

## DECISION OF THE TRIBUNAL

### **1. Reference.**

By application dated August 2016 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 Authority (“the Authority”).

The reference is in respect of the decision dated July 2016 whereby the Authority refused a placing request made by the Appellant under paragraph 1 of Schedule 2 of the Act, for the child, The Child, to attend the requested school, School A (“SCHOOL A”).

### **2. The Decision.**

The Tribunal confirm the decision of the Authority 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.

### **3. Preliminary Issues**

Conference calls were held between December 2016 and April 2017. Further documentation was lodged, including the Letter of Offer of a Place at SCHOOL A and information regarding the school (A57–A132). It is noted that while this information has been made available no formal assessment of The Child by SCHOOL A has been lodged. The explanation was given that an assessment had been carried out but the person who had done this had left the school and an updated assessment would be required. However, The Child failed to return to SCHOOL A to allow this to happen.

During this period The Child was engaging with CAMHS and Independent advocacy. It was stated that it would be difficult for The Child to attend at the hearing to give her views as she was finding it difficult to engage with others and it was agreed that Independent advocacy would be asked to present her views.

Further documents were lodged by the parties shortly prior to the hearing. At the final conference call on April 2017 Respondent representative advised that she was due to attend at a meeting with the Authority to put forward a proposal that The Child attend SCHOOL A for a trial period of six weeks to gauge whether or not she would attend and engage with them.

At the commencement of the hearing the Authority requested that an additional witness be heard – namely Education Manager. They advised that they had new information regarding the placing of pupils at SCHOOL A due to recent events and lack of communication between SCHOOL A and the Authority. This was allowed on the basis that, if required, the Respondent was allowed time to consider the information and prepare cross-examination.

During the course of the hearing the Tribunal was advised by the Respondents that there was now a formal diagnosis of ASD for The Child and a report by a Speech and Language Therapist was allowed to be lodged (A141-A143).

#### **4. The Evidence**

Documentary evidence was produced in a bundle with papers T1-T40; A1–A140 and R1-R83. During the course of the hearing an additional document was produced. This was admitted and marked A141-A143. 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 Authority. The Tribunal also had the benefit of full written submissions from the parties.

Oral evidence for the Respondents was taken from:

Witness A

Witness B

Witness C

Oral evidence for the appellant was taken from:

the Appellant,

Witness D

Witness E

The Child did not attend during the hearing but the Tribunal had the opportunity to consider a report from the Advocacy Service providing her views.

## **5. Findings in Fact**

1. The parties helpfully prepared and lodged a Minute of Agreed Facts. The Tribunal also makes the following findings in fact:-

### **The Child**

2. The Child, is aged 15 years of age. She was born 6 weeks premature and was addicted to methadone and heroin due to her biological mother's drug misuse during pregnancy. She was placed with, and subsequently adopted by the Appellant and her husband and continues to reside with them, along with her two siblings.

### **Additional Support Needs**

3. The Child underwent a cognitive assessment by Doctor, Clinical Associate of Applied Psychology in February 2016 and we had the benefit of Doctor A' report (T21-T27). This report narrated that The Child's cognitive abilities fall within the low-average borderline range. She has a specific deficit in spatial awareness. This specifically affected certain responses to the test such as how she oriented patterns or how she answered questions (bottom to top). This is likely to impact upon her ability to function in a number of curricular areas including numeracy and literacy. It was noted that The Child found it

more effortful to sustain her attention to tasks over prolonged periods. The Child presented with features consistent with executive functioning impairments, which were consistent with the picture of neurodevelopmental difficulties that arise as the sequelae of early neonatal exposure to drugs.

4. The Appellant described that The Child was prone to risk taking. She provided specific examples of The Child engaging in risk taking activities. These include using a knife to eat an apple, resulting in cutting the inside of her top lip.

