task until completion.
7. The appellant describes the child as often being angry, physically violent, threatening and aggressive at home and in public. He often stays in his room and does not join in with the family at special occasions such as birthdays, only joining them to have something to eat.
8. CAMHS professionals have completed assessments in respect of the child's mental health and anxiety. CAMHS have concluded that the child does not have any additional support needs and his level of anxiety is typical for a child with autism.
9. The family receives respite of 4 hours per week, alternating on a Saturday and a Sunday. During respite the child is given opportunities to engage in community based activities as well as social interaction with his peers. The child has access to swimming as well as exercise in the community as part of the education curriculum. Reports from the providers of the respite advise that the child engages well with

others during his respite and that he participated well during the community based activities during their Easter programme in 2017. There were no reported incidents related to the child's behaviour involving members of the public.

10. The appellant has been offered numerous referrals and supports including those from Sleep Scotland, Early Bird and Early Bird Plus. However these have been declined by the family. In addition, they were also provided with the opportunity to work in partnership with CAMHS and Social Work Resources in relation to parenting support. The appellant attended at two sessions but failed to engage with the support fully and it was withdrawn by the CAMHS team.

History of School Placement and Placing Request

11. The child initially attended at a mainstream private nursery. However, it soon became clear that he required specialist support and was moved in January 2012 to a nursery supporting children with additional support needs. There he received input from a Speech and Language Therapist, and Educational Psychologist and an Occupational Therapist.

12. The child began attending at School B Additional Support Needs Base in 2013. (The Specified School). The appellant described positively the child's first two years at school. Primary 3 was a very different experience. The child was moved from the main building of the school to an annex and no longer had the same teacher, support staff, driver or escort, and, in her view, with little transitional support or preparation. The appellant's evidence was that the child believed that he was attending a new school. In her view the child regressed, became more introverted, his violent behaviour more pronounced and she believes that his attainment has deteriorated since then.

13. The appellant first began to consider an alternative placement for the child in 2016. She investigated two other schools, one of which was a residential school. The Appellant did not pursue placing requests to these schools as she did not feel, ultimately, that they would be suitable for the child. We did, however, have the benefit of an assessment report (A43-68) prepared in respect of an application to

one of the schools, dated December 2016, which was filled out largely based on information provided by the Appellant. An important issue raised in the report was that the proposed school identified a difficulty in supporting and promoting the child's relationships with others due to the difference in the child's academic and communication functional levels and those of his peers at the school, who were functioning at a much lower level than him. While there were pupils of a similar age, and pupils of similar abilities and skills, there were no pupils who were similar in both age and ability.

14. A formal offer of a place at School A was made by letter dated 30th March 2017. The appellant made a placing request to the respondent in April 2017 requesting that the child be placed at School A. This was formally refused by the respondent by letter dated 5th June 2017. This reference was submitted to the Additional Support Needs Tribunal for Scotland in August 2017.
15. The child has made two visits to School A, the first in March 2017 and the second on 15th November 2017. He was also observed in School B by Witness D, the Deputy Head of School A on 28th November 2017, shortly before the evidential hearing.

Exclusions from School

16. The child has been excluded from School B on three occasions. The appellant considers that these demonstrate that School B is not able to provide for the child and support her placing request.
17. The first exclusion occurred following an incident on 16th May 2017. There had been a buildup in the child's challenging behaviour since the school Easter holidays. The incident occurred when the class were walking from school to the library. Witness C was aware that the child would become upset if others were ahead of him, so she put the child at the front with her. On the way there the child kept running ahead. Witness C attempted to distract him and have him follow instructions but this did not work. Witness C decided that it would not be safe for him to walk back and arrangements were made for a car to come and collect him.

18. Witness B and another adult, Adult A, took the child back to school in the car, along with another child from his group. In the car the child was agitated and was whispering rude comments to Adult A, saying "shut up" and "poo poo face". They arrived back at school and the child was taken into a separate room from his classroom. At break time he went into the playground for playtime. The child was shouting at another boy who was in the train area. The other children were removed from the train area and taken inside. The child was outside with Witness B and Adult A and was shouting at Adult A, using similar language to before. The child then pushed Adult A twice. The child was asked not to hit her but then proceeded to punch Adult A on the back and to slap her arm. Witness B then spoke with the child to tell him to stop but the child continued to chase Adult A and to hit her on the back. Adult A went into the school to get away from the situation and the child began hitting Witness B. Witness C at this point went into the playground to assist Witness B.
19. Attempts were made to calm the child using the MAPA (Management of Actual or Potential Aggression) and de-escalations techniques but were unsuccessful. Father was called to come to the school. At that time, he advised that the appellant was away on holiday in Dubai. The school had not been made aware of this change in the child's home situation prior to this. The child refused to go home with Father and stayed in school until the end of the day.
20. The reason stated for the use of exclusion on this occasion was the buildup of his behaviour and the violence towards adults. An example of the previous behaviour included an incident on 9th May 2017 when the child had been annoying other children in the class. When asked to stop, he started showing anxiety by kicking chairs. The other children were removed from the class. The child was offered "time out" but refused. He started using threatening behaviour then threw a chair which hit the Support Assistant on the hand. In the report of the incident (RB37-40) the cause of the incident was noted as "the child has been told by mum that he is leaving the school". The report by S, Educational Psychologist, who had observed the child in the playground earlier in May, noted staff reported a deterioration in the

child's behaviour for the previous four or five weeks, with management staff being called for most days. Behaviours included throwing a chair and using chairs to block doors to prevent staff from entering. However, on these occasions staff were able to diffuse the situation and the child was able to continue with his work.

