



DECISION OF THE TRIBUNAL

In terms of the Education (Additional Support for Learning) (Scotland) Act 2004, section 19(4A)(a), the Tribunal confirms the decision of the Education Authority to refuse the placing request being satisfied: (i) that all of the grounds of refusal specified in paragraph 3(1)(f) of Schedule 2 of the said Act exists; and (ii) that in all the circumstances it is appropriate to do so. The decision of the Tribunal is unanimous.

Introduction

1. This reference is brought by the Appellant for her son (“the Child”). The Child is currently attending School B, a primary School under the care and control of the Education Authority. The reference is brought in terms of Section 18(3) of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) following the Respondent’s refusal of a placing request for a special school, namely School C.
2. The Appellant made a placing request for the Child to attend School C which was acknowledged by the Authority on 31st May 2017. The statutory period in terms of Regulation 4 of the Additional Support for Learning (Placing Request and Deemed Decisions)(Scotland) Regulations 2005 expired without any formal response from

the Authority; as such the placing request refusal was a “deemed” refusal in terms of said Regulations. The Authority thereafter confirmed by way of their Case Statement (R1-R3) before the Tribunal that the refusal to grant the placing request was made in terms of Paragraph 2(1) of Schedule 2 of the Education (Additional Support for Learning) (Scotland) Act 2004 hereinafter “ the 2004 Act” namely that :

“All of the following conditions apply in respect of this placing request:-

- I. *School C is not a public School (that is, it is not within the management of the Council), (Educational (Additional Support for Learning) (Scotland) Act 2004 (hereinafter “the Act” ; Schedule 2 paragraph 3(1)(f)(i)*
- II. *The Council is able to make provision for the additional support needs of [the Child] in a School other than School B, namely School A ; Schedule 2 paragraph 3(1)(f)(ii) of the Act*
- III.
- IV. *It is not reasonable, having regard 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 C and School B to place the Child in School C; Schedule 2 paragraph 3(1)(f)(iii)*
- V. *and*
- VI. *The Council offered to place [the Child] in School B and he currently attends there: Schedule 2 paragraph 3(1)(f)(iv)*

3. The Appellant asks the Tribunal to overturn the decision of the Respondent in terms of section 19(4A)(b) of the 2004 Act. She requests an order requiring the Respondent to place the Child at School C with immediate effect. This is resisted by the Respondent.

Procedural Background

4. A number of case conferences were held to determine the procedural progress of the case. Following the initial case conference, a Direction was issued conjoining this matter with a separate Claim being pursued by the Appellant under the Equality Act 2010. Said Claim and the current Reference both related, at that time, to the Child’s attendance at School A, a mainstream Primary School with enhanced provision for Additional Support Needs under the care and control of the Authority.

Subsequent to the Direction to conjoin both cases, the Child was moved to School B, another mainstream School under the care and control of the Respondents. Following this change in circumstances, it was agreed by parties that it was no longer appropriate for matters to be conjoined as the evidence in the Claim and the Reference were no longer related; the evidence in the Claim related solely to School A. The Child's attendance at School A is no longer a consideration as far as this Reference is concerned. The Claim now proceeds separately following a Direction being issued in this regard.

5. At a procedural case conference parties agreed that the Child would find it too distressing to attend the Tribunal in person. It was agreed by all parties that an independent advocate would be instructed by the Tribunal in order to seek the Child's views on what his preferences might be in terms of his schooling arrangements. 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 and the Tribunal instructed a report which was lodged with the Tribunal and is referred to for its terms (T74-T77). This report is referred to for its terms and the Child's attendance was not therefore required by the Tribunal. The views of the Child were taken into account by the Tribunal in reaching its decision.
6. Parties representatives lodged a joint minute of agreement prior to the oral evidence (A127-A128), agreeing a number of material facts which were not in dispute. Some of the matters covered in this joint minute are reflected in the Tribunal's findings in fact.
7. An oral hearing took place over two days in April 2018. Oral evidence was taken from the following Witnesses:
 - i. Witness A. Head Teacher at School B and employee of The Respondent
 - ii. Witness B. Quality Improvement Officer(Parental Engagement)
 - iii. Witness C. Independent advocate for the Appellant
 - iv. Witness D. The Appellant and the Child's mother.

Evidence was also lodged in written statement form from each of the foregoing witnesses.

8. Late written evidence was received in this case by the Respondents in the form of a Risk Assessment (R80-R83) and a draft record of a Multi-Agency Meeting and Action Plan (R61-R79) There was no objection by the Appellants and said

evidence was lodged in terms of Rule 45 of The First-tier for Scotland Health and Education Chamber (Procedure) Regulations 2017. (“the Regulations”)

9. Following the conclusion of the oral evidence the Tribunal requested written submissions to be received within 14 days. In addition to the oral evidence of the Witnesses, summarised below, the Tribunal has taken into account all of the documentary evidence and statements lodged by the parties in determining its findings in fact and in reaching its decision.
10. Prior to receipt of written submissions and after the conclusion of the oral evidence, the Convener was notified of late evidence being lodged in the Claim which related to the Child. Whilst the Tribunal took the view that both the Claim and the Reference are decided entirely on their own merits, the evidence lodged in relation to the Claim related to the Child’s exclusion from School B. The Tribunal considered that this issue may be a material factor which we would wish to take into consideration in our deliberations. The Tribunal considered that it would be just and fair to seek to have parties comment here. The Convener issued a Direction seeking further information from Witness A and thereafter allowed the Appellant to lodge any response to this, all in terms of the overriding objective of the Tribunal in Rule 2 of the Regulations.

