DECISION OF THE TRIBUNAL

Reference

1. The reference is brought by the appellant in terms of Section 18(3) of the Education (Additional Support for Learning) (Scotland) Act 2004 ("the 2004 Act") on the basis of a refusal of a placing request for the child to attend school A (hereinafter referred to as "the specified school"), a special school run by the respondent. The placing request was resisted by the respondent on the grounds specified in paragraphs 3 (1) (a) (i), 3(1) (a) (v) of schedule 2 of the 2004 Act, respectively, that placing the child in the specified school would make it necessary for the respondent to take an additional teacher into employment and placing the child in the specified school would be likely to be seriously detrimental to the educational well-being of pupils attending the school.

Decision

2. The reference is refused and the decision of the respondent is therefore confirmed in terms of section 19(4A) (a) of the 2004 Act.

Process

3. The child's views were taken by an independent advocate and are contained within the bundle at T114-115. A large number of late productions were lodged in the days before the hearing. As there was no objection to the late lodging of the productions and to avoid a delay in the hearing they were all admitted to the bundle. The respondent's representative objected to the inclusion and consideration of one paragraph (14) of the appellant's statement as it referred to new matters on which he had not had an opportunity to ascertain the respondent's position. For this reason, and also because the paragraph referred to historical matters which seemed to be of no relevance to our considerations, it was determined that the said paragraph would not be considered.

4. We considered all the written evidence numbered in the bundle. These included a witness statement from witness C [R88-90] and a brief witness statement from witness B [R92]. A report from witness A was included [T25-33]. A statement for the appellant

[A62-66] was also included. A joint minute of admissions was included in the bundle at T117-118 which is the basis for many of the findings in fact that follow.

Findings in Fact

5. The appellant is the father of the child.
6. The child is a twelve year old girl.
7. The child has a neurodevelopmental disability, hyperacusis, significant attention and concentration difficulties, dyslexia, executive functioning disorder, difficulty processing information and difficulties with social interaction. She suffers from anxiety and long-standing sleep difficulties.
8. The child has handwriting difficulties.
9. The child currently attends the nominated school.
10. The nominated school is managed by a neighbouring education authority to the respondent.
11. The nominated school is a secondary school for children with special needs.
12. The child is very sensitive to noise and has a heightened sensory sensitivity.
13. The child struggles with transitions due to an anxiety surrounding toilets.
14. The nominated school has employed strategies to address the child's difficulties with toileting within the school. These strategies have not been completely successful and the child will regularly come home at night having had to change clothes.
15. The child is fully verbal, however she doesn't always understand inference and will speak inappropriately as she can be unaware of context. She struggles to express herself as she is prone to speaking too quickly.
16. The child receives support from educational psychology, Child and Adolescent Mental Health Services (CAMHS), Sleep Scotland.
17. The appellant made a placing request for the specified school which is a special school run by the respondent.
18. The placing request was refused on 7 November 2018.
19. National conditions of service for teaching staff specify that the teacher to pupil ratio for a special school for children with moderate learning difficulties should be no more than 1:10 and for language and communication difficulties no more than 1:6. These national conditions are incorporated into teachers' contracts.
20. Pupils in the specified school are grouped into both of the categories referred to in finding in fact 19 and accordingly maximum class sizes are 6 or 10. Pupils are also grouped in respect of age and ability.
21. Pupils in the specified school are either in the general education phase, covering the early years of secondary (up to S3), or in the senior phase (S4-S6) Pupils in senior phase cover a different curriculum involving class choices.
22. Were the child to attend the specified school she would be educated in a class for children with moderate learning difficulties with a maximum class size of 10.
23. There are no places available in any general class within the specified school.
24. It would not be possible to create spaces in classes within the general classes.
25. Were the child to attend the specified school it would be necessary to create a further class and consequently employ at least 1 further teacher. The cost of employing an additional teacher would be approximately £44,000 per year.

26. Were the child to attend the specified school she would be in a class with children who generally had more complex needs than her. There would be two other girls within the class both of whom have more complex needs.
27. The child's class at the nominated school has been designed around her needs to ensure she has an appropriate peer group. There are two other girls in the class both of whom are working at a similar level to the child.
28. The child gets on well with other children at the nominated school. She is fully engaged with them both in class and at breaks, having a particular friendship with the two other girls in her class.
29. The child enjoys playing games including tig with her friends during breaks.
30. The child appears happy in the nominated school.
31. The child's transition to the nominated school has been successful.
32. The child is thriving in the nominated school.
33. Accommodation is extremely tight at the specified school.
34. The nominated school makes use of ICT to support the child including netbooks, programme called Ratatype to teach typing and Ivona Reader text-to-speech programme. The child is moving from using Clicker 6 and 7 to using Immersive Reader to support reading and her literacy target is based on using IT.
35. The child currently has one to one support with reading, three days a week, at the nominated school.
36. The child would not receive one to one support were she to attend the specified school.
37. The child plays outside at the nominated school and outdoor education plays a significant part in the education provided in the nominated school, for example with their garden, participation in environmental award and bikeability.

