

## DECISION OF THE TRIBUNAL

---

Gender: Male

Aged: 10

Type of Reference: Placing Request

---

### Decision of the Tribunal:

The Tribunal confirm the decision of the Education Authority, first intimated in writing on 10th December 2015, to refuse the placing request in terms of Section 19(4A)(a) of the 2004 Act being (i) satisfied that one or more of the grounds of refusal specified in paragraph 3(1) of Schedule 2 of the said Act exists and (ii) in all the circumstances it is appropriate to do so. The decision of the Tribunal is unanimous.

#### 1. Reference

The reference is brought by the Appellant for her son, ("the child") in terms of Section 18(3) of the Education (Additional Support for Learning) (Scotland) Act 2004 ("the Act") on the basis of a refusal of a placing request for a special school, namely School A ("the specified school").

The placing request was refused by the Respondent on three grounds in terms of their letter the Appellant dated 10th December 2015 (T13-T14) namely:

- 1) that placing the child to attend the ASN school would make it necessary for the Council to take an additional teacher into employments in terms of Schedule 2 paragraph 3(1) (a)(i) of the 2004 Act;
- 2) that placing the Child in the ASN School would be seriously detrimental to the continuity of the Child's education (Schedule 2 paragraph 3(1)(a)(iii);

3) that placing the child in the school would breach the requirement in Section 15 (1) of the Standards in Scotland's Schools Act ("the 2000 Act). The requirement in Section 15 (1) of the 2000 Act being commonly referred to as the presumption of mainstream, (all in terms of Schedule 2 paragraph 3 (1)(g) of the Act).

The Appellant seeks to overturn the decision of the Authority in terms of section 19(4A)(b)) in order that the Child attend the ASN base. This is resisted by the Authority and the matter proceeded to three days of evidence on the 1st, 2nd and 15th of August where oral evidence was taken from the witnesses listed below

#### Preliminary Matters:

A number of Case Management calls took place on 30th March, 18th May, 6th July and 27th July 2016 prior to the full oral hearing dates. The identity and order of witnesses was agreed in advance. It was agreed that Witness A could give evidence by Conference Call to alleviate any inconvenience to her. It was agreed that the evidence of Witness B was subject to his availability due to annual leave commitments and that any motion to adjourn the oral hearing would be considered at the oral hearing given that late evidence had been lodged in this case and Witness B would be speaking to the issues to which said late evidence relates.

A Direction was issued for a joint statement of facts to be lodged with the Tribunal and this was not produced.

A Direction was issued by the Tribunal that the child's views were to be ascertained in so far as possible via an independent advocate. A report was produced in this regard (T25) and is referred to for its terms. The Tribunal wishes to record its appreciation to The advocacy service for their prompt attention in both meeting with the Child and producing their report.

Late evidence was received in this case. The Tribunal sought the views of both parties in this regard and there were no objections. In view of the nature of the late evidence and there being no objection the Tribunal allowed it to be lodged in terms of Rule 34.

#### Written Evidence:

The Tribunal had before it a comprehensive bundle of evidence together with all the late evidence. The Tribunal also considered both parties case statements and final written submissions

#### Oral Evidence

Evidence was heard as follows:

For the Appellant: The appellant, the Child's mother,  
Witness A, psychologist from Child and Adolescent Mental Health Services

For the Authority: Witness C Inclusion Manager,  
Witness B Educational Psychologist

The Tribunal also called on Witness D , Headteacher of School A, (School A) who gave evidence over the phone.

There were no significant issues relating to the credibility or reliability of the witnesses who gave oral evidence during the hearing. The case rests on an interpretation of this oral evidence, the written evidence and of the application of this evidence to the relevant statutory tests stated above.

The Tribunal further considered both oral and written submissions of the party's representatives.

## 2. Findings of Fact

In coming to our decision we found the following facts established.