Relevant Legislation

Section 19 of the 2004 Act states:

“19 Powers of Tribunal in relation to reference

(1) This section specifies the powers of a Tribunal in relation to a reference made under section 18...

...(4A) Where the reference relates to a decision referred to in subsection (3)(da) of that section the Tribunal may—

(a) confirm the decision if satisfied that—

(i) one or more 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,

(a) *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 by such time as the Tribunal may require, and*

(ii) *make such amendments to any co-ordinated support plan prepared for the Child or young person as the Tribunal considers appropriate by such time as the Tribunal may require....”*

11. Schedule 2 of the 2004 Act states:

“3 Circumstances in which duty does not apply

(1) The duty imposed by sub-paragraph (1) or, as the case may be, sub-paragraph (2) of paragraph 2 does not apply—...

(f) if all of 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 a School under their management) other than the specified School,*

(ii) *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 School and in the School referred to in paragraph (ii), to place the Child in the specified School, and*

(iii) *the Authority have offered to place the Child in the School referred to in paragraph (ii)....”*

12. Section 28 of the Education (Scotland) Act 1980 states:

“28 Pupils 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 avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.”

It is not appropriate to narrate all of the aspects of the evidence in this decision. The following is a statement of facts found by the Tribunal together with a brief summary of the oral evidence as the Tribunal heard it:

Statement of Facts:

- (1) The Child (hereinafter referred to as “The Child”) is a 10 year old boy, who lives at home with his parent and siblings. The Child has additional support needs in terms of Section 1 of the Education (Additional Support for Learning) (Scotland) Act 2004 (hereinafter referred to as “the 2004 Act”); namely Oppositional Defiance Disorder.
- (2) As a consequence of said diagnosis the Child experiences social, emotional and behavioural difficulties. The Child can display provocative and disruptive behaviours, hypervigilance and impulsivity; all of which are associated with his condition. The Child can find it difficult to accept other people’s personal space and will test boundaries and become confrontational and at times he can lash out at others. The Child can struggle to establish peer relationships. The Child can use inappropriate language when he is distressed and has general difficulty coping with school routines and obeying orders. The Child has had involvement with Child and Adolescent Mental Health Services (CAMHS), Social work, community health services and educational psychology.
- (3) A Co-Ordinated Support Plan (CSP) was developed for the Child and approved by the Respondents’ CSP advisory group on 15th August 2017.
- (4) As a consequence of the Child’s additional support needs he requires specialist support and clear strategies throughout the School day. The Child requires targeted support in order to access the curriculum and the curriculum in place for the Child requires to be flexible in order to respond to the Child’s additional support needs.
- (5) The Child was enrolled in School A, a mainstream primary School with Additional Support for Learning staff under the control of the Respondents, on or around January 2016. During much of the Child’s time at School A, he was on a part-time timetable and was subject to numerous and continual exclusions from School A. The Appellant lodged a placing request on or around May 2017 seeking that the Child was placed in School C on a full-time basis. School C is an independent school offering a structured environment, reduced sensory environment and small class sizes.

- (6) On or around July 2017 the Respondents refused the Appellant's placing request. Following said refusal, the Respondents offered to develop a more flexible learning pathway for the Child which would include a 2- day therapeutic placement at School C and part-time placement at School A. The Child was expected to return to School A at the start of the new School year in August 2017. Following a period of unsettled behaviour leading up to a house move for the Child and his family in September 2017, it was suggested by the Respondents that the Child attend School B, a mainstream primary School offering enhanced provision for Children with additional support needs. School B was nearer to the Child's new family home than School A.
- (7) A mediation session was planned to take place on 20th November 2017 between parties following agreement of same at a multi-action planning meeting for the Child in early November 2017. This mediation session required to be cancelled due to the unavailability of the Appellants advocate; it did not appear that this was rescheduled to another date.
- (8) The Child visited School B on 4th December 2017. On or around the beginning of January 2018 the Child was enrolled in School B as was his younger brother who also has additional support needs. The Child continues to attend School B for 3 days per week namely; Monday, Tuesday and Friday, and continues to attend School C on a Wednesday and Thursday. The Child attends both schools for an entire school day.
- (9) The Child has experienced significant gaps in his education. The Child is academically able and has shown a particular aptitude for reading. The Child will choose to disengage from the class when he is struggling with a piece of work. The Child is self-conscious about the gaps in his learning and this can cause him to withdraw from the class environment and be disruptive. It is likely that the gap in the Child's learning resulted from his non-attendance following exclusion during his time as a pupil at School A. It is likely that School A was unable to fully meet the additional support needs of the Child.
- (10) School B is a mainstream school offering what is known as "enhanced provision" to Children with additional support needs; this enhanced provision gives a higher level of targeted provision than the mainstream class and is to support children with additional support needs such as the Child. The Child has been allocated the equivalent of an
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additional 26 hours of staff support over a range of specific activities each week. In particular the Child attends the Outdoor Woodland Learning School (“OWLS”) within School B two mornings per week, he attends piano on a Tuesday afternoon and he attends the breakfast club each morning before school starts following a taxi ride to school with his brother. For the remainder of his time within School B the Child is expected to attend with his mainstream peers for class lessons. The Child is in a class with 20 other pupils. If the Child chooses to do so he is allowed to leave the classroom in order to avoid any escalation of the behaviours associated with his ODD. There are always at least two adults in the Child’s class. While the Child doesn’t like an adult with him all of the time, he will actively seek out staff support when he wishes.