Reasons for the Decision

38. There was no dispute that the child has additional support needs and that the specified school is a special school. We consider each of the grounds for resisting the placing request in turn.

    Paragraph 3(1) (a) (i), necessary for the respondent to take an additional teacher into employment

39. This ground is clearly and very straightforwardly established from the evidence of witness B. The national conditions of service for teaching staff specify that the teacher to pupil ratio for a special school for moderate learning difficulties should be no more than 1:10 and for language and communication difficulties no more than 1:6 (R70). These nationally agreed conditions are incorporated into teachers' contracts (witness B). Accordingly the respondent would be acting unlawfully were it to make any of the classes any larger than these ratios. Children at the specified school are grouped into both these categories and accordingly classes of 6 or 10 (R59 as spoken to by witness B). They are also grouped in respect of age and ability. There is a material distinction between general classes covering the early years (S1-S3) of secondary (general) and senior classes covering the later years (S4-S6). Witness B was clear that like any other secondary school children follow a different curriculum involving class choices in the senior part of the school. Witness B gave evidence that were the child to attend the specified school she should be educated in a class of 10 (for children with moderate learning difficulties). There are no places available in a class of 10 (or 6 for that matter) for children in the early/general classes. There were 3 places in the senior phase and witness B was asked whether it was possible to recomposite to create vacancies in younger classes to

which she responded " no, absolutely not". She further replied that "everyone is where they should be" and was clear that she had never exceeded the maximum of 10 children in a class.

40. Accordingly, were the child to attend the specified school a new class would require to be created which would necessitate the employment of at least one new teacher, the respondent not having any teachers currently under employment without any work. Indeed, from the evidence of witness B it seemed likely that more than one new teacher would need to be employed as the additional class would have to be created for all subjects.

41. The appellant's solicitor made submissions that this ground was not established but none of those submissions made any sense to us. She did not dispute the argument that it would be unlawful but did suggest that the limits had been breached elsewhere albeit no evidence was presented to suggest the respondent breached the number limits in any school. She also questioned witness B's reliability on the basis the witness commented at one point that she couldn't remember a specific detail because she had a terrible memory, brain overload and was busy. We were very surprised at this suggestion as it was clear that witness B had an extremely good knowledge of her school and its pupils and these remarks were only in response to a question seeking detail that we would not have expected witness B to have to hand. The remarks were certainly not sufficient to suggest any lack of reliability in the clear factual evidence that she gave.

3(1) (a) (v) placing the child in the specified school would be likely to be seriously detrimental to the educational well-being of pupils attending the school.

42. We do not find this ground established. The respondent did not suggest that placing the child in the school would give rise to significant expenditure on extending or otherwise altering the accommodation. For this ground they sought principally to rely on the evidence of witness B who was clear that the school was "bursting at the seams" and had no idea how she would manage were an extra class created. There was also reference to guidance in relation to space within the school. From that, the representative's argument was to the effect that because a further child would create a new class in an already busy school the educational well-being of pupils attending the school would be subject to a serious detriment. We considered this to be an enormous leap particularly in the absence of any evidence as to what this "serious detriment" would amount to in practice, what it would mean for individual children. Accordingly we are clear that this ground was not established.

Whether it is appropriate in all the circumstances to uphold the decision of the respondent.

43. In all the circumstances it is appropriate to uphold the decision of the respondent. The particular circumstances that were argued in respect of this ground were the additional cost of the child attending the specified school and the respective suitability of the two schools. During the following paragraphs we describe the factors we considered.

44. The respondent, who are not the home authority for the child, would have to employ an additional teacher at a total cost to the respondent of approximately £44,000 per year, the undisputed evidence of witness B being that this figure was likely to have been based on the lower part of the teachers' pay scale. Cost is clearly a relevant factor which we took into consideration and which suggested the decision should be upheld.

45. However, cost was not the most substantial factor which we considered. Each representative made arguments relating to the suitability of the two schools for this particular child. The respondent argued that both schools were suitable for the child but that the nominated school was the better suited while the appellant argued that the nominated school was not suited to the child's needs.

46. At the outset on respective suitability we record that we were highly impressed with witnesses B and C, who both presented as extremely professional and committed to the well-being and educational attainment of learners within their respective schools. We gained the clear impression that both schools are well run and are positive environments for the learners to attend. We agree with the submissions of the respondent that both schools are suitable but conclude that for this particular child the nominated school is better suited for a number of reasons which we articulate in the following paragraphs. Nothing in this decision should be interpreted as us having any concerns regarding the suitability of the specified school for the pupils attending.