1. The child is nine years old. He lives with his parents and siblings in the local area of both School A and the ASN base.
2. The child has additional support needs within the meaning of the 2004 Act. The child displays traits consistent with Autistic Spectrum Disorder and is undergoing assessment for this and awaits a formal diagnosis. The child has visual difficulties (Nystagmus), literacy problems (Dyslexia), social communication difficulties, social and emotional difficulties and issues with fine and gross motors skills.
3. The child is of average academic ability. Witness C and Witness B both spoke of the child being very capable particularly in the areas of Maths and the school report for end of primary 4 (R50) lists a number of other areas where the child both enthusiastically participates in class and is making steady progress including in French and Numeracy. The child's reading age has been assessed as approximately 2 years behind that of his peers (R29) and these difficulties are associated with the Child's dyslexia (R30)
4. The child has an Additional Support Plan ("ASP") (R8) and receives a number of supports at School A in accordance with this Plan . In particular the child has attended an additional support needs class for around 1 hour per week from November 2015. He receives support for his literacy difficulties and certain adaptations have been made to his classroom physical environment in the form of larger text being provided and a sloping board, although the Tribunal accepted that on occasion the adjustment of text for the child may not always taken place. The child also receives input from Speech and

Language therapists and has in the past received input from Occupational Therapy. Further adjustments have been made over time to the child's school attendance hours whereby he leaves school before his peers on allocated days and it has been agreed that the ASP will be kept under close review.

5. The child attends School A ("School A") and has just commenced Primary 6. School A is a mainstream Primary School and the child has attended said school since Primary 1. The child currently accesses the mainstream curriculum in School A with the help of the foregoing supports in place.

6. The Appellant made a placing request on for the child to attend School B Additional Support Needs base ("ASN base"). The ASN base is attached to the Primary school and the request related to the child's prospective attendance at this ASN base.

7. The Respondent refused the placing request by letter dated 10th December 2015 .The grounds for refusal were paragraphs 3(1)(a)(i), 3(1)(a)(iii) and 3(1) (g) of Schedule 2 of the 2004 Act.

8. In Primary 4 the child began crying frequently at home and at school and became unhappy, distressed and anxious about his school attendance often refusing to attend school and exhibiting self-harming behaviours in the home. School assessments indicated that the child was not continuing to progress at the rate he had enjoyed from Primary 1. The child lacked in confidence and stated that he felt different to his peers and expressed anxieties to his parents around his attending school. The child had prior to this been fairly settled within School A.

9. The Appellant attributes much of her child's distress and anxiety to his school experience within School A and does not consider that the child can be sufficiently supported in a mainstream environment at the present time. The appellant (mum) spoke of a visit to the ASN base where she was impressed by the smaller amount of pupils with a higher staff to pupil ratio and she felt that the child would be more supported in this environment. The Appellant stated that even if the child was unable to access the mainstream curriculum, his biggest barrier to learning was in her view his low self -esteem and lack of confidence in his current ability. The Appellant stated that the child's social and emotional well -being were at this time more important than his academic abilities and very strongly felt that even a short term placement in the ASN base would benefit the child .

10. All of the evidence before the Tribunal concurred that in the long term the child would benefit from being educated in a mainstream environment.

11. Multi-agency meetings were held in September and October 2015 to discuss the concerns around the child's learning and well-being following the

child continuing to exhibit school avoidance behaviours, self-harming and anxiety around attending School A. Further adjustments and supports were attempted by the School including adjustment to the timetable. A referral to Child and Adolescent Mental Health Services was made via the child's G.P following the Appellant raising her concerns with the GP. The child continued to display anxiety and distress around his going to school at this time.