- (11) The Child has shown signs of making progress at School B. The Child has attended regularly since he started in January 2018. School B have developed and implemented strategies to support the Child remaining in School B throughout the day. The Child is beginning to express a desire to spend more time in the classroom and be with his peers. The Child has progressed from seeking one-to-one support from the Head Teacher (Witness A) or the Depute Head Teacher with whom he enjoys a close relationship, to now asking and looking to play with his friends in the playground on an unsupervised basis. The Child has access to a dedicated laptop and Ipad which are helping to develop his literacy skills. The Child will often work along with his peers in class on a Chromebook. The Child has shown an aptitude and skill for reading.
- (12) School C is not a public School in terms of 3(1)(f)(i) of Schedule 2 of the 2004 Act. School C has around 40 pupils, the majority of which have additional support needs including learning disability. A high proportion of the pupils at School C have Autistic Spectrum Disorder and complex needs. School C has a high level staff to pupil ratio. The Appellant wishes that the Child attend this School as she considers that it offers him, in her view, the best chance of reaching his full potential and being happy.
- (13) School C is currently providing one-to-one support to the Child from senior experienced staff members. The Child is currently on an Individualised Therapeutic Programme which is helping him to build trusting relationships and to engage positively. School C is progressing a further objective of maintaining a positive outlook for the Child and keeping him safe. The Child attends Play and Music Therapy once each week. He goes swimming once a week and works in the candle studio which he enjoys. The Child has the possibility to take part in craft, baking, playing, estate work and animal care. The Child has related well to these routines and has ceased to be provocative and confrontational towards other young people.
- (14) There have been four separate significant incidents involving the Child since he started at School B. The first incident arose when the Child left the School grounds

although remained in sight of School staff. The second incident occurred when the Child left at the point of getting into his taxi home and went to one of his friend's houses. The third incident related to the Child throwing items in school in response to a decision staff made about him meeting friends, whereupon the Appellant was called. The Child was also subject to one exclusion for a period of three and a half days on 30th April following an incident where the child injured a staff member, disruption to classes and the Child's use inappropriate language. Following said incident staff at School B have reviewed the strategies and risk assessments in place for the Child. This exclusion was an isolated event. The Child at School C has tested boundaries with staff.

- (15) **Witness A** gave evidence for the Authority both in oral and written statement form. She has been a teacher since 1989 and employed in School B as Head Teacher since 2014. Witness A met the Child in December 2017 when he attended a visit at the School and has continued to be involved with him since he was enrolled at School B in January 2018. Witness A had knowledge of the Child's additional support needs and was familiar with the circumstances leading up to his enrollment in School B. Witness A spoke of the Child as being a creative, kind, curious and capable child and that he had started to form some relationships with pupils and staff.
- (16) Witness A spoke of the Child's impulsive and unpredictable behaviours and made reference to some of the incidents that have occurred since he started. Witness A referred to the restorative and nurturing approach that staff were taking with the Child in order that he can move on from the previous experiences of continual exclusion at School A which has been difficult for him. She spoke of the importance of him building trust and relationships with staff and peers.
- (17) Witness A spoke of the communication and contact that she has had with the Appellant with a view to making the Child's placement a success at School B. She acknowledged that the Appellant has required to attend at certain times to support the staff in managing the Child's behaviours. Witness A spoke of how the level of supervision for the Child has been reduced over time in the playground to allow the Child to feel trusted and that this had been largely successful. Staff have been learning how to effectively communicate with the Child and understand what might trigger any behaviours. The Child will continue to be assessed and a date has been arranged for early May for a planning event in order that more detailed

curricular arrangements can be put in place for the Child following him settling well into School B.