5. A further assessment of The Child was carried out by a Speech and Language Therapist, and her report dated April 2017 was lodged and referred to during the hearing (A141-A143). The report described The Child as being a girl with a range of strengths. She is knowledgeable in a number of areas and is very motivated by her interests. Her ability to function in social conversation tends to be impacted by some difficulty with the interactive aspects of communication as The Child's interactions tended to be limited by her personal interests. The report went on to state "The Child's performance on assessment, along with information gathered, suggest that a diagnosis of Autism Spectrum Disorder would be helpful in understanding The Child's current presentation. This information should be taken into account alongside The Child's existing diagnosis of mild learning disability."

6. A report dated June 2016 from Witness B, Educational Psychologist (A57 –A71) was referred to by both parties. Witness B gave evidence at the hearing and we were satisfied that she appeared to have a good knowledge of The Child's ASN needs, with information being taken from various sources, including meeting with the Appellant and The Child herself. The report was referred to by both parties during the hearing and put to certain witnesses for their comments and for making comparison between the respective schools.

7. Witness B's report provided a comprehensive summary and Analysis of The Child's Additional Support Needs and support required and identified these under the following headings:-

### Physical Environment

- Small group support
- A supportive and nurturing environment
- Opportunities for The Child to work on her own and as part of a pair or small group
- An environment which supports links to the wider community to promote The Child's social inclusion and responsibility within society
- A positive environment with clear expectations and boundaries

### Social Environment

- A consistent peer group
- A peer group with a similar level of social and emotional development
- Supported access to mainstream peer group to provide opportunities to further develop her social skills and resilience in a wider setting

### Staff Skills

- A shared understanding of how The Child's early life experiences may have impacted on her and how to support her needs
- A clear and consistent approach to supporting positive behaviour
- Staff skilled in assessing and meeting the needs of young people with additional support needs, including anxiety
- Clear support mechanisms to model and coach social skills

### Curriculum

- Differentiation of the mainstream curriculum with a particular focus on developing social skills and life skills
- Access to the full Broad General Education with a clear progression on to senior phase of the Curriculum for Excellence across a range of subjects and qualifications
- Careful consideration given to the balance between support and challenge
- A flexible and responsible curriculum
- Opportunities for The Child to reflect on her learning and the progress she has made.

8. In considering the respective potential placements, Witness B stated that, taking The Child's additional support needs into account and her present situation of not attending school, careful consideration needs to be made of the setting which would

support her to re-engage with her education and reduce her social isolation from her community.

9. She then went on to compare both schools in line with the Wellbeing indicators and detail the protective factors and risk factors for each.

10. At the conclusion of her report Witness B stated that in her view both schools have the potential to meet The Child's educational needs. In order to support The Child to succeed academically it is important to provide a positive and nurturing environment which will support the development of positive relationships both with consistent adults and with peers. Witness B expressed concerns of the potential negative impact of a placement to SCHOOL A on The Child's already vulnerable self image and that this would not support her resilience for when she returns to her local community. Furthermore, as a young person with potential attachment issues, it may impact negatively on her sense of security whilst there, as well as her longer term relationships with her family.

11. Witness B went on to consider what may lie ahead for The Child after the end of compulsory education. Whilst SCHOOL A received a positive report in 2015 from Education Scotland regarding their support for transition to learning or work beyond school, she considered that the Flexible Package being offered by the Authority at School B would allow The Child to begin the transition earlier and in a very gradual way which would support her emotional well-being.

#### *History of School Placement*

12. The Child appeared to be making progress at primary school until she reached Primary 7. At that time the Appellant noted that The Child was struggling with her school work. The Child was unable to do a school project and the Appellant ended up having to do it for her and have The Child copy her work. At that time the Appellant arranged for an unofficial testing of The Child which suggested that she was achieving below her chronological age.