12. The child attended with Witness A, a specialist Child and Adolescent practitioner on 22nd February 2016. This was followed by seven therapeutic sessions with further input between Witness A and the child still to take place. Witness A has worked with the child, his family and the school to implement a number of strategies to help the child cope with anxiety and distress. Since the child began working with the CAMHS service in this regard there has been a significant reduction in the child's distress and anxiety within school. At school the child's attendance has improved and he appears to be happy and settled to school staff. At home he continues to display signs of anxiety before leaving for school and on return from school. The child at times still seeks to avoid attending school. The teaching staff at School A have noticed a marked improvement in the child's presentation and he appears more happy and confident than he was at the beginning of January 2016 prior to the therapeutic input of Witness A. Witness D spoke of a much happier and more confident child at school and that she had witnessed a significant change in the child in terms of his confidence, self-esteem and attendance at school particularly towards the end of the last term before the summer break. The child's attendance at school has improved significantly since January however he still misses out on some days due his school refusal.

13. The ASN base proposed by the Appellant has seven individual classes where children with Additional Support Needs are taught. Four of these classes have children with Autistic Spectrum Disorder and three of the classes teach children with Additional Support Needs. The child would not be able to access the mainstream curriculum at the ASN base. The children in the class of the ASN base where the child would be placed follow a curriculum specific to the needs of children with moderate learning difficulties. The child is of a higher intellectual ability than the children currently being taught in the ASN base. The ASN base would be unable to manage the key elements of the mainstream curriculum that the child has been following.

14. The child has peers within School A. The child does not have peers in the community or in the ASN base. If the child is placed within the ASN unit he will not be with any of his current peers. School A is about to move to a new building. The child and his peers have been involved in the planning process for this.

15. School A has Support for Learning staff who work with the Child. The teaching and support staff within School A have an awareness of the child's current needs and continue to monitor his progress and work with the other

professionals involved with him including the CAMHs service, Speech and Language Therapy and Psychology.

16. The Child has expressed different views to different people around his current schooling arrangements. The views that the child expresses to his parents are contrary to the views that he expresses to teaching and support staff.

### 3. Reasons for the Decision

The onus rests with the Authority to establish that one or more of the grounds referred to in their refusal letter of 10th December 2015 exist or exists, and to satisfy the Tribunal that in all of the circumstances it is appropriate to confirm the decision.

We considered the Respondent's grounds for refusal in turn.

#### Schedule 2 Paragraph 3(1) (a)(i)

Witness C spoke to the class composition and nature of the teaching arrangements at the ASN base. Witness C is an Inclusive Education Manager within the Authority and has worked in the field of education and additional support needs for 28 years. The ASN base teaches children who require significant support in small class sizes. Witness C advised that currently there are 7 classes within the ASN base. 3 of these teach children with moderate learning difficulties, 3 teach children with an autism specific diagnosis and 1 class teaches children with significant sensory difficulties. Witness C confirmed that the latter class had one space and that it would not be suitable for the child as the children in this class require a significant degree of support. It would be unsuitable for the child as he does not have such sensory difficulties and that the specific complex needs of the children in this class are such that the child could never be educated in this class. The child therefore would require to be placed in one of the other classes which were currently at capacity and as such this would require an additional teacher to be brought into the school if the child were to be placed there. Witness C was clear in his evidence that there were currently no unallocated teachers who could be moved across the Authority; nor was it possible to reconfigure the classes within the ASN base to accommodate another child. The evidence on this ground was not challenged by the Appellant's agent nor was there any contrary evidence placed before the Tribunal to suggest this was not in fact the case. The only evidence therefore before the Tribunal was that of Witness C and the Tribunal was satisfied that this was credible and reliable in all the circumstances

Accordingly the Tribunal found that the ground of refusal specified in schedule 2 paragraph 3(1) (a)(i) of the Act was established.

#### Schedule 2 Paragraph 3(1) (a)(iii)

In considering this ground of refusal the Tribunal paid particular attention to both Educational Psychologist reports lodged in process.

All professional witnesses agreed that the child over the longer term would benefit from mainstream inclusion. In addition, the professional evidence concurred that the child's cognitive aptitudes and abilities are such that mainstream education is appropriate for him. The view however by the Appellant, which is supported by Dr A's report (A26) is that the child's emotional and social aptitudes and abilities are such that mainstream is not appropriate at the present time.