- (18) Witness A stated that the Child enjoys school and that he was a rewarding boy to work with. Witness A stated that School B was an inclusive School and that both she and her team would go to extraordinary lengths to make the Child's placement a success.
- (19) Witness A spoke to the positive start that the Child has made since coming to School B. She indicated that in the term before summer break, there were plans to stretch the Child academically. She stated that it was her experience that when the Child was in an optimal mood and in the right place. Staff were able to challenge him to engage in classroom work with his peers. The Child had recently engaged in an entire PE lesson and sat in for an assembly; both of which he had not tolerated at the start of his placement in School B. There were now plans to expand on his reading books and further challenge him in order to let him see what he is capable of achieving. This would require the development of individual targets and work was about to commence in this regard. Witness A advised that School B planned to build an e-profile of the Child in order that School B, School C and the Appellant could share the Child's experience of the curriculum.
- (20) Witness A stated that it would be her preference that the Child attended School B on a full-time basis on 5 days per week. It was her view that the Child now recognised School B as his School. The Child has developed routines and forged relationships with pupils and staff. Witness A also spoke of the importance of the transitional arrangements for secondary School that would start when the Child was in primary 7.
- (21) **Witness B** has over 35 years experience in working with children services, education and in particular additional support needs and has been employed by the Respondents as a Quality Improvement Officer for Parental Engagement since November 2017. She has worked in the Respondent's Additional Support Team since 2010. Since January 2018, Witness B has worked on a consultancy basis with staff at School C, in partnership with the Respondents to improve services to children with additional support needs. Witness B had knowledge of the curriculum at School B and was familiar with some of the educational arrangements at School C which assisted the Tribunal greatly.
- (22) Witness B became involved with the Child on or around April 2017. Witness B conceded in her evidence that things had not gone well for the Child at School A. Witness B was involved in the process of the Child being enrolled at School B .
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Witness B spoke to the marked change in the Child's attendance and behaviours from his time at School A where she had also known him. Witness B attributed this to the flexible learning pathway in place, the efforts of staff in collaboration with the Appellant and the therapeutic placement at School C.

- (23) Witness B's evidence broadly speaking concurred with Witness A in terms of the positive start for the Child at School B, making particular reference to the Child initially having a higher level of supervision at breaktimes, but now playing outside with class mates at break time and lunch time without direct staff support.
- (24) Witness B spoke to some of the challenges for the Child. In particular she stated that the Child has had to learn to cope in a bigger primary School and accept new rules and boundaries but in her view he had done this very well. Witness B acknowledged that there had been some episodes but with successful collaboration with the Appellant as well as the staff in School B's own experience, most situations had been successfully de-escalated.
- (25) Witness B spoke of the Child now re-engaging with his learning following gaps in his attendance at School A. The Child spoke to her positively about School B. Witness B spoke of the importance of the transition to the local high school in the Autumn term later this year and that this would best be achieved at School B, as a feeder school.
- (26) When challenged by the Appellant's solicitor on why the Child spent so little time in class, Witness B responded that the staff at School B did not want to push the Child too much in the early stages. Staff were still getting to know him and they wanted to take the lead from the Child at the early stages.
- (27) Witness B had experience and knowledge of School C. She spoke to the composition of School C. In her view, the majority of children who attended School C on a full time basis would not be suitable to a mainstream environment. In her view, the Child was suited to a mainstream environment with the appropriate targeted approach that School B could offer him. She advised that the class composition in School C was very different to School B. In School C pupils worked in very small groups of 4 or 5 pupils across a range of age and ability. Witness B felt that School C would not offer the Child an appropriate peer group. This would in turn not offer him the same opportunities to learn from his peers that is offered at School B. The Child, in her view, was on par with pupils in a mainstream setting and would benefit from seeing other children as role models of behaviour in the mainstream setting as well as being able to appropriately socialise with them. It was her view that the Child would not benefit from attending School C on a full-time basis. Witness B advised that the Child did not have a learning disability and as such he would benefit from a mainstream environment where his skills and aptitudes could be stretched.
- (28) Witness B spoke of the benefits of the part-time placement at School C. In particular the Child had been involved in activities that allowed him to intensively build trust with

staff, which was important following his period at School A. The placement at School C allows time for the Child and staff to look at coping strategies to assist in managing his behaviours in School B. It was the opinion of Witness B that this approach had been highly successful for the Child compared with his time in School A alone.

- (29) Witness B spoke of the next stages for the Child. Now that the Child has an increased ability to cope with a mainstream environment, the next stage would involve a more detailed and formal assessment (IEP) in order to develop more specific targets for the Child.
- (30) Witness B was unable to attribute the improvement in the Child's overall engagement and attendance solely to his part-time placement at School C. It was her view that the approach of staff in School B together with the therapeutic placement have all played a role in the significant improvement and it was her view that the Child would continue to make significant progress if this arrangement continued.

Witness C

- (31) Witness C is currently a voluntary Advocacy Worker providing information, advocacy and practical support to parents of children and young people with autism and their families. He has a post-graduate certificate in "Autism and Learning". He was previously a manager at Scottish Autism and the National Autistic Society and is experienced in working with autism through his work with such individuals and their families. He has known both the Appellant and her son since April 2017. He was familiar with the Child's diagnosis of ODD and has worked closely with the Appellant both when the Child was a pupil at School A and through the Child's move to School B.
- (32) Witness C expressed an opinion that mainstream schooling was not suitable for the Child. He made specific reference to the Child's placement at School A and the fact that School A was not able to deal with the Child's challenging behaviours. It was his opinion that any mainstream School would not be able to meet his needs as they would not have sufficient training or resources to support the Child's additional support needs. Much of his evidence focussed on the Child's attendance at School A where the Child was subject to a number of exclusions.
- (33) Witness C advised that in an incident the Appellant was contacted by Witness A at School B where she was told that the Child was missing. The police were called however the Child was thereafter located in close proximity to the main School.
- (34) Witness C stated that it was his impression that the placement at School C was going well. He believes that School C would be a better school for the Child. He believed that the Child would have the opportunity to learn through their holistic approach to learning and he would settle well in this environment .