21. The second exclusion occurred following an incident on 6th June 2017 at around 2.45pm when the child was reported to be upset. Shortly before, the child had chosen to play tennis as his reward activity. He became upset that there was another pupil there as he only wanted it to be his teacher, Witness C, and him. Despite attempts to resolve matters, the child began to get upset and ran back to the class. Witness C followed him to the class, the other children having been sent to a different room.
22. The child started picking up chairs and throwing them at Witness C. Witness C went behind the door where she could still see the child but wouldn't get hurt. Witness B arrived at this point and the child started shouting at her. The child started upsetting tables and throwing chairs at Witness B and shouting at her "I hate you, you are making me move school", "You know at the end of this term I am going to a different school", "You have ruined my life. I am getting a message on Friday [9th June]. You are making me move." At this point the taxi escort arrived at the classroom. The child saw her and ran out of the room with his schoolbag and went home in the school taxi. The appellant was telephoned to advise of the incident and the exclusion paperwork was posted through the letterbox of the family home. At this point the school was aware that a placing request had been made but was not aware if a decision had been made.
23. The reason given for the use of exclusion was again that there had been a period of unsettled behaviour, including various comments about not wanting to leave the school, and the violence towards the staff. It was also felt that the issue leading to the behaviour was one that was outwith their control to resolve. After his return to school on 12th June 2017 the child's behaviour was much better and he was able to chat with staff and to take part in events such as watching sports day. By this time

the appellant had received the letter from the respondent refusing the placing request.

24. The third exclusion occurred following an incident on 29th November 2017. On 13th November 2017 the appellant sent a note to school advising that the child would not be at school the next day as he was going to visit School A. Following this the child appeared to revert to the unsettled behaviour that he had exhibited in June 2017, in particular, he was taking himself out of class, refusing to participate in class and throwing things around. The child was described as "having a worry". Sometimes he would not want to talk about it, other times he referred to leaving School B.
25. At around 10.40am on 29th November the child was upset and did not want to go into his classroom. He ran off and went into another nearby empty classroom. The door of the classroom was locked by the child. Witness C was able to unlock it from outside and as she started to open it the child came running to the door and slammed it. The door hit Witness C on the head. Witness C did not believe that the child intended that she should get hurt. Witness B arrived and sent Witness C to get first aid. She required to apply an ice pack.
26. Witness B asked another member of staff to watch the child through the window to ensure his safety. Witness B attempted to engage the child in conversation using MAPA and de-escalation tactics. The child threw a chair and then a shoe at Witness B. The child shouted at Witness B "I hate you, you don't want me here". Witness B watched from a safe distance and the child began to calm down. He was offered a snack or toast but refused both. The child then chose to lock the door of the room and sat in the room quietly.
27. The appellant was called and arrived. The door was unlocked from the outside using the staff access key. The child attempted to stop the appellant from entering the room but she was able to push her way in. The appellant began to massage the child's back and legs. The child did not wish to go home. The child was upset that he would not be in school. After a while the child calmed and agreed to leave the school with the appellant.

28. The reason stated for the use of exclusion was that the child had become very upset, had been taking himself out of class and his use of violence towards staff, as well as concerns for his safety. In the report of the incident (RB42-45) Witness B carried out the follow up and noted that "over the last 3 weeks since visiting School A the child has become very angry. He states he wishes to stay at GPS and is upset due to visits and visits by professionals to the home and school."

School B – Specified School

29. School B is a non-denominational, co-educational school of approximately 323 pupils between the ages of 5-12 years. School B is under the control of the respondent. At present (session 2016/2017) there are 11 mainstream classes, 7 supported classes and a Nursery Class which can cater for 100 children. They have approximately 80 children (40 am & 40 pm) aged 3-5 years.

30. School B has seven supported classes for children with additional support needs who require small group and individual teaching. The classes are divided into pupils with ASD (communication difficulties) and ASN. The child is in the supported ASD class. While he has autism, he is able to work at a cognitive level which allows him to work close to his age appropriate level. Those in the ASN supported classes have moderate learning difficulties and tend to work to a much lower level of attainment.

31. Integration with mainstream classes is planned and managed individually and as a group for appropriate curricular areas. There are also opportunities for supported social integration during assemblies, social activities, mealtimes and educational visits. While some of the children in his class are unable to participate in the school Assembly, the child does.

32. The report by S, Educational Psychologist, after observations of the child in school, states that the child benefits from being educated alongside his peers with similar needs in terms of academic and language skills.

