



Additional Support Needs

DECISION OF THE TRIBUNAL

Reference

1. The appellant sought the placement of her daughter, aged 5 who has been diagnosed with an autism spectrum disorder (“ASD”) and global developmental delay, at a special school (school A) which provides education for children with additional support needs (ASN). The respondent refused the request, deciding to place the child at another special school (school B) which also provides education for children with additional support needs. Both schools are under the management of the respondent. The respondent wrote to the appellant on 11 March 2020 refusing the appellant’s request for the child to attend school A on the basis of Schedule 2, paragraphs 3(1)(a)(i) and 3(1)(a)(v) of the 2004 Act. The appellant has referred that decision to the Tribunal for a determination. The Tribunal is invited to overturn the authority’s decision and require the authority to place the child at school A, in terms of Section 19(4A)(b) of the 2004 Act.

Decision

2. We confirm the respondent’s decision. We are satisfied that a ground for refusal of the placing request has been established (Education (Additional Support for Learning) (Scotland) Act 2004, sec 19(5)(a)(i). We are satisfied that it is, in all the circumstances, appropriate to confirm the respondent’s decision (sec 19(5)(a)(ii)).

Process

3. A case conference call took place on 7 July 2020.

4. The written evidence consisted of documents prepared by both parties included witness statements comprising 132 pages and a joint minute of agreed facts.

5. We issued a further direction at the conclusion of the oral evidence for parties to lodge written submissions to the tribunal within 6 days after which the tribunal reached its decision.

6. It was agreed between parties at the conference call on 7 July 2020 that given the age of the child, her level of verbal ability and the fact that she had left nursery, it would not be possible to obtain her views about either school provision. It was agreed between parties that advocacy would not be suitable given the child's age and communication difficulties. The child did not attend the hearing.

7. The witnesses were heard in the following order:

Witness A Head Teacher of school A (for the respondent)

- Witness B Appellant
- Witness C Senior Project Worker from independent support organisation (for the appellant)
- Witness D Depute Nursery Manager (for the appellant)
- Witness E Head Teacher of school B (for the respondent)

Witness A was recalled at the end of the first day of oral evidence at the request of the respondent, there being no objection by appellant's representative. The appellant gave further evidence at the conclusion of the oral hearing, there also being no objection by the respondent's representative. A summary decision was issued by the tribunal on 30 September 2020.

Findings in Fact

The child

8. The child is a five year old girl, who has been diagnosed with autistic spectrum disorder (ASD) and global developmental delay. The child also has a suspected learning disability, however a formal diagnosis has not yet been made due to the child's young age.

9. The child was diagnosed with global developmental delay at around age one. The child's ASD diagnosis was made just before she was two years old. The child has been assessed by a geneticist and further diagnoses may be made about the nature of the child's presentation.

10. The child is physically able and very active. The child loves to run and jump and enjoys swinging and other sensory activities. The child has low muscle tone which means that she finds it hard to push bicycle pedals, for example.

11. The child requires support to retain focus and motivation and does not cope well with transitions. The child can have difficulty concentrating. The child can become upset and distressed during transitions. The child can struggle to communicate her needs which can often lead to her becoming distressed when she is not understood or responded to appropriately.

12. The child's mood can be variable and her poor sleep pattern can impact on her behaviour. When the child is tired, she is more likely to display challenging behaviours. The child requires adult supervision and support for all aspects of daily living including personal care, toileting and dressing. The child can feed herself finger food independently but supervision is required. The child benefits from a strict routine.

13. The child has previously received input from occupational therapy and speech and language therapy although she currently has no ongoing involvement with either.

14. The child's language skills are significantly behind her peers. The child uses verbal communication as her predominant form of communication however requires encouragement to do so. The child has been supported to develop verbal communication skills with the use of visual aids and other strategies. The child is currently being supported by her mother and a worker from an independent specialist organisation to develop her verbal communication further. The child's support worker at nursery used a picture exchange communication system (PECS) and other visual aids to motivate the child to communicate verbally. The child responds well to visual symbols which has helped her to develop a wider vocabulary. The child's verbal communication has developed significantly in the last year and it is anticipated that this progress will continue. It is anticipated that the child will become a predominantly verbal communicator.