13. The Child commenced at School C. She continued to struggle academically and her behaviour deteriorated to the extent that she was excluded on more than one occasion. The Child transferred to School D High School and the Appellant requested that she be allowed to repeat S1. The Child's experience of School D High School appears to have been more positive. There were no exclusions but there were still referrals for her behaviour. The Appellant describes that The Child was putting her energy in to her behaviour at the expense of her learning. The Child complained of not learning anything. Her behaviour at home deteriorated. She would return home in a high state of agitation and it would take a couple of hours for her to calm down. The Appellant approached the school to raise with them that her behaviour was linked to her difficulty with learning but describes that she was not listened to. The Appellant describes that during this time The Child's self-confidence and self-esteem were being eroded because she was not understanding the work at school and she was being punished for her behaviour. In S2 The Child's level of attendance reduced and she became increasingly reluctant to attend. There were instances when The Child was subject to bullying, including by those who she had thought were her friends. The Child has refused to return to school since November 2015.

14. School D High School closed in June 2016 and all were transferred to School E. The Child is currently on the roll for School E.

#### *The School B Learning Centre– Specified School*

15. School B Learning Centre ("School B") is an Off Site education provision provided by the Authority catering for pupils who have a range of social, emotional and behavioural needs and who have disengaged from mainstream education. School B is an amalgamation of 3 off site Learning Centres. Bringing the 3 Centres together allows an economy of scale and a wider range of subjects.

16. The School B Learning Centre is divided into two main parts, the Broad General Education end of the Centre which usually houses s1 to s3 pupils and the senior phase end which usually houses s3 to s5 pupils. Witness C, the head teacher, stated that School B has nine teachers, twelve support staff and management. The BGE area consists of a

primary qualified teacher and support staff providing a primary class setting, which allows for a flexible, supportive and nurturing provision. The senior phase has eight subject specific teachers providing Maths, English, PE, Art, ICT, History, HE and CDT usually to National 3 or 4 level. There are never more than six pupils in a class. There are presently 34 young people who attend School B Learning Centre at the moment, with approximately 25 of these being in the senior phase.

17. BGE offer ten part-time places, five in the morning and five in the afternoon. There are currently three pupils attending School B Learning Centre on a full time basis, BGE in the morning and senior phase in the afternoon. Some of the pupils spend part of their time in School B and part of their time in mainstream education. Some pupils return to mainstream education full time. Witness C confirmed that all pupils attending School B Learning Centre have additional support needs, however they are individuals and have a range of different needs.

#### *(SCHOOL A) – Requested School*

18. SCHOOL A is an independent residential school. The school accepts children between the ages of 11 and 19. SCHOOL A specialises in education for pupils with Aspergers/Autistic Spectrum conditions, ADHD, Tourette's syndrome and Foetal Alcohol Syndrome. Many of the pupils at the school are on the Autistic spectrum. All staff at SCHOOL A have ongoing training in autism and the school is working towards accreditation with the National Autistic Society. SCHOOL A has received good HMIE reports. The report by the Care Inspectorate in 2015 evaluated SCHOOL A as "very good" for Improvements in performance, Learners experiences and meeting Learning needs; and "good" for the curriculum and improvement through self-evaluation.

19. The majority of pupils at SCHOOL A are residential but SCHOOL A can also offer non-residential places. SCHOOL A offers pupils the opportunity to attain ASDAN qualifications, which are life skills based, and more formal qualifications such as National Awards and Highers. The school can offer a range of academic courses including English, Maths, Geography, History, Modern Studies, Computing, Biology, Chemistry and Physics.



Class sizes are small (with an average of 4 pupils, classed by ability rather than age) and there is a high staff/pupil ratio.

20. In addition to academic achievements SCHOOL A also supports and teaches life skills and independence. SCHOOL A offers a number of extra curricular activities both at the school and in the local community. Pupils can take part in The Duke of Edinburgh Award Scheme and NBS can support pupils on to higher education throughout Scotland and has links with various colleges and supports pupils to attend at Open Day events and to make college applications.

#### [Cost to the Authority of School B Learning Centre](#)

21. The additional cost to the Authority of providing for The Child's additional support needs within School B Learning Centre are nil. No additional staffing or accommodation would be required and The Child's needs would be met from within the resources of the school. Transport by taxi to School B Learning Centre, if required, is estimated at £6,000 per annum. The Authority's Children and Families Services budget for 2015/2016 is £135,732,000. Of that £13,187,310 is allocated to ASN. The Children and Families Services budget serves to meet the needs of all social work and educational provision for every child in the local authority area. The Children and Families Services budget is required to make savings of £1,300,000 in the year 2016-2017. Further savings will require to be made in the coming years.