33. The child is presently in primary 5. He is in a class of 6 children and that class has one teacher and two support assistants. At the time of placing the child within the class, consideration was given to the mix of pupils, their needs and how the pupils within the class would best be supported. The pupils in the child's class range from primary 3 to primary 5 stages. The child enjoys having an element of control within the classroom and enjoys being with those he perceives to be less able than himself.

34. The child has an Additional Support Plan and an Individualised Education Plan. School B have put a number of strategies in place to support the child. The child is brought into school in the mornings and escorted out to the taxi and accompanied by a support worker going home. The staff take account of his demeanor and mood each day, and things like whether he has had a good night's sleep. In the classroom the child is supported by his teacher and support worker. There may be days when a particular person may act as a trigger for heightened behaviours in which case, another member of staff will take over. He is supported in the playground at break and lunchtime with a strategy having been put in place whereby the child is able to choose a game and a group of children to join in the structured game, such as hide and seek, with adult support. The child is allowed to leave the room, accompanied by an adult, if he needs to have time out. Staff are trained in de-escalation techniques and are trained in MAPA (Management of Actual or Potential Aggression). Strategies are adapted where these are identified as having a benefit, such as allowing the child to earn Golden Time but not to lose it as this was causing him upset.

35. The child is presently progressing with his educational attainment although he is slightly behind the national average for his age. He is working at the level of a child one year younger than him. He enjoys some subjects more than others and is provided with extra support for those he enjoys less. He is given opportunities for inclusion during music and P.E.

School A – Requested School

36. School A is an independent, non-denominational school for children and young people with moderate, severe and complex learning and behavioural needs and who all have learning difficulties. Many may also have a history of disrupted and fractured education and therefore arrive at the school with significant learning, behavioural and social needs. Pupils are aged between 5 and 18 years. School A intends to extend this to offer places up to 21 years of age. It provides care and education for 28 residential pupils and 10 day pupils through a curative education approach.
37. Every pupil is admitted with the understanding that the first three months are seen as a trial and assessment period. Pupils stay in one of the five houses, supported by a house co-ordinator and, where necessary, night waking staff. All meals are taken in the houses and the dining room in the houses form a hub where pupils and staff gather for meals and conversation. Established routines and rhythms help pupils to feel safe and relaxed. Everyone in the house plays a part in ensuring that domestic tasks are carried out. Each child has their own room and there are communal rooms where pupils can either come together or spend time on their own.
38. Pupils have access to extensive grounds for taking walks, cycling, playing in the playgrounds and planting and growing. Access to the grounds is part of the strategy for accessing the curriculum for pupils who find a classroom environment difficult.
39. Day to day management is the responsibility of four joint co-ordinators who, along with other experienced and permanent co-workers whose home is the school, form the core group members. Other co-workers, many from overseas, spend a year or more at School A, assisting with care and education. There is also a small number of paid care staff and ancillary workers. School A ensured that appropriate recruitment and induction arrangements were in place for all staff and volunteers. All staff are registered with the Scottish Social Services Council (SSSC). Most staff

hold appropriate qualifications. A small number of staff have conditions on their registration with SSSC to attain appropriate qualifications for full registration.

40. Staff have carried out core training such as child protection and MAPA which they use in their work with pupils to keep them safe.

41. A Care Inspectorate Report completed in January 2017 gave gradings of between 5 (Very good) and 6 (Excellent) for Care and Support, Environment, Staffing and Management and Leadership. There were only a few recommendations, including having a procedure to review the children's risk assessments following upon any incidents.

42. Pupils are kept under constant review and assessment of their progress is undertaken in a number of ways:

- Post Placement Review and initial Care and Education Plan in the first 8 weeks after admission.
- Daily feedback/review. Pupil self-assessment and teacher feedback.
- Weekly reports.
- Care and Education Plans.
- Terms SMART aims for both house and class.
- Recording of achievements.
- 6 monthly reviews.
- Annual school reports.
- Working towards qualifications
- Parents are invited to attend at reviews for children and young people and there is direct communication between the school and parents by way of telephone calls and emails.

43. In the school setting each class is led by a teacher, supported by support staff. The pupil staff ratio is either 2:1 or 1:1, depending upon the needs of the children in the class. All teachers address the Professional Standards as defined by the GTCS. The curriculum at School A follow the principles of Curriculum for Excellence and

GIRFEC. Literacy, Numeracy and Wellbeing are the core elements of the curriculum and pupils are supported in these areas through highly personalised learning programmes which optimise opportunities for individuals as well as group activities. All pupils, regardless of age, are initially provided with a broad general education encompassing both formal and informal learning with a wide range of activities and experiences designed to build self-confidence and self-esteem. The Senior Phase usually begins at the end of S3, although this can be delayed for some pupils if felt appropriate. The senior phase is characterised by a focus on achievement and attainment, which describes an individual's progress through successes, awards and qualifications. When the pupil reaches the age of 16 the school work with parents and local authorities to plan and implement and review agreed learning aims over the course of the senior phase. The curriculum then offers opportunities to undertake ASDAN courses in collaboration with the Dynamic Youth Award (DYA) and Scottish Qualifications National 1 to National 5 in partnership with the Community School of Auchterarder. School A also has links to local High Schools and Perth College where pupils can experience other learning opportunities.