47. We considered the peer group which the child has in the nominated school and the peer group that she would have were she to attend the specified school. The evidence presented to us by witnesses B and C which was accepted by the appellant was that children within the child's class at the specified school would generally have more complex needs than the child herself. Witness B gave evidence that within the class the child would be most suited to in the specified school there were 2 other girls, both of whom had more complex needs than the child and who did not appear to us to be an obvious peer group. On the other hand, the class the child is currently part of had 2 other girls both of whom are working at a similar level to the child and who would be an appropriate peer group. The appellant suggested that the child had a need to nurture other children and that the wider range of needs educated at the specified school would benefit the child socially. The evidence of witness C was that the child got on well with her peers at the nominated school socially and fully engaged with other children both in class and at breaks, having a particular friendship with the girls in her class. The child similarly expressed positive views about other children; particularly that she had made friends and enjoyed playing games with them. It was very clear to us, based on the evidence of witness C and the child, that she has an appropriate peer group at the nominated school which benefits her both academically and socially. On the other hand as detailed above the children who would be in her class in the specified school have more complex needs and we do not consider such a peer group would be likely to benefit the child either academically or socially to the same extent as her current peer group. While the solicitor for the appellant highlighted evidence given by witness C that two children in the child's class are at a lower level for reading and writing than the child in order to suggest that the peer group at the nominated school was not appropriate, the evidence of witness B was to the effect that the majority of children in S1 at the specified school are at an earlier level. Similarly while the respondent and witness A did not think the child would have difficulty making friends in the specified school given she is a very sociable child, we are not convinced that it would be as straightforward as they think

given the difference in needs between the child and the other girls who could be in her class.

48. Related to the issue of peer group is behaviour management within both schools. We heard a lot of evidence about the different strategies employed by each school but do not consider it necessary to go into detail as we have no doubt that the strategies employed by each are appropriate for the profile of students within each school. What we did consider relevant was the evidence given relating to the needs of the children in each school and consequently the need for behaviour management strategies. Witness A indicated that as the specified school has children with moderate learning disability then by definition the school will have more challenging behaviour. Witness B in response to questioning regarding the specified school's experience of managing children with challenging behaviour responded that they had a lot of experience, it is a very diverse population and "it can be very difficult." Witness C on the other hand when asked similar questions indicated that the nominated school did not have a huge number of children with challenging behaviour but there have been more in the past and said "we do have behaviours to manage." Challenging behaviour did not appear from this evidence to be a significant issue within the nominated school, certainly as compared with the specified school and we consider this to be a factor in favour of the nominated school for the child.

49. Further, the overwhelming evidence is that the child has settled extremely well in the nominated school notwithstanding parties agreed that she is a child who struggles with transition. In her advocacy report she appeared happy at the nominated school, albeit with some concerns. Other documentation provided including a wonder wheel completed by the child (R93) corroborated this view. The evidence of witness C was overwhelmingly positive about how she had settled into the school (see witness statement R88-90). While the appellant was of a different view, he had only seen the child in class on one occasion at an open day and accordingly we did not consider his evidence on this point to be reliable when considered against the direct evidence of witness C, the views of the child and the associated documentary evidence.

50. The clear and overwhelming evidence before us that the child is thriving at the nominated school confirms our view that the nominated school is more suited to the child's needs than a specified school where the peer group would not be so appropriate. Similarly given the transition has been so successful it seemed entirely illogical to us to be suggesting a further early transition for a child who we were told struggles with transitions. Contrary to this it was suggested that as things currently stand the child would require to transition to a different school campus in her fourth year but if that were the case the evidence was that the nominated school plans for such transitions, and that they are almost always successful (with only a couple of exceptions as spoken to by witness C both of which with further time spent on supporting the transition were ultimately successful). Significantly the evidence was that there are significant benefits in the education environment the child would ultimately transition to in terms of access to mainstream facilities and pupils.

51. Witness B gave evidence that the specified school was bursting at the seams and if another class had to be created were the child to be placed there then that would put

further pressure on the school's infrastructure. On the other hand we heard nothing to suggest the nominated school had similar issues and we heard from witness C that approval has been given by the Council for a purpose built replacement school to open later in the child's attendance at secondary (currently scheduled to open in August 2022).

52. Currently the child has one to one support with reading scheduled 3 days a week. Witness B was clear that she would not receive one to one support at the nominated school.

53. The major issue that witnesses A and C, as well as the appellant, spoke about regarding the nominated school related to the child's difficulties with toileting. The child has always had difficulties with toilets which the appellant described as a fear of toilets. At primary school this had been managed and it was clear that the nominated school had put a great deal of effort into attempting to address the issues including: adopting strategies that had been successfully used in the child's primary school. Nevertheless, this had not been completely successful and the appellant gave evidence that the child regularly came home having changed clothes. The issue of toileting featured significantly in witness A's evidence which was to the effect that the toilets at the specified school were more suitable, a view confirmed by the child who liked that the school had individual toilets rather than cubicles. However, witnesses A and C agreed that toileting strategies had taken some time to succeed at primary school and the same would be the case at the nominated school. In addition there were further options available in the nominated school (witness C) such as the child using the disabled toilets rather than the cubicles. This demonstrated to us a willingness to adopt a flexible approach to dealing with the issue.