15. The child's sensory issues have improved over the past year with support provided at nursery and from an occupational therapist who made home and nursery visits to support the child's sensory seeking behaviour. The child still displays these behaviours when distressed. The child can display challenging behaviour when distressed or not understood. These behaviours include screaming and running away from adults who are looking after her or lying on the ground and throwing items. These behaviours have decreased as her language skills have improved.

16. The child attended a mainstream private nursery from the age of 6 months on a full-time basis. The child remained there until June 2020.

17. The child was provided with one to one support at all times at nursery in order that she be kept safe.

18. The child enjoyed being able to move and roam between rooms at nursery. The child benefited from peer relationships that she developed at nursery. The child enjoyed interactions with her peers, playing alongside them and mimicking their behaviours. The child had begun to follow the daily routine within the nursery prior to her placement coming to an end. The child also developed language to count at nursery. The child benefitted from being around peers who had social communication skills and this contributed further to the development of the child's verbal communication. The child benefits from being around children who are verbal, active and physical.

Present time

19. The specialist independent provider has continued to support the appellant on a weekly basis with ideas and strategies to continue to develop the child's verbal communication.

20. The child was due to start primary one in August of this year however did not commence the placement offered to her at school B.

School A

21. School A is a specialist school under the management of the respondent, providing education to children with additional support needs. The school provides nursery, primary and secondary education to 120 school children with a broad range of additional support needs including children with complex medical conditions.

22. School A has medical staff who are based within the school building including school nurses, as well as speech and language therapists and occupational therapists who work directly with staff and children within the school.

23. School A provides education to children with diverse communication abilities. School A uses a wide range of techniques to support children to access the curriculum and develop

their communication skills. These techniques include signing, British sign language (BSL), song and object signifiers, visual aids and verbal communication. No one method takes precedence and depends on an individual child's needs.

24. Children in school A can access an outside space to play and learn.

25. The eight children currently in the primary one class with whom the child would be placed have a variety of additional support needs. One of these children has a significant visual impairment, two have significant hearing impairments and two of the children have behavioural risk assessments as they can present very challenging behaviours which pose a risk to others. These include swiping at others, hitting out, self-harming and biting. These two children require constant one to one adult supervision in order to minimise risk. All of the children in the current primary one class require adult supervision and support with their personal care, eating and drinking. One child has a complex medical condition and requires feeding with a tube. Children in this class can become deregulated and distressed and require a high level of adult support. Staff use a range of strategies to manage this.

26. Five of the children in the current primary one class attended a specialist nursery provision.

27. All of the children in the primary one class in school A have language and communication difficulties. Three of the children are non-verbal. Of the remaining five children, verbal communication is very limited and none of the children have developed verbal communication to the same level as the child.

28. Two of the children in this class have moving and handling plans for mobility difficulties. Three children have prescribed seats by occupational therapy. One child crawls to reach for objects and the child with visual impairment has impaired mobility. One of the children uses a walking aid and another child uses a wheelchair. The remaining children are more mobile but require support from adults, such as holding hands. The child is more physically able than the children within the current primary one class in school A.

29. Four pupil support assistants (PSAs) and one teacher are attached to the primary one class of school A. There is currently no additional teaching or PSA capacity in school A that could be used to support the child should she attend school A.

30. There is no existing classroom space within the building of school A that could be

adapted or adjusted to accommodate an additional class or teaching space. Any existing space currently available within school A is being used for storage or staff purposes and is not suitable to be used as a classroom.

School B

31. School B is a specialist ASN primary school provision under the management of the respondent. There is a current roll of 68 children of whom 85% have an ASD diagnosis.

32. School B uses a wide range of techniques to develop children's communication skills. These include verbal communication, picture exchange communication system (PECS), visual aids and signing and depend on the needs of a particular child. The school is considered to be a total communication environment.