44. School A has a full time Speech and Language Therapist who sees pupils on a weekly basis and contributes to their ongoing planning and assessment of progress. School A also offers a range of therapies which focus on physical, emotional or social aspects of the pupil's profile.

45. Each pupil has an individualised Care and Education Plan which reflects:

- An overview of their complex additional support needs.
- The long term aims.
- An Achievement Model which is informed by the 4 capacities in CfE and SHANARRI indicators.
- Smart Aims – with a strong focus on Literacy, Numeracy and Health & Wellbeing within a Broad General Education or the Senior phase, as appropriate to the pupil.
- Qualification Planner and Qualifications achieved.

- Individualised Behaviour Intervention Plan which outlines behaviours to be addressed.
- Triggers to behaviours
- Intervention Strategies.

And an Individualised Risk Assessment to address any safeguarding concerns.

46. It is rare for the pupils at School A to attain National 4s and 5s as their focus is largely on the broader curriculum of life skills and increasing independence. There is no teacher at School A with secondary school experience or experience in offering higher grade teaching. There is one teacher in the school who is in touch with a local school in order to prepare himself and a senior pupil to do one Higher course.
47. The appellant has taken the child to School A on two occasions. The appellant stated that she had not told the child why he was going. "We shared nothing with the child about the fact that we feel that we want him to go somewhere else. We said we would like to take you to another school, just to look at it. We never made more of it than that."
48. During the first visit in March 2017 the child was shown around the campus by Witness D but did not get to meet any of the other pupils. This was a short visit and the child was described as being comfortable and interested in learning about the school. The child was shown round the campus and was told that some children stay there, but was not shown into the residential blocks. No connection was made for the child between being shown around the school and the possibility that he might be going to stay there. The second visit in November 2017 was specifically for the child to come into the classroom while the other pupils were working. He spent approximately an hour in the class looking at what the pupils were working on and Witness D spoke with him about school and what he was interested in. He didn't show much interest in what the other children were working on but did interact with the other children when they started to ask him questions. He particularly enjoyed meeting Witness D's dogs, who were in the classroom.

49. Witness D observed the child at School B on one occasion. The child was aware that she was coming and had told his fellow pupils about her visit. He didn't ask her why she was there. She observed that the child was very integrated in his group and enjoyed playing hide and seek outside. When it was time to come in he became disengaged and wouldn't come into the classroom. Witness D identified that he struggled with the transition from the playground to the classroom. When he eventually did choose to come back into the classroom Witness D was asked to leave.

50. If the child were to attend at School A then Witness D has identified a class that she believes would be suitable for the child. It has 6 pupils aged 9 to 13 years of age. Witness D teaches this class herself, along with an assistant teacher. She has a lot of "talkers" in that class. While the child's communication skills are greater than the other pupils, the child would benefit from being "king pin" and could help carry the other pupils and to be part of the school life. Witness D considers that the child would sit in the middle of this class in terms of maturity and ability. By this, she explained that she meant that he would be above the rest of the class in terms of his language skills and academic ability but in the middle of the class in terms of his emotional maturity and behaviour.

51. If it became evident that the child wasn't settling into this class, then he could be moved to another class but the class of pupils close to his age would be less suitable as the children have more complex additional support needs. The next class up has older children aged 12 to 16 years of age and would be more challenging.

Cost to the Respondent of School B

52. The additional cost to the respondent of providing for the child's additional support needs within School B are nil. No additional staffing or accommodation would be required as the child's needs would be met from within the resources of the school.

53. We were not provided with any details of the respondent's education budget to allow us to put any respective costs into context of the overall education spending.

Cost to the respondent of School A

54. School A has two flat rates of fees – one for day pupils and one for residential pupils. The school does not charge extra for pupils who require a higher level of support, such as waking night staff and costs involving supporting those with high levels of challenging behaviour. Instead, the costs are averaged out. Similarly, the costs for educational and social trips, including the annual outward bound week, are included in the weekly fee. For weekly residential pupils the cost per pupil is £2,276 per week for the school year 2017/2018 and £2,480 per week for the school year 2018/2019. School A operates a 38 week/4 term school year. Accordingly, the cost to the respondent of placing the child at School A on a residential basis, Monday to Friday, is approximately £86,488 (to be apportioned for the balance of the school year 2017/2018) and £94,240 in 2018/2019. We were not provided with the cost of transport to and from the school each weekend.

Availability of a place at School A

55. If the placing request is granted, the requested school, School A, would be able to offer a residential place to the child. A place would be available for the child to start at School A after Christmas 2017. There would be an initial settling period, although Witness D considered that this was likely to be short and that the child would be staying for the whole week soon after attending. Support would be available for the transition between home and school, with lots of parental contact to assist in settling in.

Views of the Parents

56. The appellant and her husband had very helpfully prepared written summaries of their position and the appellant gave evidence to supplement the same. In the written summary we were given a history of the child's development, his needs and his journey through school.