#### [Cost to the Authority of School A](#)

22. The cost to the Authority of placing The Child at SCHOOL A on a residential basis, Monday to Friday, is approximately £51,571 per annum. Transport to SCHOOL A by taxi is estimated at £3,800 per annum. The total cost to the Authority would therefore be £55,371 per annum.

#### [Availability of Place at School A](#)

23. If the placing request is granted, the requested school, SCHOOL A, would be able to offer a residential place to The Child. While there was no direct evidence about this, we understand that the place was offered with immediate effect.

#### Views of the Parent

24. The Appellant wishes The Child to attend at SCHOOL A. The Appellant has knowledge, through her employment as a social worker, of the pupils who attend at the Offsite Learning Centres and who are now transferred to School B. She understands that they are there because of behavioural issues. The Appellant is concerned that The Child is vulnerable and that the other pupils would be likely to pick up on this and exploit it. The Appellant is confident that SCHOOL A would offer a safe and nurturing environment. The Appellant does not accept that School B can meet The Child's needs. She considers that School B is a new provision and has not been tested and does not want The Child to be a guinea pig.

25. The Appellant does not consider that School B would provide The Child a suitable peer group having regard to their emotional and social development. She is also concerned that the peer group would not be consistent in that some of the pupils would be going from the BGE end to the senior end throughout the week, or on to mainstream school. She does not consider that The Child could return to a mainstream school.

26. The Appellant was critical of the efforts made to encourage The Child back to School B. She described that for a period after The Child refused to return, The Appellant received daily telephone calls asking if The Child was going to attend. When The Appellant relayed that The Child did not wish to go this was accepted and she felt that no further effort was made.

27. The Appellant advises that The Child has decided that she will not return to School B and that it would be very difficult to change her mind. She considers that if The Child was going to attend at School B then she would have gone by now.

28. The Child has attended at SCHOOL A and spoken positively about it. The Child advised her that at SCHOOL A she felt that the help was better, she achieved something and she learned something. The Child has told her that she would be willing to attend at SCHOOL A. The Appellant accepted that the transition to SCHOOL A would be difficult but believed that because The Child had a positive view of SCHOOL A, it was achievable. This is in contrast to the offered provision where The Child had a view of being labeled as having “bad behaviour” rather than learning difficulties.

### Views of the Child

29. The Child’s views were provided through Independent advocacy. The statement from, ASN Advocacy Worker, stated that ASN Advocacy Worker had met with The Child on October and November 2016. She advised that The Child did not engage with her after November 2016. The Child was asked what she thought about school and advised that it was “boring and hard”. The only subjects she reported to enjoy were H.E. (not the writing part) and art.

30. When asked about School B Learning Centre The Child stated “It was fun then I got bored. I got to wear my own clothes and keep my hood up. I don’t like it now.”

31. When asked about School A she reported the good things as:

It is near horses

The work is super easy

The teacher’s help was better, the other school help was bad – they didn’t help a bit – I still didn’t know what to do.

People get to wear their own clothes – school uniform is not comfy, especially the shirts.

It is a good school

I would like to go to School A.

32. When asked about the not so good things she reported

It smells like horse manure.

I don’t want to stay over as I don’t want to leave my dogs, guinea pigs or snake.

When asked about how she felt about her mum's suggestion that she stay part time she said she would be happy about that.

33. Witness D, Autism Consultant, met with The Child in January of this year and also had the benefit of considering the report of Doctor A. At that time The Child confirmed her current and ongoing situation of residing at home and not attending at school. He reports that The Child told him that problems at school related to difficulties with the work rather than to social factors. She admitted nocturnal habits and a lack of structure in her day to day life. She agreed her preference was to maintain as she is, without attending at prospective schools, and she indicated limited consideration of future plans or possibilities for her.