33. Children across the school have access to an outside space to play and learn.

34. The primary one class currently comprises six children. Within this class, three of the children are verbal and three are pre-verbal but are expected to develop verbal communication. All of the children in school B have a learning disability.

35. All of the children currently attending the primary one class in school B previously attended mainstream nursery provisions. All of the children are physically active and all the children have a tendency to roam. There are currently no children with mobility issues in school B. Children in school B can struggle to manage transitions and staff use a range of strategies to support children during transitions.

36. Apart from the primary one class, classes in school B are grouped according to communication ability and not by age. The children currently within the primary one class of school B are likely to be of similar verbal and physical ability as the child. Children in school B can access learning activities in a mainstream primary which is located next door, if appropriate.

37. There is a speech and language therapist in school B two days per week. Referrals are made through the school to allied health services, such as occupational therapy and physiotherapy, when needed.

38. In the current primary one class where the child would be placed should she attend, there is currently one teacher and three pupil support assistants (PSAs).

Reasons for the Decision

The Oral Evidence

39. We benefitted from detailed witness statements from Witnesses B, C and D. We were provided with very brief statements from Witnesses A and E. None of the witnesses deviated in any significant way from their witness statements in their oral evidence.

40. It was clear to the tribunal that Witness B (the appellant) wants to ensure that her child is best placed to reach her full potential. It was also evident that the child had benefitted significantly from the additional supports put in place for her and that the appellant is very committed to ensuring that the child's abilities will continue to develop, particularly her use of verbal communication.

41. The appellant's evidence relating to the provision within each school was based on one visit to each school lasting approximately one hour. It was evident that the appellant had formed a fairly negative impression of school B from her visit there. It was in her words "chaotic" and the appellant was left with a strong impression that school B would not focus on developing the child's verbal communication. The appellant also formed the view from her visit to school B that the child would be placed in a class with children who were significantly less able than the child. This contrasted with the view that the appellant formed following her visit to school A, where the appellant thought that the child would be in a much calmer environment with children who were more able than those at school B. The appellant also formed the view that school A would place a stronger emphasis on the development of the child's verbal communication than school B.

42. The evidence before the tribunal when taken as a whole was at odds with this particular aspect of the appellant's evidence. Whilst the tribunal considered that the appellant was honest in all of her evidence, the impression that she gained of the two schools from relatively brief snapshot visits appeared to us to influence her opinion about their relative suitability. The appellant has not had the opportunity to see the current primary one classes in each school. By her own admission, the appellant was surprised by a number of aspects of the oral evidence from the headteachers, particularly relating to each school's pupil profile and their links with mainstream education. It appeared to us that the appellant was not fully informed about these aspects. We were of the view that this affected the weight we could attach to the appellant's evidence about the benefits of the child attending school A as well as her evidence of the unsuitability of school B. The tribunal therefore concluded that it could not rely on the appellant's evidence as it relates to the composition of classes, available provision and links with mainstream. The tribunal considered that it could attach more weight to the evidence of the headteachers about these issues. Both had worked in each of their respective schools for a number of years and gave detailed and credible evidence about class composition, links to mainstream and the overall provision within their respective schools.

43. The tribunal also heard from Witness D, who is a qualified nursery teacher. It was clear from her written and oral evidence that she knew the child well and was familiar with her needs and behaviours. It was Witness D's understanding that the child's needs would be better met at school A and not at school B. On questioning, it was clear that this view was based on the opinion of one of her colleagues who had visited both schools with the appellant, as well as the appellant herself. Witness D had not visited either school nor was she familiar with the provision at either school. Whilst the tribunal was not considering a ground of refusal in terms of suitability, we did need to consider whether there was any other fact or reason in determining the appropriateness of the placement in either school. The tribunal concluded that we could not attach weight to the evidence of witness D about the suitability of either provision for the child. The tribunal agreed with the respondent in this respect.