The child enjoys a peer group in his current placement. The evidence of Witness D was that the child was at the time of her evidence running around the playground and happy talking with his friends. The child had started to make progress with his attendance, learning and general happiness. Witness D stated that she was confident given the improvements in the child's confidence and happiness that School A would be fully able to meet the child's needs and that she had in particular noticed an improvement towards the end of last term which had led her to this conclusion.

The child had subsequent to the placing request significantly benefited from the input of Witness A and further sessions with Witness A were planned. Witness D spoke of the child appearing to be a different boy than when in Primary 4. The child appeared more confident and happy and was engaging with his teachers and progressing to meet the wellbeing targets agreed in his "My World Triangle" document ( A19)

The Appellant maintained that the family continued to experience problems with the child whereby he continued to exhibit distress and would refuse to attend school, although the child's attendance had improved.

The child along with his current school peers has been involved in the plans to move to a new school building and the child was very much part of the school community in School A.

The child, with the exception of his reading age, is of average ability and up until primary 4 has successfully followed the mainstream programme with his peers. If the child were to be placed in ASN base, the evidence before the Tribunal was that this would be a retrograde step and that the child would not be able to follow the same mainstream programme in accordance with his academic ability. The programme accessed within the ASN base was one designed for children who required an individualised curriculum and would involve a degree of over learning and repetition of concepts and that this

would not be appropriate for the child such was his academic ability. The Appellant fully accepted that the child would not achieve academically if placed in School B but that the child's emotional needs and low self-esteem would be more likely to improve in the ASN base if the child was placed there.

The Tribunal had regard to the evidence of Witness D who advised that work now required to be done to help the child build a peer group out with school as the child now enjoyed a peer group within School A. There was no evidence that the ASN base would be able to promote this. Whilst this was not a material factor, the Tribunal felt that this would be important in further building the child's confidence and self-esteem.

The Tribunal was satisfied that the child if placed in the ASN unit would be more academically advanced than his peers and the child was very capable of learning. The Tribunal also considered the evidence of Witness D that the Tribunal should consider the impact of the child moving for a short period as was proposed by the Appellant and Witness B, with a return to mainstream at some point in the future. Witness C and D considered that this may be disruptive to the child in all the circumstances.

The Tribunal was satisfied having regard to all of the evidence before it that the placing the child in the ASN School would be seriously detrimental to the continuity of the child's education and was satisfied that this ground was established.

Schedule 2 paragraph 3(1)(g)

The presumption of mainstream that this ground refers to applies unless one of the circumstances specified in section 15(3) of the 2000 Act applies, these circumstances are:-

“that to provide education for the child in a school other than a special school-

- (a) would not be suited to the ability or aptitude of the child
- (b) would be incompatible with the provision of efficient education for the children with whom the child would be educated
- (c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred”

We then considered the grounds where the presumption of mainstream might not apply.

Not suited to the ability or aptitude of the child

There was a wealth of evidence before us that mainstream education, and particularly the mainstream education available to the child at School A was suited to the ability or aptitude of the child. Both Witness C and Witness B had



no concerns regarding the ability of the nominated school to meet the child's needs. Witness D stated that she had seen a marked improvement in the child's presentation from January 2016 especially in school terms 3 and 4. Witness D was candid in her admission that she would have been less confident prior to the CAMHS involvement that School A would have been able to meet the child's needs. She was clear that the mainstream environment of School A was currently best suited to the child's needs and that the child was more confident, happier and more engaged with learning and teaching staff had indicated to her that the child's learning was now beginning to pick up. All of the additional supports identified as being required for the child can and are being provided to the child in the mainstream placement of School A and all of the witnesses with the exception of the Appellant spoke to this.