34. Witness D commented upon The Child's current isolation, the importance of socialisation, and the lack of structure to her time. He stated that if structure could be introduced to her day at school, then this would naturally lead to better structure during the rest of her day.

35. Witness D did not ask The Child about School B or why she is not attending there. In cross examination he accepted that it may be that The Child does not necessarily have a negative view of School B, but after attending at SCHOOL A she may just have viewed attending at School B as futile if she is to go to SCHOOL A.

## **6. *Reasons for the Decision***

The Tribunal found the witnesses to be 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 fair decision on the reference.

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
  - (ii) in all the circumstances it is appropriate to do so;
- (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:

- (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).

In the circumstances of this case, in terms of paragraph 2(2) set out above, the Authority 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.

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 Authority has established any of the circumstances in paragraph 3(1)(f); Secondly the Tribunal has to consider whether in all the circumstances it is appropriate to confirm the decision of the authority.

Para 3(1) (f) (i) and (iv) are not in dispute. SCHOOL A is not a public school and the authority have offered to place the child in School B Learning Centre, which is an off site education provision under their management.

Accordingly, in order to refuse the decision of the Authority, we have to be satisfied that the Authority are not able to make provision for The Child's additional support needs in School B; or that it is reasonable, having regard to both the respective suitability and the respective cost to the Authority of the schools, to place The Child in SCHOOL A. If we are not satisfied on either or both of these grounds then we require to uphold the decision of the Authority.

#### *Preliminary issue raised by Authority over Recent Events at School A*

Dealing first with the issue raised by Education Manager at the commencement of the hearing. Education Manager advised that following the recent meeting when concerns were raised about SCHOOL A the Authority had taken the decision to suspend all placements to that school. From the information that we were provided with, the concerns appear to have related to two separate incidents involving two separate children. The first incident involved a child who sadly took his own life. The second incident involved the decision of SCHOOL A to terminate the placement of a child who had been exhibiting bullying and threatening behaviour. The complaint of the Authority was the lack of

communication between SCHOOL A and the Authority in reporting these incidents. Having heard also from Witness E we accept that there appears to have been no direct contact between SCHOOL A and the Head of the Education Department. However, we accept that there had been contact between SCHOOL A and the children's individual social workers. Witness E described the subsequent actions taken by the school and this was not challenged. Overall, we do not consider that this information materially affected our overall focus, which was to consider the respective suitability of each school to provide for The Child's educational needs.

Having dealt with the preliminary issue we then required to consider if the Authority have been able to satisfy us that either or both of the conditions described in section 3(1)(f)(ii) and (iii) are fulfilled.

#### [Provision at School B Learning Centre](#)

We are satisfied from the evidence that the Authority have a good understanding of The Child's additional support needs. There is no dispute between the parties as to the description of her additional support needs and both parties appeared to accept in full the terms of the report by Witness B and the recommendations contained therein.

Witness C was very confident that School B was the correct provision for The Child and that School B could meet all of her needs. The report by Witness B was put to him and he was able to confirm that School B could meet each of the identified supports. He also stated that he has knowledge of SCHOOL A having visited there and also from his work on the Authority's Residential Resource Group that considered placing requests. He stated that there was another young person who had been assessed as not suitable for School B and had been placed at SCHOOL A. However, he did not consider The Child to be the same and that School B was the appropriate place for her.

Witness E did not have any knowledge of the provision at School B and could make no assessment of their ability to provide for The Child. He did accept that if School B could meet the needs, as set out in Witness B's report, then School B could be a suitable provision. The evidence of Witness D was to the same effect.

The Authority submitted that they would put in place a Flexible Learning Programme which would involve a placement at School B (from a minimum of 3 to 5 days per week) and Action in Motion (AIM) /Outreach up to 2 days a week. In addition to accessing the mainstream curriculum she would receive additional input to support her social and emotional development. She would have access to activities within the local community through the provision. While the Authority did not have a formal plan in place for The Child they were able to provide an exemplar of what The Child's timetable could look like. They stated that ultimately they would require to engage with The Child to identify her interests and to tailor her timetable around that. Progression to the Senior phase of the Curriculum for Excellence would enable her to access the resources in the other area of School B from which a range of courses towards SQA qualifications could be followed. With regard to support for transition to further education or work beyond school School B would support her in beginning this transition early in a very gradual way. College A are partners in curriculum delivery with the Authority which means that options can be built into The Child's timetable at school from S4 to build bridges between school, home and college and/or work.