44. There was no dispute between the parties on the question of whether the child has additional support needs, as defined in section 1 of the 2004 Act. Given the findings above, it is clear to us that this is the case

The Statutory Grounds

45. The respondent relied on two grounds of refusal. Firstly, the ground of refusal of the placing request set out in the Education (Additional Support for Learning) (Scotland) Act 2004, Schedule 3, Schedule 2, Paragraph 3(1)(a)(i) of the 2004 Act: *“placing the child in the specified school would make it necessary for the authority to take an additional teacher into employment.”*

46. Secondly, the respondent sought to rely on Schedule 2, Paragraph 3(1)(a)(v) of the 2004 Act:

“ placing the child in the specified school would be likely to be seriously detrimental to the educational well-being of pupils attending the school.”

The respondent further submitted that if a ground of refusal was established, it would be appropriate in all the circumstances to confirm the respondent’s decision.

Schedule 2, Paragraph 3(1)(a)(i) of the 2004 Act – placing the child in the specified school would make it necessary for the authority to take an additional teacher into employment.

47. With this ground of refusal, the tribunal was clear that there must be evidence of a direct link between the placing of the child in school A and the necessity to employ a new teacher.

48. The respondent contended that an additional teacher would be required should the child be placed in school A. The respondent’s submission in respect of this ground focussed on the Schools General (Scotland) Regulations 1975. These regulations specify that each education authority may determine the maximum number of pupils who may be accommodated within each class of a school. In terms of these class size maximums, further reference was made by the respondent to national conditions of service for teaching staff.

These conditions specify the teacher to pupil ratio for a special school or the “class size maximums” referred to by the respondent and are listed on page 111 of the written evidence.

49. It was submitted by the respondent that school A by its nature provides education for children with ‘severe physical impairment’ for which the maximum recommended class size is eight and also for children with ‘language and communication difficulties’ for which the maximum recommended class size is 6. The respondent argued that all of the children in the current primary one class in school A have profiles consistent with ‘severe physical impairment’ for which the maximum class size is 8 in terms of the conditions of service listed within page 111 of the written evidence.

50. The appellant challenged this, arguing that the maximum class sizes are not set out in legislation. It was further submitted by the appellant that it is open to the tribunal to find that an additional teacher would not need to be employed by the respondent, as the existing class teacher with the support of other staff could teach up to ten children in the class if we considered the class composition to fit a different category for which that maximum is in the guidance. It was argued that it was not clear from the evidence that eight children is the maximum class size (as per page 111) in any event, given the different needs of the children in the current primary one class.

51. The tribunal accepted the submission of the appellant in this respect. Whilst the tribunal heard evidence from Witness A that the class was at capacity, we took the view that this evidence relates to the second ground – which we deal with separately.

52. Witness A’s description of the needs of the children did not offer sufficient evidence that *all* of the children fit the category for which the maximum class size is eight. There was insufficient evidence presented about the needs of all of the other children within the class in order for the tribunal to be satisfied that the children in the primary one class would all be within this cohort in terms of the teacher’s conditions of service upon which the respondent relies

53. We also accept the appellant’s argument that the maximum class sizes are not set down by statute. The respondent did not offer any evidence about why it is necessary that the guidance on maximum class sizes must be followed. There was no evidence before the

tribunal on the necessity of complying, or indeed of failing to comply with the guidance to which we were referred.

54. The tribunal did not consider, on the evidence that was presented to it, that any additional staff member required should the child attend school A must be a teacher in terms of the meaning of paragraph 3(1)(a). It was for the respondent to show that it would be necessary and the tribunal concluded that they did not. The respondent's argument focussed on teachers' terms of service in terms of class size maximums, but there was evidence that PSA staff are used so that children in school B can be supported to access the curriculum.

Conclusion

55. The tribunal was not satisfied that the case for an additional teacher was made and accordingly we do not find that this ground is established.

Schedule 2, Paragraph 3(1)(a)(v) of the 2004 Act – placing the child in the specified school would be likely to be seriously detrimental to the educational well-being of pupils attending the school.