57. The issue that came through most clearly from the appellant was the difficulty that they have experienced with the child at home. While describing the child as a bright little boy who is sociable and funny, with a great sense of humour, the appellant also describes him as very angry and violent, especially towards his brother, who is close in age, and to herself, his primary caregiver. She describes that his inability to regulate his emotions have resulted in “violent, unpredictable outbursts which result in family, friends and the general public or staff working with him at risk of being subjected to serious physical and verbal abuse or attacks which has led to myself having a mental health breakdown, my other son being taken to hospital, an attempt to kill our puppy, my daughter and husband attacked, scissors and knives held in anger with an express to kill and on occasions chasing our other children or ourselves to try to hurt”. (T21)

58. The appellant goes onto express her view of how the child’s behaviour has affected the whole family. “We can no longer function as a family unit, we are emotionally and physically exhausted and receive no appropriate respite to allow us to repair ourselves, emotionally and physically, damage to our home etc and both myself and my husband and my other children are constantly denied the privilege of resting in our own home, nobody can visit us without witnessing or being subjected to an altercation, no friends of my son (L) can visit to play unless meticulously planned, no friends of my daughter can visit for fear of him attacking her while her friends are here.” “These can be due to him [the child] being unable to control his anger or whether he is retaliating due to resisting having his teeth brushed, bath, hair washed etc..” “We cannot enjoy a family at the dinner table, we all retreat into different rooms to seek peace and quiet from the attacks throughout the day, it is wrong and not how we wish our children to be raised.”(A31).

59. The appellant spoke of having to supervise the child when playing with his brother and to limit their time in order to reduce the risk of injury. The appellant also spoke of the child not being able to access community activities, although it seems that horse riding and swimming are available for him. It appears that the reluctance on the part of the appellant to take advantage of these arise from her concerns about

his behaviour and inability to regulate himself while taking part. The family do, however, seem to be able to access some community activities and the appellant was keen to let us see a picture of the child, smiling and happy, with his family at a football match.

60. The family have respite for 4 hours each week, alternating on a Saturday and Sunday. They do not have overnight respite. The appellant stated that the reason for this was because the school were not being truthful with the Social Work Department regarding the level of the child's violent behaviour. She was of the view that if the school had advised the Social Work Department of the high level of violence, then she would be more likely to be able to access overnight respite packages. The appellant spoke of having to "cram in" activities such as a visit to the shops or to visit gran with her other children during the 4 hours that the child was at respite. If the child is sent away to a residential school, then the family would get to experience a normal family life. The appellant also stated that following an attack by the child on her daughter, she saw this as "the final straw" and "if Social Work can't protect me, I have to do something to protect my family".
61. The appellant described an occasion when the family had arranged a long weekend trip to London. The child didn't want to go as he knew that it would be busy and there would be a lot of walking. They were able to arrange for a childminder, who was known to the child and had cared for him before to stay with the child overnight in their home while they were away.
62. When asked about the fact that the placement being sought by her is a residential one, the appellant stated that, in her view, the child does not care who is meeting his needs, so long as his needs are being met. The Appellant advised that since she and the child's siblings have moved out of the family home he has not asked for her.
63. With regard to School B, the appellant on the one hand complains about the school excluding the child from the school following certain behaviour, but also complains

that the school minimises other behaviour which, in her view, is equally violent. She did not appear to accept that the child enjoyed school, stating that the only part that he enjoyed was in the playground and meeting two fellow pupils. The appellant is of the view that since the disruption in Primary 3 the child has regressed and that he has “outgrown the resources at School B”.

64. The appellant described the benefits of attending at School A as-

- An opportunity for him to access the community.
- To learn skills that he can transfer from school to home.
- To transfer skills learned to his own family and to understand family life.
- To experience the whole of life and to grow up with skills to be more independent, rather than the solitary life that he presently leads at home.
- To access specialists who can support his emotional needs and reduce his anxieties.

Views of the Child

65. The child’s direct views were provided through an independent advocate. The child was asked what he liked or did not like about his current school, School B. He responded “I can’t remember” “It’s an ok school”. He waved his thumb in the middle to indicate that it was ok. He was asked a few times in different ways what he liked and did not like but did not want to add anything more.

66. When asked about School A, he said that he had gone to see it and that his mum had shown him it on the computer. At first he said that he couldn’t remember what he liked and didn’t like about the school. After a few more questions the child gave the school a thumbs down. When asked why he said “You have to use coins to get snacks there”. (The appellant later explained in her evidence that at School B they didn’t use coins to pay for snacks and lunch so the child hadn’t appreciated that these had to be paid for by his parents).

67. The child also stated:

“there was lots of trees and I don’t like when there are lots of different trees”

“there were little houses, I didn’t like that”

When asked if the little houses were where people stayed over, he said that he didn’t know and when asked if people slept over at the school, he said no.

When asked if he wanted to go to School A, the child shook his head to indicate no.

When asked why he replied “I don’t like it and I won’t see my friends.” When asked if there were any other reasons he didn’t want to go he replied “miss my friends, I promised my friend that I would go to the same school as him and I can’t if I go there”. When asked if he meant go to a high school, the child said yes.

