Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

1. Background

(1) The appellant is mother of the child. Together the appellant and the authority are referred to as the parties.

(2) The appellant was represented by a solicitor. The authority was represented by a solicitor. The appellant made a placing request in terms of paragraph 2(2)(a) of schedule 2 to the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act) requesting the authority to place the child in School A. The authority wrote to the appellant by letter dated 14 July 2017 (page T14 of the papers before the Tribunal) acknowledging receipt of the appellant's placing request for the child to attend School A and advising that the authority would endeavour to respond to the appellant's request by September 2017 but, if the appellant did not hear from the authority by that time, the appellant should treat the request as having been refused. It was a matter of agreement between the parties that the appellant's placing request was refused by the authority on the basis that the duty of the authority to place the child in School A did not apply by virtue of paragraph 3(1)(f) of schedule 2 to the 2004 Act. The authority's decision refusing the placing request is a decision specified in section 18(3)(da)(ii) of the 2004 Act. The appellant is a person specified in section 18(2)(a) of the 2004 Act. In terms of section 18(1) of the 2004 Act, the appellant referred the decision of the authority to the Tribunal by notice of reference received by the Tribunal on 4 October 2017.

(3) This reference now falls to be determined.

2. Procedural history

(1) A case conference took place by telephone on 1 December 2017 between the convener and the representatives of the parties.

(2) Directions were made by the convener on 26 February 2018.

(3) The reference proceeded to an oral hearing on 28 and 29 March 2018.

(4) At the end of the hearing, at the request of the parties, the parties were allowed to make written submissions to the Tribunal by 6 April 2018. Written submissions on behalf of both parties were lodged on that day.

3. Preliminary matters

(1) At the beginning of the hearing the convener explained the procedure which the Tribunal proposed to adopt in the hearing, which the parties accepted.

(2) Thereafter, with the consent of the parties, documents lodged late by each party were allowed to be received, the Tribunal being satisfied in all of the circumstances that it was fair and just to do so.

4. Documentary evidence and witnesses

(1) The Tribunal had before it a bundle of papers comprising papers numbered T1 to T54, A1 to A74 and R1 to R80.

(2) The Tribunal heard oral evidence from Witness A, Educational Psychologist for Authority; Witness B, Deputy Head Teacher, School B; Witness C, an autism consultant; and the appellant,.

(3) Dr J, Clinical Psychologist, Child & Family Mental Health Services NHS, from whom the appellant had intended to take oral evidence, was unavailable due to illness. The appellant was content to proceed without the oral evidence of Dr J and for the Tribunal to proceed to determine the reference without that oral evidence.

5. The child's views

The child's views were obtained by a Flexible Advocacy Worker, and set out in a statement to the Tribunal dated 19 March 2018 (page T53 of the papers before the

Tribunal). The parties were content with the manner in which the child's views were made known to the Tribunal. The Tribunal had regard to those views.

6. Relevant statutory provisions

(1) The principal relevant statutory provisions which the reference concerned are noted below.

Education (Additional Support for Learning) (Scotland) Act 2004

(2) Section 4 of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act) provides that:

> "4 Duties of education authority in relation to children and young persons for whom they are responsible
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> "(1) Every education authority must–
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> (a) in relation to each child and young person having additional support needs for whose school education the authority are responsible, make adequate and efficient provision for such additional support as is required by that child or young person, and
>
> (b) make appropriate arrangements for keeping under consideration–
>
> (i) the additional support needs of, and
>
> (ii) the adequacy of the additional support provided for,
>
> each such child and young person.
>
> (2) Subsection (1)(a) does not require an education authority to do anything which–
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> (a) they do not otherwise have power to do, or
>
> (b) would result in unreasonable public expenditure being incurred."

(3) Paragraph 2(2) of schedule 2 to the 2004 Act provides that–

> "2 Duty to comply with placing requests
>
> …

(2) Where the parent of a child having additional support needs makes a request to the education authority for the area to which the child belongs to place the child in the school specified in the request, not being a public school but being–

(a) a special school the managers of which are willing to admit the child,

(b) a school in England, Wales or Northern Ireland the managers of which are willing to admit the child and which is a school making provision wholly or mainly for children (or as the case may be young persons) having additional support needs, or

(c) a school at which education is provided in pursuance of arrangements entered into under section 35 of the 2000 Act,

it is the duty of the authority, subject to paragraph 3, to meet the fees and other necessary costs of the child's attendance at the specified school."