- (35) Witness C stated that he was aware of School C from working with children who have autism and their families. Witness C was unsure if School B had the resources to educate the Child. He understood that School C conducted person centred planning and that this approach would help the Child regulate his emotions. Witness C expressed concerns that Children with ODD and Autism found the transitioning process to Secondary School extremely difficult.
- (36) Witness C criticised the current arrangements at School B, particularly around the flexible timetable in place for the Child. Witness C did not feel that this was appropriate for the Child. He expressed surprise when put to him by the Respondent's solicitor that things were getting better, stating that he knew the Child and in his view the environment in School B would make it very difficult for the Child to cope. He stated in his evidence that he did not know enough about what School B were doing to attribute any improvements in the Child's attendance to School B. He also conceded that he had not spoken to any staff at Camphill about the Child.
- (37) Witness C expressed concerns about the Child mixing with other children with behavioural problems at School B although he acknowledged that he had not observed the Child in this regard. It was his opinion that the Child required a school who better understood him and that School C would be able to do this better than School B. He stated that the Child didn't spend a lot of time learning at School B.

(38) **Witness D**

The Appellant is the mother of the Child. She has another younger son with additional support needs who also attends School B. It was her experience that all mainstream schools her son has attended have struggled to cope with his additional support needs, School B being the third such mainstream placement for her son. The Appellant spoke of the difficult time that the Child experienced as a consequence of the exclusions at School A. She spoke of her son being a fluent reader but that his abilities in reading and writing were not at the same level as other peers in his mainstream class which made him feel isolated. The Child was very aware and self-conscious of gaps in his learning and he was aware that he wasn't on the same level of everyone else in his current class which upset him.

- (39) Witness D expressed concerns that the current curriculum in place for her son at School B was neither sufficient or appropriate. She spoke of the "OWLS" outdoor learning and other activities her son was offered. She expressed concern that he was out of the classroom more often than he was in. It was her sense that her son was simply being kept occupied and not in fact receiving an education. She acknowledged that things had started off well at School B when the Child started in January 2018 however she noticed a real difference when the Child started the therapeutic sessions

at School C twice per week. In her view he was managing better and this was attributable to the Child's attendance at School C.

- (40) Witness D spoke of her son disrupting the learning of others and that she was aware of other parents complaining about this, although these complaints did not appear to have been made to the School on a formal basis. It was also her view that her son had learned at School B that he could choose when he wanted to engage in lessons and that this gave out the wrong message to her son around managing his behaviours.
- (41) Witness D felt that her experience of mainstream so far for her son had proven that it is not possible for him to cope in a mainstream setting on a long-term basis. She was of the view that the Child will struggle with the same challenges no matter what school he attends. She stated that School C would provide an education on the Child's terms and provide him with reassurance which he needed.
- (42) Witness D spoke of the contact from School B by telephone and email, in particular from Witness A, which she felt was excessive. She felt that the School relied very heavily on her input to manage her son's behaviours and that it was not appropriate for her to be as available as the School would wish her to be in order to prevent or manage her son's behaviours. She did concede that the frequency of calls both directly from her son and from the School have reduced. In addition some of the contacts and attendances with School B related to the Appellant's other Child who also attends School B and did not always relate to the Child.
- (43) Witness D was of the view that her son would benefit more from education if he were to attend School C on a full-time basis. The Child would attend more of the workshops which he enjoyed and education would be on his terms. She stated that School C would follow the Curriculum for Excellence and that the workshops would be suitable for him. She expressed concerns about her son following an academic timetable due to the damage done in the past when he has been excluded and lost time in education. It was the view of the Appellant that the Child was happy at School B as he went there to play and do what he wants and not to learn. The Appellant's long-term goal for her Child was that he was happy and not reliant on his mother for his education as she feels is the case currently. Witness D stated that she understood that her son would have the opportunity to access a more academic curriculum if he wished.

Both party's agent's lodged written submissions subsequent to the conclusion of the oral evidence which were of assistance to the Tribunal. Further documentation in the form of a written statement from Witness A and a response from Witness D were lodged in terms of the Direction dated 18th May 2018.

Appellant's Submissions:

The Appellant stated that the grounds for refusal had not been satisfied and furthermore it was not appropriate to confirm the decision of the Authority.

Schedule 2 section 3(1)(f)(ii):

It was submitted on behalf of the Appellant that it was not possible for the Respondents to make provision for the additional support needs of the Child within School B or any other School under their management. In particular the Appellant has serious concerns about the lack of time that the Child spends within the classroom environment and the lack of evidence of any academic progress. It is submitted on behalf of the Appellant that there is little evidence of the Child participating in academic work. The Appellant also expresses concerns about the Child being allowed to choose to disengage from the classroom when he is uncomfortable and wander round the School if he wishes.