Criticism is made by the Appellant of the Authority that they have not assessed The Child's needs or have a clear plan for her education. In considering all of the evidence we do not accept that this is the case. It is clear that the Authority have gathered information about The Child from various sources and have clearly thought as to how they can meet her needs. They are working with AIM and CAMHS as a means of engaging with The Child and bringing her to School B.

In contrast, we were provided with no formal assessment by SCHOOL A of The Child or her needs. Witness E has drawn his information of The Child from the information provided by the Authority, a meeting with The Child and information from the Appellant. He stated that were the placement to be granted then assessment would be carried out over the first six weeks of her placement, with efforts focused on seeking to engage her attendance at school. At the end of 6 weeks if it proved impossible to get The Child to attend then at that point it would be clear that SCHOOL A was not the place for her.



Should that be the case, however, we are concerned that the responsibility for The Child's education would revert to the Authority and would leave even less time until her 16<sup>th</sup> birthday for them to attempt to engage with her.

The appellant was critical of the attitude in the past that the schools labelled The Child as having bad behaviour. Witness D in his evidence agreed that categorising The Child's behaviour as "bad behaviour" was not helpful. However, it is clear that this view expressed of The Child at school was at a time before the assessment by the educational Psychologist was carried out. There is no suggestion that this has been repeated since. It is possible that The Child may still associate attending at a mainstream school with the risk of being labelled "bad". However, School B is a completely different set up with a clear understanding of The Child's difficulties and needs and does provide The Child with an opportunity to make a fresh start. The evidence of Witness C was clear that mainstream was no longer being considered for The Child and she would be able to access education entirely at School B.

In her evidence The Appellant expressed her concerns about the older pupils at School B. Reference was made to the Minutes from the meeting of the Team Around the Child on 16.03.16 (R23), where Deputy Head Teacher at School D stated that he believed that Offsite (School B) would not be a good place for The Child as most of the children who attended there had behavioural difficulties. From the evidence it appears that this comment was made at a time prior to the restructuring of the offsite provision and before Offsite moved to the School B campus (R28).

The Appellant also drew on her own experience as Social Worker and her belief that the pupils who were referred to School B were usually there because of issues with their behaviour. She expressed concern that The Child was vulnerable and she didn't want The Child to come into contact with these older pupils. However, as the preliminary issue raised at the start of the hearing highlights, SCHOOL A also has pupils with challenging behaviour.

The central argument for the Appellant, as clearly stated in their submissions, is not that School B is unable to make provision for The Child's additional support needs, but principally that they have failed, to date, to engage The Child in education despite having had 18 months to do so (since November 2015). We find that The Child had been starting to engage with School B, albeit to a limited extent, in September 2016 up until the point when she visited with SCHOOL A.

The Appellant criticises the Authority's suggestion that The Appellant did not engage with them in supporting The Child's return to School B in that the Authority did not raise concerns with the Appellant regarding any lack of engagement on her part, nor did they write to her in strong terms about concerns or take any steps to indicate that the Authority had issues with The Appellant.

The Appellant confirmed that following The Child's refusal to return to School B, she would speak on the phone when School B called to see if The Child would be attending. She would advise them "The Child doesn't want to come". The Appellant is an articulate, intelligent person who is employed as a Social Worker. She described that in her employment she can be a caseworker for a young person in Offsite and would act as liaison between the family and Offsite, becoming involved to try to avoid exclusion of the young person. In these circumstances the Appellant was more than aware of the importance of The Child attending at school it is particularly unreasonable to criticise the Authority for respecting her knowledge and experience and not writing to her "in strong terms".