There was in our view very limited evidence before us to suggest mainstream was not suited to the ability or aptitude of the child. The most significant evidence of this was Educational Psychology Report prepared by Dr A (A5-A33) who concluded that mainstream inclusion was the source of the child's stress and anxiety. The Tribunal did not hear from Dr A and relied only on the terms of his written report. The Tribunal had the benefit of both oral and written evidence from Dr C who confirmed that the causes of the child's distress and anxiety were multifactorial and that School A could not be attributed as the direct cause of his feelings and subsequent behaviours. Dr A himself stated that he had observed the child in the mainstream class setting (on June 22nd 2016) where the child appeared to be participating and not in any way uncomfortable or out of context. (A31) Dr A does not at any point in his report say upon what basis he has linked the child's distress and anxiety to the mainstream provision and his conclusion was contradictory to the observations in his report.

It appeared to the Tribunal that Dr A placed a great deal of reliance on information about the child obtained from the parents (including the Appellant). Dr A's report also did not appear to take into account the improvements in the child's levels of confidence and happiness evidenced by School A and by Witness A. The Tribunal accepted fully the evidence of Witness C, Witness B and Witness D that the child's needs were able to be met at School A and that the child was showing significant signs of improvement. The Tribunal also accepted the evidence of Witness A that the cause of the child's distress, anxiety and self-harming behaviours could not be directly linked to his mainstream schooling provision although it may play a part. Witness A was clear in her evidence that there were a number of factors that may impact on the child and that there was no one trigger or situation causing the child to have such low self-esteem or confidence. Witness A in particular made reference to the child feeling pressures in a number of areas socially, academically and with more sensory triggers than other children. She stated in her evidence that she was not trained to comment on what would be the most suitable educational environment for the child. Witness A evidence was critical in that it highlighted that the current mainstream environment could not be regarded as a causal factor for the child's difficulties with anxiety. Dr A's conclusions around the provision of ASN support report markedly differ with the views of the professionals who gave evidence and who are

currently involved directly with the child. The Tribunal was unable to reconcile the views of Dr A with the other professional witnesses. Accordingly a choice required to be made as to the evidence we accepted or preferred. Whilst we certainly respected Dr A's views, we considered he was lacking too much important information to make a fully informed assessment about whether mainstream education was suited to the child's ability and aptitude. In particular Dr A did not evidence in his report the basis upon which he considered mainstream provision was the cause of the child's distress and anxiety. There was no reliable evidence before the Tribunal to allow it to reach this conclusion.

The Appellant in her evidence stated that the child frequently told her of feeling stupid and that he lacked confidence and self-esteem. Whilst the Tribunal fully accepted that the child had stated such; and moreover had exhibited upsetting behaviours at home, this was not evidence in itself that the current mainstream provision was not suited to the child. All of the evidence required to be taken as a whole and as such the Tribunal concluded that the current mainstream provision was suited to the ability or aptitude of the child.

Incompatible with the provision of efficient education for the children with whom the child would be educated

We considered this ground does not apply and that the evidence on this ground was incontrovertible. Witness D made reference to a number of children within School A with additional support needs and was clear that this would not be the case. Indeed it appeared to us that School A was experienced and capable at educating children with additional support needs, including others with similar needs to the child, alongside other children in the school.

Result in unreasonable public expenditure being incurred which would not ordinarily be incurred

There was absolutely no evidence presented to the Tribunal to allow a finding on this ground.

Accordingly given none of the grounds for an exemption to apply to the presumption of mainstream we conclude that the Respondent has established a ground for refusing the placing request that to place the child in the specified school would be contrary to the presumption of mainstream as provided for by Schedule 2 Paragraph 3(1) (g) of the Act.

Conclusion on appropriateness of confirming the Respondent's decision

Notwithstanding the Respondent has established that a ground for refusing the placing request applies we then had to consider whether, in accordance with section 19 of the Act, it is appropriate in all the circumstances to confirm the decision of the Respondent.

