Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

Reference

1. This is a reference by the appellant following a refusal by the respondent to place the child at school A.

Decision

2. We confirm the decision of the respondent to refuse the placing request, in accordance with section 19(4A)(a) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**the 2004 Act**). We therefore do not require the respondent to place the child in School A.

Process

3. As a result of the covid-19 pandemic, this case had an unusually long procedural history. Following three case conference calls between December 2019 and July 2020, a two-day oral hearing proceeded remotely by video on 19 and 20 October 2020. Parties lodged written statements from each of their witnesses. Parties also lodged a joint minute of admissions. The views of the child were obtained by Who Cares? Scotland and lodged in the form of an advocacy report. All these materials were included in the 176-page electronic bundle of written evidence numbered T1-38, A1-102 and R1-33:
    - witness A, educational psychologist, written statement [R28-29]
    - witness B, headteacher of School B, written statement [R20-23]
    - witness C, head of education at School A, written statement and CV [A8-13]
    - the appellant, written statement [A14-21]
    - joint minute of agreed facts [T37-38]
    - views of the child [T36].

4. Following the oral hearing, parties exchanged written submissions before lodging. Before reaching our decision we considered the oral and written evidence and written submissions.

Findings in Fact

General findings

5. The appellant is the mother of the child, who is thirteen years old. The child lives in the parental home.

6. The child has been diagnosed with autism spectrum disorder (**ASD**) with associated social, emotional and behavioural difficulties. The child has also been diagnosed with epilepsy and learning difficulties associated with STX1B gene mutation.

7. The child is verbal with limited comprehension. The child needs visual cues to supplement verbal communication.

8. The child is a flight risk and requires to be supervised during lessons and at breaks. The child once ran away from school during primary 4. The child's parents requested a move to another primary school following this incident. The child was moved to another primary school and has not run away from school since.

9. During the child's primary 6 year, the respondent considered the child's educational needs for secondary school placement. Following this process, a panel of professionals decided that school B was an appropriate placement to meet the child's educational needs. The child's parents requested a review of this decision. A second, different panel of professionals came to the same view, namely, that school B was an appropriate placement to meet the child's educational needs.

10. On 4 June 2018, the respondent made an offer of placement of the child at school B. The parents did not wish the child to attend school B. The child has never attended school B.

11. As a result of the child not attending the provision offered to him at school B, the respondent has arranged for three days of one-hour, one to one teaching sessions per week at the additional support needs (**ASN**) department of another school.

12. On 20 June 2019, the appellant made a placement request to the respondent for the child to attend school A.

13. On 10 July 2019, the respondent refused that request on the basis of Schedule 2, paragraph 3(1)(f) of the 2004 Act.

14. School A continues to be willing to provide a placement for the child.

Findings on school B and the child

15. School B is a purpose-built special school for children with ASN. It is recognised by Education Scotland as an example of outstanding practice in curriculum design and in life skills.

16. School B has small class numbers and a high ratio of staffing to pupils within classes. The child would be one of a class of nine pupils. The class would have pupils of an appropriate peer group for the child. There would be one teacher and two learning assistants for the class. One of the learning assistants would be responsible for keeping eyes on the child at all times within the school building.

17. The child's education would be differentiated. The child would be provided with one to one teaching where this was assessed to be needed. The child does not require one to one support from an adult at all times. School B would follow Curriculum for Excellence.

18. School B has all the necessary equipment and teaching aids to meet the educational requirements of the child. It has a sensory room and an anxiety lowering room for respite. There is a workstation in each class. School B has access to support and advice from the following services: speech and language therapy, occupational therapy, physiotherapy, educational psychology and nursing. Staff from these services are very responsive to the needs of children in the school and attend when required.

19. Staff at school B are trained in seizure management.

20. School B has fire doors fitted with screamer alarms and internal doors secured with a magnetic fob system.

21. School B would therefore provide an educationally appropriate and secure environment for the needs of the child.

22. School B is a 10-to-15-minute taxi ride from the parental home.

Findings on school A and the child

23. School A is not a public school. It is an independent school providing education to children and young people with severe and complex ASN, including ASD.

24. School A has small class numbers and a high ratio of staffing to pupils within classes. The child would be one of a class of five pupils. None of those pupils would be the same age as the child. There would be one teacher and seven support workers for the class.

25. The child would be provided with one to one adult support at all times. It would not be the same adult at all times. School A would follow Curriculum for Excellence.

26. School A has all the necessary equipment and teaching aids to meet the educational requirements of the child. School A has a life skills suite, multisensory room and soft play area. It has access to speech and language and occupational therapy services.

27. Staff at school A are trained in seizure management.

28. School A has fire doors that release on a fire alarm allowing access from classrooms to a central, fenced garden area. The fire doors can also be opened using a magnetic fob. Internal classroom doors in school A are fitted with 'thumb locks' that children can open easily. This leads to a corridor in which all non-classroom doors are secured with a fob system.