In rejecting this criticism we also had regard to The Appellant's evidence when she stated that on one occasion when The Child met with A social worker, Social Worker, the Appellant considered it inappropriate that The Child was told that her mother could get into trouble if she did not attend at school. We also considered her evidence to the effect that she was content with the advice from CAMHS that it was not appropriate for too many agencies to be seeking to attempt to engage with The Child while they were working to build a relationship with her.

The Tribunal considered the evidence before it of the ability of the Authority to make provision for The Child's additional support needs in School B Learning Centre, and concluded that we were satisfied that they could. Para 3(1)(f)(ii) accordingly is satisfied.

The issue then for the Tribunal was, accordingly, 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 the SCHOOL A and in the school referred to in paragraph (ii), to place the child in SCHOOL A.

### *Respective Suitability and Respective Costs*

With regard to the respective costs, it is clear that there would be a substantial additional cost each year to the Authority if The Child were to attend at SCHOOL A. We were provided with details of the Authority'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 that if our decision had been that School B could not meet her needs then it is likely that we would have found that the costs would not have been prohibitive.

With regard to the respective suitability of the two schools, so far as provision of education, we consider that they are similar in what they can provide. With regard to SCHOOL A, they have expertise in Autism but we do have regard to the fact that The Child's main issues arise from her low-borderline intellectual ability and issues with executive functioning rather than the impact of a diagnosis of ASD.

We consider School B to have the advantage that, if attending there, The Child would be able to remain at home where she has a clear sense of security and emotional support. The Appellant spoke of The Child requesting that she be present while The Child met with A social worker, Social Worker. While The Child agreed to speak with A social worker on one occasion on her own, the Appellant stated that usually The Child will not speak to anyone unless she is there. She described that The Child feels safer and more confident if her mother is there and sometimes asks her to speak on her behalf. To be placed at

SCHOOL A would remove The Child from her important family support. We heard from Witness D that, especially for girls, there can be a strong attachment to family pets and that The Child had a number of pets at home. There was a discussion around whether she could take a pet snake to SCHOOL A but we did not form the view that she had a particular attachment to that particular pet. School B would also have the advantage of outreach supporting The Child in interacting in activities in her local community

The Tribunal considers that where the suitability of the provision in both schools is almost identical, and where there is a significant cost to be incurred by the authority in placing the child in SCHOOL A, it would be unreasonable to place The Child there.

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 authority to refuse the placing request is reasonable. The most important issue is The Child's refusal to attend at school.

#### [Refusal to Attend – School B Learning Centre](#)

The Child has attended at School B on 5 occasions. We did not hear that there had been any difficulties for The Child when attending or that she had made any particular complaint that she didn't like it. The Appellant spoke of concerns of The Child being labeled as a pupil with "bad behavior" but this clearly refers to The Child's experience at mainstream schools prior to her formal assessment by Doctor A rather than to The Child's experience at School B.

Witness C could give no explanation as to why The Child has chosen not to go back to School B. However, it is notable that this refusal came after her visit to SCHOOL A. Had it not been for that we are of the view that the indications are that School B had been successful in engaging with her and it is unfortunate that this had been interrupted

When asked how they would address The Child's clear stated intention not to return to School B Witness C advised that they would look to build upon The Child's relationship with CAMHS and use this to encourage her back to school. A link had already been made and they were confident that they could build on that. The Appellant stated that if the decision of the Tribunal was to uphold the Authority's refusal of the Placing Request then she would support that.

### Refusal to Attend – School A

At present The Child has indicated desire to attend at SCHOOL A. The Appellant advised that The Child had shown a willingness to attend and an enthusiasm for the school, which was in contrast to her refusal to attend at School B.

SCHOOL A advised that they would arrange for The Child to attend at School A initially for a day, then for a couple of days and gradually build this up. They would meet with her outside of the school and attempt to engage her in projects. They would encourage her to want to stay overnight by showing her the activities that were on offer after the school day. They were confident that The Child would be attending at the school on a residential basis, Monday to Friday, within 6 weeks. They based this on The Child's apparent enthusiasm for the school and their experience of other pupils. They accepted that The Child would be likely to find this difficult during the initial 6 week assessment period but remained confident that she would be residential by the end of that period. If they did not succeed within that period then they would accept that SCHOOL A "was not for her" and she would have to return to the care of the Authority.