In our view the evidence clearly established that the education that the child will receive at School A would be far more suited to his educational development than the ASN base.

There were a number of other factors that we considered relevant to this ground.

There was no evidence before the Tribunal that to show that the distress and anxiety the child had experienced would improve should the child attend the ASN Base. While The appellant (mum) had very positive things to say about the base, there was no evidence placed before the Tribunal to show that the child would feel differently. The Tribunal also placed heavy reliance on the evidence of Witness A when considering this issue. Witness A stated when suggesting possible routes to anxiety for the child as being new and uncertain events and the making and keeping of friendships, amongst other things the and that the causes of the child's distress and anxiety were multi-faceted. The Tribunal also recognised that the child's difficulties around engagement and attendance at school had improved considerably following Witness A involvement and the indicators were that this progress is set to continue. Both Witness C and Witness D spoke of their willingness to continue to monitor and assess the child in order that his ongoing needs can be met. The appellant (mum) spoke of her relationship with the school breaking down; both Witness C and Witness D stated that they were keen to work with the Appellant in seeking to ensure the child's needs were met on an ongoing basis.

The Child expressed his views in the advocacy report ( T2) where he stated that he was unhappy at school. He also states later that he has friends who make him laugh. Finally he tells the advocacy worker that he would try a new school. The evidence on the child's feelings around school is inconsistent and it was difficult for the Tribunal to reach a conclusive view here. It is clear to the Tribunal however that the child currently appears more happy and settled in the mainstream setting than he has been for sometime, but that he continues to display feelings of distress, anxiety and low self-esteem at home before and after school. The child awaits a formal diagnosis of Autistic Spectrum Disorder and in the interim period CAMHs involvement will continue in conjunction with school A , the child and his family.

We accepted the evidence fully of the Appellant that the child expressed feelings of distress and anxiety around his attendance at school and that the child had issues around his confidence and self -esteem. The Tribunal were not satisfied however that these concerns and behaviours, as upsetting as they are to the child and his family, are directly linked to his attending mainstream school currently and there was no evidence to support this contention. There was also a wealth of evidence including that of the Appellant herself that the child's emotional well- being had improved in recent months following the child's engagement with the CAMHs service.

The Tribunal in no way wishes to minimise the distress and anxiety felt by both the child and no doubt his family but the Tribunal must make its decision based on all of the evidence before it at the present time. The professional evidence of those currently responsible for providing the child with an education was that the child can be appropriately educated and is making progress in his current placement following a period from Primary 4 until February 2016 when the child failed to continue to make the progress that he

had previously enjoyed. The only other professional evidence is that of Dr A who links the child's attendance at school A with his distress and anxiety and the Tribunal cannot place the same weight upon this opinion for the reasons given. There was a considerable body of evidence before the Tribunal that showed it would not be appropriate for the child to attend the ASN Base, particularly in light of his academic abilities and improved emotional state. The Tribunal also had regard to the evidence of both Witness C and Witness B who expressed their concerns around the child struggling to find a peer group in the nominated school. The Tribunal was concerned about this prospect especially when the evidence suggested from all the Witnesses ( including that of the child ) that he did have a peer group within the school. The Tribunal also took into account the evidence of Witness D that work was now going to take place to build on relationships for the child at home.

There would be, in our view, a reduction in the quality of his educational experience as a whole should he attend the ASN Base

Accordingly for the reasons articulated above we are satisfied that the Respondents have discharged the necessary onus of proof and find in their favour.

We noted the position of the Appellant that she felt let down by the school and that the relationship between the family and the school had unfortunately broken down. We further noted from Witnesses C and D that they were keen to work with the Appellant and that they had undertaken to continue to carefully monitor and assess the needs of the child in order that he could be fully supported within the mainstream setting. We very much hope that parties can now go forward and work together in this regard.

Finally, we record our thanks to both representatives for the manner in which they conducted the reference.