29. School A would provide a secure environment for the child.

30. School A is a 30-minute taxi ride from the parental home.

Reasons for the Decision

31. Parties are agreed on the law.

32. The child has ASN in terms of section 1 of the 2004 Act.

33. The respondent's refusal of the placement request is based solely on schedule 2, paragraph 3(1)(f).

34. The onus of proof lies with the respondent.

35. The assessment point is at the time of the hearing.

36. Even if the ground of refusal exists then we still have to consider whether in all the circumstances it is appropriate to confirm the decision (section 19(4A)(a)(ii) of the 2004 Act).

The ground of refusal

37. There are four constituent parts to schedule 2, paragraph 3(1)(f), numbered in paragraphs (i) to (iv). The respondent must satisfy us that each of the parts is applicable to the facts of this case, as at the date of the hearing.

Paragraph 3(1)(f)(i)

38. There was no dispute that the specified school (school A) is not a public school. Accordingly, this part of the ground of refusal is met.

Paragraph 3(1)(f)(ii)

39. This paragraph requires that the respondent is able to make provision for the child's ASN in a school other than the specified school. In this case, that other school is school B. We are satisfied that school B can make provision for the child's ASN. Accordingly, this part of the ground of refusal is met.

40. The application of this paragraph is disputed.

41. There was no skilled evidence to the effect that school B could not meet the needs of the child. The skilled evidence that does exist is to the contrary effect. The appellant challenged the evidence of witness A for two reasons. Firstly, witness A had only visited school B once and that had been some time ago. Secondly, witness A suggested that the child would benefit from access to mainstream schooling in physical education. We accepted the second of these challenges and did not place any weight on the fact that school B offered the potential of mainstream access. Our assessment of the evidence was that the child was very unlikely to access mainstream education.

42. In relation to the first challenge, we carefully noted the appellant's desire to have the child educated on a one to one support basis at all times. The appellant, as the child's mother, clearly knew her child well. However, on this particular issue, we placed more weight on the skilled evidence. Both witness A and witness B were skilled. They had canvassed opinion of those who had educated and had knowledge of the child. Both witnesses had experience of placing children with higher support needs than the child's at school A. About one third of school A's roll came from the respondent's area. Both witnesses considered that the child did not require the same level of support when compared to those children who were placed at school A from the respondent's area. Had they felt the child required the level of support provided by school A then they would have had no hesitation in recommending placement at school A. Overall, we preferred the skilled evidence on this issue. School B is able to provide the level of ASN required by the child.

43. In the event we are wrong about the child's ASN to the extent that the child requires one to one support at all times, on the evidence of witness B, we are confident that the respondent will provide this for the child at school B. Accordingly, even if the appellant's evidence on this point is accepted, the respondent is able to make provision for the child's ASN in a school other than the specified school.

44. The appellant also had a concern about the child's security at school B. The appellant following a visit to school B believed that not all school doors were secured with fob access. The screamers on the fire alarm doors would not deter the child. The appellant was not aware of any other system for addressing the child's risk of running away.

45. We were satisfied on the evidence of witness B that the risk of the child running away from school B was going to be appropriately managed. Witness B, as the head teacher at school B, had detailed knowledge of the policies and procedures of the school. All the concerns highlighted by the appellant following her visit to school B had been addressed since that visit. In particular, all doors except the fire doors had fob security access only. In any event, there would be an 'eyes on' policy for the child. This entailed one of the support assistants in the child's class being assigned to have eyes on the child at all times within the school building. In our assessment, this was sufficient to address the child's flight risk. We came to the conclusion that this also negated the perceived risk of the fire doors being protected only by a screamer device.

46. In addition, witness B gave evidence that school B successfully managed five or six pupils who were in the same risk category of running as the child. None of these other pupils had absconded from the school indicating that the policies were working.

47. The appellant invited us to look at google maps online to see how close the woods were to school B. Parties indicated they were happy for us to do this. However, in light of our reasoning above, there was no need to check this on google and we did not do so. The measures described above were sufficient to address the flight risk, in our view.

48. School B, as a purpose-built special school for children with ASN, has all the necessary physical resources required for the child. The child would have access to a workstation in each class. Once the covid-19 pandemic passes, the child will move between different classrooms. We accepted the evidence of witness A who opined that the child would benefit from movement breaks to help his concentration. The opportunity to have a short

gap between lessons and to move physically to a new classroom could provide him with such movement breaks.

49. In terms of curriculum, the child would benefit from the fact that school B is recognised by Education Scotland as an example of outstanding practice in curriculum design and in life skills. There was no challenge to this evidence.