56. Witness A expressed a number of concerns about any additional children being placed in the current primary one class of school A, in particular, in relation to the consequent reduction of adult supervision. There was evidence that a reduced level of adult support would be likely to lead to some children displaying more challenging behaviours. It would be likely that children would need to wait longer to have an adult attend to their needs. For some of the children this would cause distress which would be manifested by behaviours such as biting and hitting out. Several of the children within the class have risk assessments in place as their challenging behaviour presents as a risk to themselves and others. One of the children is a choking risk at meal times and any reduction of staff supervision could exacerbate this risk at a time when most of the children, including the child, would require support. Witness A made reference to staff input from other areas of the school often being required to support the unplanned care, medical or toileting needs of children in the current primary one class.

57. There was evidence from Witness A that introducing an additional child into the current class would also increase the noise level and cause a decrease in safe available space. There was evidence that the class is already at capacity in its physical space. The class houses a range of specialist equipment including a wheelchair, prescribed seats and a walking aid. One of the children has a visual impairment and another gets around by crawling. There was evidence that the safety of these children may be compromised if the classroom was more crowded.

58. When questioned about the possibility of an additional PSA being introduced, Witness A referred to the increased noise and lack of space that introducing another adult would cause. There was evidence that was not contradicted, that the school is already at capacity in terms of space and the number of children attending. All available areas within the school are being used and no other areas within the school could safely or appropriately accommodate a classroom or additional teaching space. The tribunal accepted the submission of the respondent that placing the child in school A would exceed the capacity of the school's accommodation.

59. The appellant argued that no formal risk assessment had been carried out in respect of the child attending this class and that there was no, or at least limited evidence, as to what would amount to a serious detriment in practice for the children as a whole or for any individual child within the class should the child be placed there.

60. The tribunal rejected this argument. There was evidence that the primary one class is currently at capacity in terms of safe staffing ratios and available space. The class provides an education to children with a broad range of complex needs, including medical needs and a variety of physical impairments. We accepted that there is a significant risk that the existing children's needs would not be met if another child with complex needs is placed in the class and that it would compromise their safety and impact on their ability to learn. Witness A was familiar with both the provision and set up within this classroom and indeed the rest of the school. Witness A gave evidence that she is sometimes required to assist in a class to supervise children to accommodate staff absence or breaks or to deal with unplanned situations relating to a child. There was clear evidence about the risks that introducing an additional child into the current environment would cause.

Conclusion

61. The tribunal was satisfied that this ground was established.

Appropriateness

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

63. We need to consider all of the circumstances as they relate to our decision including all of the circumstances relating to the child attending either school A or school B

64. There was compelling evidence that the child has made significant progress with the positive input and support of nursery staff, her specialist provider and the appellant. In particular, the child has developed her verbal communication skills. The appellant is understandably keen for the child's abilities to develop fully during her primary school education.

65. The tribunal considered that all of the evidence indicates that school B is better placed than school A to provide an appropriate education to meet the child's needs. Critically, at school B she will be placed with peers who are more likely to be of similar physical and verbal ability. The evidence suggested that this would not be the case if the child were to attend school A. The child has shown that she benefits from interactions with verbal peers. She is more likely to have such opportunities at school B and more likely to be appropriately challenged by her peers.

66. The appellant expressed a preference for school A as she was of the view that school A has better links to mainstream schooling, more suitable outside space and would generally be more appropriate to the needs of the child. We carefully considered the appellant's concerns in light of all of the available evidence when determining whether or not it was appropriate to confirm the respondent's decision. We were satisfied that school B was more suitable than school A taking each of these factors into account. Whilst both schools had

access to suitable and safe outdoor space, there was clear and compelling evidence that school B had greater links to mainstream education and would be more appropriate to the needs of the child at this time. The tribunal was satisfied that the resources and provision available to the child at school B would meet the child's needs.

Conclusion

67. Considering all of the evidence available to us, we are satisfied that the refusal of the placing request should be confirmed.