68. The child was asked questions which were relevant to the disability discrimination claim but his responses were also relevant to this Reference. That claim relates to being excluded from school as a result of certain behaviour. When asked how he felt about that his response included “I was unhappy”, “I wanted to go back to school to my friends”.

69. The tribunal also had the benefit of hearing evidence, although led more in relation to the conjoined Claim, of incidents at the school which were of relevance to the issue of the placing request.

70. An incident occurred on 31st May 2017 within the school when the child was upset in class. He lay down on the floor initially, shouting and making comments to the teacher. He then began to cry and started talking about his feelings. He talked, amongst other things, about moving to a new school and that his mum had told him that if he mentioned that he didn’t want to move school again she would remove his Xbox. This account in the school records was not challenged by the appellant and when asked about it, she stated that she didn’t know anything about it. There was further evidence led that the child continued to express unhappiness at School B and that the reason was that he thought that the school didn’t want him anymore and that he was being sent away to another school and that he didn’t want to go.

5. Reasons for the Decision

71. The tribunal found the witnesses to be largely credible and reliable and their evidence extremely helpful. We considered all of the evidence and we were satisfied that there was sufficient evidence available for the tribunal to reach a decision on the reference.

72. Firstly, the Tribunal considered the statutory provisions of the Act relevant to this Reference.

Section 19(5) of the Act provides:

"Where the reference relates to a decision referred to in subsection (3)(e) of that section, the 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
- (b) overturn the decision and require the education authority to –
 - (i) place the child or young person in the school specified in the placing request to which the decision related, and
 - (ii) make such amendments to the co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require..."

Paragraph 2(2) of Schedule 2 of the Act provides:

"Where the parent of a child having additional support needs makes a request to the education authority for the area to which the child belongs to place the child in the school specified in the request, not being a public school but being –

- (a) a special school the managers of which are willing to admit the child...it is the duty of the authority, subject to paragraph 3, to meet the fees and other necessary costs of the child's attendance at the specified school."

Paragraph 3(1) of Schedule 2 of the Act provides that this duty does not apply in certain circumstances. Those being relied upon by the respondent in terms of their

letter refusing the placing request, (T12) relies on the following sub paragraphs of that section, namely:

- 3(1)(a) if placing the child in the specified school would-
- (iii) be seriously detrimental to the continuity of the child's education.
- 3(1)(b) if the education normally provided at the specified school is not suited to the age, ability or aptitude of the child; and
- 3(1)(f) if all the following conditions apply, namely –
 - (i) the specified school is not a public school;
 - (ii) the authority are able to make provision for the additional support needs of the child in a school (whether or not under their management) other than the specified school;
 - (iii) it is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified special school and in the school referred to in paragraph (ii), to place the child in the specified school, and
 - (iv) the authority have offered to place the child in the school referred to in paragraph (ii).

73. In the circumstances of this case, in terms of paragraph 2(2) set out above, the respondent is required to meet the fees and other necessary costs of the child's attendance at the Requested School unless one of the circumstances in paragraph 3(f) is established.

74. There is a two-stage test in terms of section 19(5)(a) as set out above: Firstly the tribunal requires to determine if the respondent has established one or more of the circumstances in paragraph 3(1) or (3); Secondly the tribunal has to consider whether in all the circumstances it is appropriate to confirm the decision of the respondent.

75. Para 3(1) (f) (i) and (iv) are not in dispute. School A is not a public school. The managers of that school are willing to admit the child as a pupil there and the

respondent have offered to place the child in School B being an education provision under their management.

76. Accordingly, in order to refuse the decision of the respondent, we have to be satisfied that-

1. Placing the child in School A would not be seriously detrimental to the continuity of his education; or
2. The education provided at School A is suited to his age, ability or aptitude; or
3. The respondent are not able to make provision for the child's additional support needs in School B; or
4. that it is reasonable, having regard to both the respective suitability and the respective cost to the respondent of the schools, to place the child in School A.

If we are not satisfied on any or all of these grounds, then we require to uphold the decision of the respondent.

77. We are satisfied from the evidence that the respondent has a good understanding of the child's additional support needs and are able to support him and provide for his educational needs. Whilst the description of the child having a bad primary 3 was not challenged by the respondent, it would appear that the child has been able to progress educationally and socially in School B. The child is integrated into the class and describes as having friends there. His peers are appropriate to him in terms of ability and communication skills. As a child with autism, he does exhibit challenging behaviours at school but the teachers and staff are able to make adaptations to support the child receives in the classroom and during lunch and breaks. This is evidenced by such things like the use of a communication book between school and home; letting him choose games to play at break time and pupils to play with in structured and supervised games; allowing him to play with a teacher instead of pupils if he wanted; appropriate use of MAPA and de-escalation techniques; providing a space that he can go to if he needs to leave the classroom for a while; the recognition that the loss of Golden Time was distressing to him and the willingness to adapt this system so that this trigger was avoided; judging his mood and changing staff if one particular teacher is identified as being a trigger on that day.