50. Nursing provision capable of dealing with the child's epilepsy is available at school B.

51. School B is about a ten-to-fifteen-minute taxi ride from the child's home address. The appellant gave evidence that the child is used to taxi journeys, accompanied by an adult, and manages them without difficulty.

Paragraph 3(1)(f)(iii)

52. It is clear from the evidence that the provision for the ASN of the child at school B is highly suitable. We have provided our analysis and reasoning on this issue above.

53. We have come to the conclusion that school A is not as suitable for the child's ASN as school B. Witness B, in her wellbeing assessment, stated that the child has a 'moderate learning disability'. This was not disputed by the appellant. Witness C stated that school A supports children with 'severe and complex needs' and that the child would be one of school A's more able learners. Witness C appeared to be of the view that the child required either one to one or two to one support at all times. This did not accord with our assessment of the evidence. The child only requires one to one support for literacy and numeracy. There is no requirement for two to one support. At school A, the child would have continuous one to one support. On the evidence of witness A, it could be detrimental to the child to have continuous one to one support. This is consistent with the evidence of witness B, whose view was that school A generally catered for children with a higher level of support need than that required by the child. Witness B was of the opinion that school B was the more suitable of the two schools for the child. For the reasons given above, we accepted the evidence of witness B on these matters. Witness C appeared to us to be proceeding on an incorrect assessment of the child's support needs.

54. In addition, the peer group in the intended class for the child at school A is not as suitable for the child's needs as the peer group in the intended class for the child at school B. Most of the pupils in the child's intended class at school A are older and require more support than the child does. The levels of distress amongst these other pupils in the intended class would be higher at school A due to the nature of their support needs. There would be no-one of the same age as the child in the child's intended class at school A. The child's ability to develop social skills in a peer group of the same age would not be possible at school A.

55. School A has access to nursing staff who would be capable of dealing with the child's epilepsy. The appellant pointed out that one of the nurses linked to school A had dealt with the child for the past 11 years or so. Witness C was unaware of this but did not attach the same importance to it as the appellant did. Witness C was of the view that there were sufficiently trained staff within the school to manage the child's epilepsy. On this matter there was no material difference between school A and school B.

56. The taxi journey to school A would be about two to three times as long, being a 30-minute journey as opposed to a 10-to-15-minute journey. If the child were to attend school A, about an hour each day would be spent by the child in a taxi. Whilst this was not ideal, we accepted the appellant's evidence that the child would have no difficulty with the extra travel time. Accordingly, travel time was a neutral factor in our consideration of this legal test.

57. It is clear from the advocacy report, that whilst the child was positive about school A, it was difficult to gauge the child's understanding of the situation in respect of school. In addition, the child had not visited school B and so was not able to give a view on that school. Overall, in these circumstances, we were unable to attach any significant weight to the child's view.

58. In relation to respective cost, we accepted the appellant's position that insufficient evidence had been led by the respondent to allow us to make a comparison. Accordingly, we treated this as a neutral factor. We proceeded on the basis that whichever of the two schools the child was to attend, there would be no cost differential to the respondent.

59. For the reasons stated above, it is not reasonable to place the child in school A. Accordingly, this part of the ground of refusal is met.

Paragraph 3(1)(f)(iv)

60. There was no dispute that the respondent has offered to place the child in school B. Accordingly, this part of the ground of refusal is met.

Conclusion on the ground of refusal

61. The respondent has satisfied us that all four constituent parts to the ground of refusal are met on the facts of this case.

Appropriateness in all of the circumstances – section 19(4A)(a)(ii) of the 2004 Act

62. Having concluded that a ground of refusal exists, we require to consider whether, nonetheless, it is appropriate in all of the circumstances to confirm the decision to refuse the placing request, or whether we should overturn the decision and require the respondent to place the child in school A.

63. We have considered the evidence as a whole, including all the relevant circumstances discussed above. We are satisfied that the refusal of the placing test should be confirmed. The respondent has behaved reasonably in assessing the child's educational needs and determining that those needs could be met at school B. Independent agencies and experienced professionals have been involved in the assessment process. A second and separate panel came to the same view. It seems clear to us that the child would benefit from attending school B. The child's educational needs would be met at school B. The child would be able to utilise social skills to develop appropriate relationships with peers at school B.

64. In contrast, school A would not be as appropriate educational setting for the child. School A would not provide the child with an appropriate peer group within which to utilise social skills to develop appropriate relationships with peers.

65. The respondent has listened to the concerns expressed by the appellant. All reasonable measures have been put in place to alleviate those concerns. In the circumstances, the respondent could not reasonably have done any more.

66. Having considered all of the evidence in the context of the much wider test of appropriateness, we have decided that it would, on balance, not be appropriate to place the child in a school where the education provision and level of support is not as suited to the child as it would be in school B.