The Appellant considers that there is an overreliance on her to resolve any issues that might arise with her son in School B, a situation that is not sustainable. The Appellant makes further reference to incidents where the Appellant has had to be called; one of which involved a call to the Police when the Child left the School without permission causing concerns for his safety and that these issues have not arisen when the Child is in attendance at School C.

The Appellant contends that School C will meet the Child's needs; offering therapies as well as learning within one campus offering routine and stability for the Child.

Schedule 2 section 3(1)(f)(iii)

The Appellant attributes the Child's progress to the two days per week that he spends at School C. The Child has made friends at School C and these Children have a wide range of need. The Child would have access to the learning environment as well as therapies offered at School C should he attend on a full time basis. Submissions make reference to the report provided to the Tribunal by W for School C(A121-122) which, whilst acknowledging the challenges facing the Child, evidences the progress that the Child has made.

The Appellant submits that the respective cost of the Child attending School B can be justified in light of the respective suitability of the placement.

Appropriateness of the Placement:

It was submitted that School C would provide an ideal environment for the Child to flourish. School C has a holistic and targeted approach. It is contended for the Appellant that by trying and failing to provide the Child with an education throughout his time at School A and School B suggests that the Respondents are unclear on what the Child's needs are and it would not be appropriate to confirm the Authority's decision.

We were invited to overturn the Authority's refusal and require the Child to be placed at School C.

Respondents Submissions:

Schedule 2 section 3(1)(f)(ii):

The Respondents submitted that they could provide for the Child's additional support needs. Reference is made to the evidence in chief from Witness A and Witness B where both set out clearly what the Child's needs were and how the education authority were meeting those needs at School B.

The Child has been attending School B since January 2018 and is spending 3 days per week namely Monday, Tuesday and Friday at School B and currently Wednesday and Thursday on a therapeutic placement at School C. Both Witnesses spoke to the improvement in the Child's behaviours since he started and the Appellant accepted that things had been going well. Witness A spoke to the range of activities in place for the Child and that the Individual Education Plan was being reviewed to incorporate more academically-based education targets. Witness A said that the School had been starting to try to stretch the Child academically and that he had responded well to this. The Child is an academically able pupil and was managing to spend time in mainstream classes and his behaviours were largely controlled.

The Respondents' submissions make reference to the three incidents that have occurred since the Child started at School B and contends that there have been no further incidents

Schedule 2 section 3(1)(f)(iii):

It argued by the Respondents that the Child will not have an appropriate peer group, he would not have an appropriate curriculum and there were concerns that he would be socially isolated at School C. There is little evidence as to the provision that School C would actually offer the Child, however Witness B had knowledge of School C and it was her view that School C was not the better School for the Child's needs.

The cost differential for the Child to attend School C is approximately £20000 and it is contended that this is something that the Tribunal must take into account.

It was further submitted by the Respondents that it was acknowledged by all parties that the position regarding the Child's education is much better at the end of April 2018 than it was in January 2018. It is submitted that this is in a large part due to the education provided at School B and that this should be allowed to continue .

It is submitted that the Tribunal find that the ground set out in paragraph 3(1)(f) of Schedule 2 of the 2004 Act has been established that in all the circumstances of the case the Child should continue to attend School B and the reference should be dismissed.

Reasons for the Decision

The Tribunal considered all the evidence before it both written and oral. The Tribunal was satisfied that there was sufficient evidence available to reach a fair decision on the reference and considered all of the written and oral evidence placed before it when we deliberated.

The first Stage :

If the Tribunal is satisfied that the grounds stated by the Authority in their Case Statement in terms of Schedule 2 para 3(1)(f) exist at the date of the hearing, then the Tribunal must move on to the second part of the test;

The second Stage:

The Tribunal must exercise its discretion and determine whether in all of the circumstances of the case, it is appropriate to confirm the Authority's decision.

For both stages the onus rests with the Respondents to satisfy the Tribunal that the grounds exist and that in all the circumstances it is appropriate to confirm the decision of the Authority.

It was a matter of agreement between parties that the specified School (School C) is not a public School in terms of paragraph 3(1)(f)(i) and further agreed that the Child had been offered a place in School B in terms of paragraph 3(1)(f)((iv). Thereafter the following matters required to be determined by the Tribunal:

Can the Respondents make provision for the additional support needs of the Child at School A (paragraph 3(1)(f)(ii)

The Act requires that in order to uphold the decision of the Authority, we have to be satisfied that they are able to make provision for the additional support needs of the Child in a School other than the requested School. In the present case we carefully considered whether the Authority had satisfied us that they were able to meet the Child's needs in School B.

The evidence presented to the Tribunal suggested that whilst enrolled at School A, prior to the Child attending School B, the Child had, effectively not been in receipt of an education. This situation occurred as a consequence of a series of exclusions from School A. Since moving school, it was clear to the Tribunal that the staff at School B had gone to great lengths to support the Child in attending school both regularly and throughout the day. The Respondents have put in place a number of measures to support the Child attending school throughout the day. They have worked with the Child and the Appellant to develop strategies in this regard, including the part-time therapeutic placement at School C. The staff at School B have spent time in the first term the Child has attended getting to know him in order that they can now develop further targets for learning as the Child progresses through the summer term and into the new school year. We were satisfied that the Respondents have identified and correctly assessed the Child's needs. Moreover, the evidence suggests that this assessment will continue with a view to further engaging the Child in the curriculum and the Tribunal was satisfied that all of the evidence suggested this is more likely than not if the current arrangements continue for the Child. School B has been largely successful in supporting the Child to attend School throughout the day and for a full term.