78. They also recognise his individual needs and wishes – such as not liking others to be ahead of him when walking in a group and also liking to be in control in a class with his peers. They show a willingness to constantly review and adapt as the child's needs evolve.
79. The report from the educational psychologist confirms that the school was coping well with matters within their control, responding appropriately and trying different tactics in response to the child's needs. The report does go on to state that the school clearly cannot be in control of the child's home situation and it will be important for the child for all of the adults in his life to communicate and to work together. If the current situation escalates or does not improve and support strategies fail to make a positive difference, then this placement may need to be reviewed. We take from this that it is the child's home environment which is where input is required rather than any failing of the school to provide for his education. The tribunal considered the evidence before it of the ability of the respondent to make provision for the child's additional support needs in School B, and concluded that we were satisfied that they could. Para 3(1)(f)(ii) accordingly is satisfied.
80. We then considered if we were satisfied that School A could offer a suitable provision for the child or whether placing him there would be seriously detrimental to the continuity of his education. The respondent did not lead any evidence that attending at School A would be seriously detrimental to the continuity of his education. Accordingly, we do not make a finding that this ground of refusal applies.
81. We considered whether the education provided at School A would be suited to the child's age, ability or aptitude. We do not accept the appellant's position that all three require to be satisfied and that the phrase "age, ability or aptitude" should be read conjunctively. If this were the case, then the "or" would be an "and". It is not unusual for classes with children with ASN to have a mixture of age and ability and aptitude. The child's class at School B has pupils who range from primary 3 to 5 in

ability. The important thing is the balance between these so that there is no great disparity between the pupils in that class.

82. The view of the appellant is that School A would be able to provide the child with life skills that would make him more independent and able to access the community. She also believes that it would give the child access to specialists who would support his emotional needs, regulate his behaviour and then the child could transfer those skills from school to his home life. Her position that his educational attainment has deteriorated since primary 3 does not appear to be borne out as the child is achieving academically and socially at School B. We require to be satisfied regarding his access to education. While we are entitled to consider the supports required to meet this in a wide sense, and are not restricted to considering only what goes on in the classroom, we do require to focus on the access to education. If the educational provision at the two schools were similar, then the fact that School A also offers support in achieving independence and life skills could be taken into account when considering the respective suitability and costs of the schools. However, we do not consider that the education provision for the child at the two schools is similarly suitable.
83. The Deputy Head of School A, Witness D, advised that she was confident that they would be able to differentiate the curriculum for the child from the rest of the class and that they would be able to assist him in achieving. However, we take into account the fact that in the class identified for him the child would be far more able in terms of his communication skills and educational attainment. We also note that the number of pupils from School A who go on to further education, achieve higher awards or placements at further educational establishments is very low. This is likely to be more of a reflection of the higher level of needs of the pupils and the curricular focus rather than any criticism of the teaching within the school. As the child is academically able, we are not satisfied that there would be sufficient focus on this as the school does not start to focus on academic achievements until the senior phase at the end of S3.

84. Witness A had a good knowledge of both School B and School A. He has been involved in decisions to place other children at School A where he considered that their level of needs was such that this was the correct placement for them. He described that at School A, the school provides a therapeutic environment for children with complex needs, including severe extreme sensory issues; very rigid in their routines; limited or no language skills; and where a mainstream environment is very difficult for them to cope with. Witness D accepted this as a valid observation. While School A does cater for children with less complex autism, at present the pupils who are there do all have greater additional support needs than the child.

85. We share Witness A's concerns that the other children would not provide suitable peers or role models for the child. A previous placement had already been rejected because it could not offer pupils of a similar age, ability or skills. If placed at School A, the child would be one of the most, if not the most cognitively able pupil at the school. While the child likes to be with others who he feels are less able than himself, the view of the educational psychologist is that he benefits from being educated alongside peers with similar needs in terms of academic and language skills.

86. The report by the educational psychologist describes that the child is achieving at just below the national average for his age. He is currently in a small class with peers academically similar to himself. However, whilst School A would be able to offer a similar class size, the cohort that the child would find himself with would be at a much lower level of attainment than himself. The child would not only require to follow a completely different curriculum to the rest of the class, he would be so far ahead in terms of his abilities in communication and academic ability that there would be a risk that his educational achievements could be limited

87. For all of these reasons we do not consider that the education at School A is suited to the child's ability or aptitude.

88. The next issue for the tribunal was, in terms of paragraph 3(1)(f)(iii), to consider whether or not it is reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in School B and in School A.

Respective Suitability and Respective Costs

89. With regard to the respective costs, it is clear that there would be a substantial additional cost each year to the respondent if the child were to attend at School A. We were not provided with details of the respondent's education budget to allow the figures to be put into context. As we have held that section 3(1)(f)(ii) has been satisfied, we do not require to make a determination about the cost. However, it may be noted the respondent's position was that they had already placed other children at School A when they considered it appropriate to do so and that cost was not a factor in their decision to refuse the placing request for the child. We can, however, still take a view that, regardless of the impact on the education budget, the cost of a residential placement of £94,240 per year is a substantial commitment.