54. When we heard from the appellant on this subject he seemed to play down the direct toileting issues – certainly as compared with witness A – as a problem, indicating that given time the child would become acclimatised to toilets anywhere. When asked directly what the specified school could do to improve the situation that the nominated school was not able to do, the appellant could not identify a particular action. Therefore it was not clear that the toileting issues would improve should the child move school. His view was that the frequency related to anxieties the child was experiencing about school. However, it was not entirely clear to us from any of the evidence what the cause of any anxieties would be. Witness A when asked responded that they are trying to work it out. She stated that the child struggles to make sense of why people behave the way they do and that worries about what's happened during the day might be maintaining her sleep difficulties. The appellant suggested there being inappropriate conversations among pupils including bad language which the child would later (and indeed late) at night reiterate to the child's mum. However the content of those conversations from the appellant's description did not seem particularly unusual in a secondary school context and there was no evidence to suggest that if conversations with other pupils was a source of anxiety this would be any different in any other education environment. The appellant was critical that the conversations were happening and appeared unsupervised but we are of the view that school staff cannot, and indeed should not, monitor all children's conversations and, from our specialist knowledge we are aware that with children with additional support needs it is not always best to deal with inappropriate conversations immediately, it sometimes being best to deal with issues in a planned manner. We were not convinced that any issues with anxiety that exist just now would be any different in another learning environment and the issues with toileting are being addressed with the appellant expecting them to succeed in time.

55. Other arguments made by the appellant to suggest the specified school was more suited to the child's needs related to social activities (the appellant having a preference for dance classes available at the specified school), opportunity for outdoor activities and the use of ICT to support learning. On none of these issues did we consider there was much difference between the schools. From the evidence of both witnesses B and C, both had social activities available to the children, both schools valued outdoor activity and both utilised appropriate ICT.

56. In relation to outdoor facilities the evidence of the appellant was that the child needs to be outside to get exercise and that the specified school had good facilities for this. However, the evidence of witness B suggested such facilities had reduced with the trim trail at the school being closed for health and safety reasons. Witness C gave evidence that the nominated school has plenty of opportunities for exercise as well as gardening. She gave evidence that outdoor education is very important in the school and is encouraged in teachers' planning across the curriculum. The school participated in the environmental award, had a staff member training for the Forest Schools qualification and did bikeability. The child plays outside every day at the nominated school, not choosing to go indoors at break time but instead playing tig, running around and chatting with her friends.

57. In relation to use of ICT, the appellant in his application had indicated that the child requires ICT to support fine motor skills, has handwriting difficulties, and that pupils at the specified school have access to IPads throughout the day whereas within the nominated school out with the allocated time for ICT she has minimal access. This was not evident in the evidence. Witness B advised that the use of IPads is being reviewed for various reasons, including that they are less beneficial for children with fine motor skills than keyboards and associated by learners with play rather than learning. One of the options they were looking at was netbooks. In relation to the nominated school witness C advised they didn't always use IPads and that the school likes to enhance touch typing using netbooks. Witness C indicated that netbooks have an advantage over IPads in terms of touch typing for pupils with difficulties with fine motor skills. A programme called Ratatype is used to teach typing and its use at home is also encouraged. Witness C stated that the child uses the Ivona Reader text-to-speech program, is moving from using Clicker 6 and 7 to using Immersive Reader, and that her literacy target is very much based on using IT support. Witness C also gave evidence that each class in the nominated school has a Promethean Board (a type of Smartboard) in place, and that these are used interactively by pupils. Indeed, the appellant stated that he had observed his daughter involved in playing a game on the Promethean Board in her classroom. Based on the evidence we concluded there was not much difference between two schools in relation to ICT availability but that at the moment the provision at the nominated school would seem to be better suited to the child's needs, particularly with regard to her dyslexia and handwriting difficulties.

58. It can be seen from the above paragraphs that on a large number of factors when we have compared the suitability of both schools for the child either there is not a material difference or some factors favour the child's current nominated school. The suitability of the peer group we consider to be the most convincing factor favouring the nominated school. When we also consider the clear evidence of witness C that the child is happy and thriving at the nominated school and the fact that the child struggles with transitions we do not consider it to be in the best interests of the child to move school at this stage to another school which we consider less suitable for her at an additional significant cost to the public purse. Accordingly in all the circumstances we consider it appropriate to

confirm the decision of the respondent.