The Tribunal considered the issue of the further exclusion that occurred on April 2018 and notwithstanding this incident, which appeared to the Tribunal to be an isolated event, were satisfied that School B was able to meet the needs of the Child. It was clear that the nurturing and restorative approach would continue and that following said exclusion, staff at School B had reviewed both strategies, risk assessment and learning plans for the Child to avoid any re-occurrence.

Having regard to all of the evidence available to us we were satisfied that School B is able to make provision for the additional support needs of the Child and we rejected the Appellant's submissions here. The Respondents provided the Tribunal with credible and reliable evidence in oral and written form of the suitability of School B to meet the Child's needs. The contrary evidence in this regard was principally from the Appellant and Witness D, which we deal with later. Whilst the Tribunal does not seek to minimise the concerns of the Appellant, we require to look at all of the evidence before us as a whole. The evidence provided by Witnesses A and B taken together suggests that the Authority has, over a fairly short period of time, sought to implement a range of strategies and

supports for the Child to be educated within School B in order for his educational needs to be met. The Child has shown significant signs of progress. There is a marked improvement from the position when the Child was a pupil at School A . The approach of the Authority indicates that this progress will likely continue. The Child is more settled and happy within School B where his educational needs are subject to ongoing review and collaboration between all the staff involved with him.

The Appellants' evidence and that of witness D, at times, made reference to what had happened at School A. The Tribunal however is concerned with the current situation and as such, the Tribunal must focus its mind on the current arrangements at School B, and not on any failures that might have occurred at the Child's previous school. The Appellant made reference to her requiring to attend School B and deal with email communication and telephone calls which she considered excessive. Some of this evidence referred to her attending School A, in the past. She also referred, at times, to requiring to attend School B for her other son who is also a pupil there. It appeared to the Tribunal that Witness A was making a significant effort to communicate with the Appellant, as the person who knows the Child better than anyone, to support him to re-engage with his learning. The Tribunal could not conclude from this therefore that School B was unable to meet the child's additional support needs. The weight of evidence before the Tribunal from the Respondent was such that it outweighed that of the Appellant in this regard.

The Tribunal carefully considered the contrary evidence of Witness C. At times, the evidence of Witness C took the form of advocacy on the Appellant's behalf. His evidence was in the form of various opinions on what educational provision would work for the Child. Witness C did not offer much evidence to support the opinions he expressed to the Tribunal. In particular, his view that no mainstream School would meet the Child's needs was without foundation. It was an opinion without any evidence being offered in support of it. Witness C did not have any experience or expertise of children with a sole diagnosis of ODD such as the Child nor was he suitably qualified in education and the additional support needs of children such as the Child.

Witness C also focused large parts of his evidence on the Child's attendance at School A. This did not assist the Tribunal as we are charged with making a decision about the Child's current educational arrangements as they relate to School B and School C; not what has happened in the past. The Tribunal were again not assisted by his evidence in this regard.

For these reasons the Tribunal did not consider that it could place sufficient weight on Witness C's evidence and preferred the conclusions of the professional witnesses. Witness A had worked within School B and Witness B had over 35 years experience working with children with additional support needs in education and provided credible

evidence of the arrangements within School C. Both witnesses were also familiar with the Child's circumstances.

The respective suitability and respective costs of the Schools

In the determination of this ground, the Tribunal considered together the suitability and cost of the Child attending School C. The Tribunal assessed the respective qualities of each of the two Schools. The question for the Tribunal to determine is not whether School C is a better school than School B, but whether School C is a more suitable school for the provision of the Child's additional support needs.

The Tribunal was not presented with evidence on the provision School C would be able to make for the Child on a more academic basis beyond the therapeutic programme currently in place. The Tribunal was able to conclude from all of the available evidence that School C would offer a high level of appropriate therapeutic input to assist the Child rebuild trust with others and develop strategies for managing his behaviours. It was unclear, however, what elements of a more academic curriculum could be offered to the Child at School C. The Appellant in her evidence suggested that the Child would be able to access the academic part of School C's curriculum, but there was no evidence presented to the Tribunal on what this would involve for the Child, when the Child would be able to access this or what might be achieved for him. The evidence on what School B would make available in this regard was clearer. The Tribunal considered this to be a material factor given the evidence before the Tribunal that the Child was academically able and had experienced gaps in his learning. There was no evidence on how School C might address this very fundamental issue. For example, there was no evidence presented to the Tribunal on how the Child's reading would further be developed at School C. The Tribunal considered this to be an important factor in the Child's learning as there was evidence from both the Appellant and Witness A that the Child had an aptitude for reading. In contrast, the Tribunal was presented with evidence on the steps that School B had taken and would be continuing to take to re-engage the Child with learning. Moreover there was evidence from Witnesses A and B that the Child was now expressing a willingness to re-engage with learning and was looking to spend more time in the class with his peers.