The Child has attended at SCHOOL A on 2 occasions as part of the initial introduction and assessment. It was accepted that after her initial attendances at SCHOOL A The Child had made excuses not to return to allow a further assessment to be carried out. In the report by the Intensive Outreach Team (A136-A140) the giving of excuses not to go appeared to be an avoidance strategy. The evidence of Witness E was that they had not arranged any further dates in case the decision of this Tribunal was to uphold the decision of the Authority. While The Child has verbally stated that she would go to SCHOOL A her actions suggest that there is no greater certainty that she will attend there than at School B. Her positive view of SCHOOL A was based on the work there being "super easy". Clearly this will not always be the case and we consider it likely that when she perceives things becoming more difficult at SCHOOL A there is a strong likelihood that she will refuse to attend there also. Her statement to Witness D in January stated that her preference was for things to remain as they were. We did not find that there was any

evidence to suggest that she was more likely to engage with SCHOOL A than with School B.

### Conclusion

We consider that both schools are able to make provision for The Child. SCHOOL A have expertise in Autism. However, The Child's main issues arise from her low-borderline intellectual ability and issues with executive functioning rather than the impact of a diagnosis of ASD. School B are able to meet each of The Child's identified needs and has the advantage that she would be able to continue to reside at home where she feels safe and has the support of her family and pets. School B allows her the opportunity to make links to her local community, with offers of support during the summer, and to start a gradual transition to local opportunities after compulsory education comes to an end.

While The Child has expressed a positive view about SCHOOL A we are not satisfied that there is an increased likelihood that she will engage there than at School B. After only two visits she is already making excuses not to return. SCHOOL A are relying upon engaging with The Child within 6 weeks and basing their expectation on their experience with other children rather than knowledge of The Child herself. If The Child fails to engage by the end of that time then SCHOOL A are likely to terminate her placement, returning her to the responsibility of the Authority, with little time before she reaches the age when she can leave education. Having made the decision that both schools are able to provide for The Child's needs, the balance favouring School B, the respective costs are such that the cost of SCHOOL A cannot be justified. Had we found that School B was not able to meet her needs and SCHOOL A could, then it is likely that the costs, having regard to the overall budget, would have been justified. In all of the circumstances, looking not only at the present situation but also having regard to the possibility of further education, School B is well placed to support her into this if she expresses a willingness to do so.

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

## Addendum

### Statutory Provision.

#### **Education (Scotland 1980**

Section 28 states that Pupils are to be educated in accordance with the wishes of their parents.

(1) In the exercise and performance of their powers and duties under this Act, the Secretary of State and education authorities shall have regard to the general principle that, so far as is compatible with the provision of suitable instruction and training and the

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avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents

### **Education (Additional Support For Learning )(Scotland) Act 2004, as amended**

Section 1 of the Education (Additional Support for Learning)(Scotland) Act 2004 states:

1(1) A child or young person has additional support needs for the purposes 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 young person.

1(2) In subsection (1), the reference to school education includes, in particular, such education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential.

The 2009 Act came into force on 14<sup>th</sup> November 2010 and accordingly, the amendments therein apply as at the time of this hearing. The amendment to the Act is shown in italics.

1(3) In this Act, “additional support” means-

(a) in relation to a prescribed pre-school child, a child of school age or a young person receiving school education, provision (*whether or not educational provision*) which is additional to, or otherwise different from, the educational provision made generally for children or, as the case may be, young persons of the same age in schools (other than special schools) under the management of the education authority *responsible for the school education of the child or young person, or in the case where there is no such authority, the education authority* for the area to which the child or young person belongs.

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
- (ii) in all the circumstances it is appropriate to do so;
- (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:

- (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).

In terms of paragraph 2(2) set out above, the authority 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.