90. With regard to respective suitability, the Case Statement for the appellant proposes that School B is not suitable for the child as evidenced by two exclusions (three at the date of the hearing). However, we do not accept that this is the case. Each incident of heightened behaviour followed closely in time events relating to the issue of whether the child would be moving school – the first visit to the school in March was followed by a period of increasingly unsettled behaviour culminating in the incident on 6th May; the second incident occurred around the time when the family were expecting the respondent's decision on the placing request; and the third incident occurred shortly prior to the hearing when the child again visited the school and would have been aware of the impending hearing either from his parents or from the visit to the school of Witness D, Deputy Head of School A. The teachers at School B were clear in their view that the child was unsettled and upset at the thought of leaving School B and we find that this is supported by the child's own views to the Advocacy Worker. The issue of whether the child will be leaving the

school or not was not something within the control of the school and accordingly not something that they could resolve for the child.

91. The tribunal considers that having reached the conclusion that School A would not be suitable for the child and taking into account that there would be a significant cost to be incurred by the respondent in placing the child in School A, we conclude that it would not be reasonable to place the child there.
92. We then go on to consider the second stage of the test set out in section 19(5)(a) of the Act, namely if, in all the circumstances, the decision of the respondent to refuse the placing request is reasonable. The decision of the tribunal is that the decision of the respondent is reasonable for all of the reasons stated above. In addition, we had regard to the child's own views on the matter. While the child is not of an age where his views are determinative, he has made a clear expression of wanting to remain at School B and reacted negatively, with cogent reasons, against the suggestion that he attend at School A instead.
93. The witnesses for the respondent were clear in their view that the child's heightened disruptive behaviour exhibited in the periods up to his exclusions were directly related to his worry that he was not wanted at School B and that he would be leaving to go to another school.
94. The appellant's position was that she and her husband had not spoken with the child about the possibility of attending at School A. This seemed incredible, having regard to the fact that they had taken him out of his usual routine, out of school and to School A on two separate occasions. We also had the child's evidence that his mother had shown him the school on the computer. The appellant stated that they had told him that they were taking him to visit a school without telling him why they were going there. This, again, seemed less than credible when dealing with a child with autism being taken out of his normal routine. The child is described as a bright boy and it would not be difficult for him to come to his own conclusion as to why he was visiting another school. If it is true that the appellant and her husband did not

tell the child the purpose of his visit to the school, even on the second visit, this would indicate that they perhaps anticipated his reaction would be a negative one.

95. When the child's views were put to the appellant, particularly the part where he did not want to go to School A, the appellant's response was that any child would be hesitant about the prospect of changing schools and minimised the value to the child of his friends at School B, asserting that it is more about 'I need **a** friend' than a particular friend.
96. If the decision of the tribunal were to overturn the decision of the respondent and uphold the placing request, this would result in removing a child from his home and his family and placing him in a residential school in a place which he has stated that he doesn't like and doesn't want to go. Having regard to the fact that the child has not yet spent a night away from his own home, even for respite, it is concerning that the appellant has not spoken with the child about the school and particularly that it would be a residential placement. It is stated by the appellant that the child reacted negatively in Primary 3 when he thought that he was attending at a new school but there appears to be little thought given by the appellant as to how he would react to not only moving to a new school but also living away from home. When the appellant was asked to comment on the child's views, she responded that with the right supports he would thrive and that she and her husband wanted the best for him.
97. It is clear to the tribunal that the child feels secure at home, despite his challenging behaviour towards his family. He has not spent any time away from home, although the appellant has stated that the child is angry that he does not go for overnight respite like other children. School A have the facility to offer waking night staff but we were not given information that they had discussed with the appellant how they would deal with the issue of the child's breathing difficulties at night and the fact that he is used to sleeping with his mother or father each night. We accept that School A will have experience in settling children into the new environment and such issues could be overcome. However, we also have regard to the feelings of rejection that

the child has expressed over thoughts of leaving School B. To be sent away not only to another school when he doesn't want to go, and at the same time to be sent away from his home and his family is, in our view, likely to lead to even greater feelings of rejection.

Conclusion

98. We consider School A is not suitable having regard to the child's ability and aptitude and that School B is. Having regard to the respective suitability and cost of the two schools, School B is the more suitable of the two schools for the child. Accordingly we confirm the decision of the respondent to refuse the placing request, in terms of section 19(4A)(a) of the Act, being (firstly) satisfied that one or more grounds of the refusal specified in paragraph 3(1) of Schedule 2 of the Act exists, and (secondly) that in all the circumstances it is appropriate to do so.

99. We heard clearly that the appellant's home life is extremely difficult as a result of the child's behaviour. However, our remit is to make a decision regarding the child's access to education and we are satisfied that, in this regard School B is supporting him and that he is progressing academically and socially. While we cannot make any order in respect of provision of additional support outside of education, we would strongly encourage the respondent to work with the social work department to explore if additional respite resources are available for the appellant and her family. We note that supports have been offered to the respondent and been rejected and we would similarly encourage the respondent to revisit these offers of support in order to support the whole family.

100. **For all of the stated reasons, the appeal is refused.**