The Appellant expressed concerns that School B allowed the Child to leave the class when he chose and rewarded him with activities in response to any behaviours. Whilst the Tribunal accepted that this had been the case to date, we were satisfied that this approach was appropriate given the Child's past experience. The Child required to regain the trust of staff and cope with remaining in school for the whole day, a goal that appears to have largely been achieved.

Both the Appellant and Respondent attributed the Child's significant improvement to each of their preferred Schools. The Tribunal was unable to attribute the Child's improvement to either School on the evidence presented to it. The evidence suggests that the Child is currently deriving benefit from his attendance at both School B and School C.

In light of this conclusion, in terms of the suitability of each placement, the Tribunal was satisfied that the current placement at School B, with the included therapeutic placement at School C, was the most suitable provision from the evidence presented to it. The Tribunal was not satisfied that School C would be a suitable school for the Child to attend on a full-time basis for the reasons given.

Looking at the respective costs, the Tribunal considered what the additional costs would be to the Authority if the Child were to be placed in School C. The respective costs of educating the Child at the two Schools was a matter of agreement between the parties. The Tribunal accepted that the additional cost to the Authority of placing the Child in School C would be in the region of £20,000.

Having regard to the respective costs and respective suitability of the provision of the additional support needs of the Child in both Schools, the Tribunal does not consider that it is reasonable to place the Child in School C.

The Tribunal was not satisfied on the evidence available to it, that School C would be a suitable school for the Child to attend on a full-time basis. This then must be considered in light of the additional costs in sending the Child to that School. Taking all these factors into account the Tribunal is satisfied that the Respondent was entitled to reject the placement request.

Appropriateness in all the circumstances

In this appeal the Tribunal is satisfied that the first stage has been established by the Respondents in terms of Schedule 2 paragraph 3(f)(i-iv). The Tribunal must thereafter consider the appropriateness of the decision to refuse the placing request, notwithstanding the grounds of refusal exist. The Tribunal is entitled to exercise its discretion and determine whether, in all of the circumstances of this case, it is still appropriate to confirm the decision of the Authority. In the application of this provision, the Tribunal is entitled to consider all of the facts and circumstances as they relate to the Child and reach a view as to whether it continues to remain appropriate to confirm the decision of the Authority.

The Tribunal gave very careful consideration to the views of the Appellant in determining this issue. The Appellant was very clear in her wish that her son attend School C; it was her view that based on her experience thus far in the primary education system, School C would be best placed to meet her son's needs. The Tribunal must consider all of the evidence available to it as a whole when reaching its decision. The Respondents provided credible and reliable evidence about the ability of School B to meet the needs of the Child. In doing so, it satisfied the Tribunal that those now working with the Child were mindful of the difficult journey that the Child as well as the Appellant had experienced over the past few years in previous placements, particularly School A. The evidence suggested to the Tribunal that the Respondents were taking appropriate steps to support the Child to access the curriculum and develop his learning. The Tribunal were further provided with credible and reliable evidence that School C would not be able to meet the needs of the Child. The Tribunal accepted the evidence of Witness B that some, although not all of the children, were diagnosed with a Learning Disability, Autism or other complex need which generally meant they would not be suited to mainstream provision. The Child would not have an appropriate peer group having regard to his academic ability. The Appellant stated that the Child shared a close relationship with his five siblings and that he enjoyed plenty of interaction with other children outside of school. The evidence however presented to the Tribunal was that the Child was enjoying unsupervised play time and lunch time with peers at School B and was beginning to form relationships with other children. There was further evidence that the Child was looking to spend an increasing amount of time with his peers in a class environment at School B. As far as School C is concerned, the only evidence presented to the Tribunal about relationships with peers was that the Child had ceased to be provocative and confrontational towards other young people. There was compelling evidence however that the Child was benefitting from his interactions with his peers at School B.

The Tribunal accepted that there had been a series of incidents, including the 3 day exclusion in April. Notwithstanding this however, there was also evidence that School B taken appropriate steps to address some of the issues which had caused the escalation in behaviours leading up to this exclusion.

The Child has attended School B for a relatively short period of time. During this time it was evident that the Child has made significant progress in his school attendance. There appeared to the Tribunal to be a clear plan to re-engage the Child further in his learning. The approach of School B together with the therapeutic input of School C is benefitting the Child in his education. The Child is learning not just to cope in a mainstream setting, but is learning to build relationships and maintain a positive outlook. The Child is now seeking to spend more time in his class with his peers. The evidence before the Tribunal suggested that if the Child were to attend School C he may not have the same opportunities to

engage with an appropriate peer group; in addition , there was no evidence presented to the Tribunal about the academic curriculum which would be available to the Child. The Tribunal considered these to be material factors in the case before it.

The Tribunal was presented with compelling evidence that the Child is benefitting from his attendance at School B with the inclusion of the placement at School C. The Tribunal was also satisfied that School C would not be an appropriate full-time placement for the Child for the reasons already stated. Accordingly in all the circumstances of the case it is appropriate that the decision of the Authority to refuse the placing request is confirmed.