(4) Paragraph 3(1)(f) of schedule 2 to the 2004 Act provides–

"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,

(iii) 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

(iv) the authority have offered to place the child in the school referred to in paragraph (ii) …"

(5) Section 19(4A) of the 2004 Act provides–

"19 Powers of Tribunal in relation to reference

(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,

(b) 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."

7. Matters in Dispute

(1) The ground of refusal relied upon by the authority in refusing the placement request and maintained before the Tribunal is that set out at paragraph 3(1)(f) of schedule 2 to the 2004 Act. It was a matter of agreement between the parties before the Tribunal that conditions (i) and (iv) of the ground of refusal set out at paragraph 3(1)(f) of schedule 2 to the 2004 Act applied.

(2) The dispute between the parties was whether conditions (ii) and (iii) applied. Those conditions are:

(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,

(iii) 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.

(3) It was a matter of agreement between the parties that the onus was on the authority to satisfy the Tribunal that conditions (ii) and (iii) set out in the preceding paragraph applied as at the date of the hearing before the Tribunal.

(4) In short, it was a matter of agreement that to maintain the ground of refusal it was for the authority to satisfy the Tribunal that:

(i) the authority are able to make provision for the additional support needs of the child in School B (School B), and

(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 School A and in School B, to place the child in School A.

8. Oral evidence

(1) The Tribunal heard oral evidence from the witnesses and appellant as set out at paragraph 4(2) above. Each appeared to the Tribunal to seek to answer the questions put to them to the best of their ability. It appeared to the Tribunal that each of the witnesses had a good rapport with the appellant.

(2) The Tribunal noted that Witness A has been involved with the child's case only since 28 August 2017. She had read the relevant papers, spoken to the relevant people and been involved in this case since then. The Tribunal noted that Witness B had not met the child, but had been advised as to his circumstances and needs.

(3) Witness C, for understandable personal reasons which he explained to the Tribunal, had not had any involvement with the appellant or the child for a significant

period. He had previously worked closely with the appellant and the authority, discussing a transition plan to get the child back to School C Primary School (School C) with appropriate support. However, he was not aware of why it had been decided by the authority not to return the child to School C; he explained that he did not know anything about School B or the school's experience of pupils with autism; and the evidence he gave with regard to School A was extremely limited.

9. Findings in fact

(1) The child is a 12 year old boy born 2006. He lives with his mother and stepfather and their other children, who are ages 5, 6, 14, 16 and 19. Those children have a wide range of abilities and levels of communication.

(2) The eldest child was mute until he was 15½; the 14 year old has autism spectrum disorder and has previously been unpredictable and aggressive towards the child.

(3) The child has an autism spectrum disorder and presents with sleep difficulties and inattention. The child has a diagnosed processing delay, which means that he takes longer to process new material when compared to his peers. In particular the child has difficulties with social interaction, emotional regulation and behaviour.

(4) The child experiences anxiety, stress and distress and has on occasion been aggressive to school staff and pupils.

(5) The child has additional support needs in terms of section 1 of the Education (Additional Support for Learning) (Scotland) Act 2004.

(6) The child has a significant history of behavioural difficulties, absconsions from the school grounds and a record of violent incidents and exclusions going back to his time at his first primary school, School D Primary School.

(7) The child is intellectually able.

(8) The child transferred from School D Primary School to School E Primary School (School E). In June 2016, the child's family moved home and the child transferred to School C. The child ended attendance at School E at the end of Primary 5 and commenced attendance at School C at the beginning of Primary 6 in August 2016. The appellant notified the head teacher of School C at the end of May

or the beginning of June 2016 of the transfer. The appellant and the child were known to the head teacher. There were no specific transition arrangements in place for the transfer of the child from School E to School C, other than one visit by the child to School C.

(9) The child has a history of formal exclusions from primary school. He also has a history of informal exclusions where the school would request the appellant to come and take the child home.

(10) Planning for the transition of a child with additional support needs from primary to secondary school would normally commence at the end of Primary 6.

(11) The child requires a stable and consistent environment in which he can be nurtured and supported to trust those around him to meet his needs. He requires a mixture of individual and small group work to build his resilience and support him positively back into education and learning. He requires input and support from people with a good understanding of autism spectrum disorders. The child's difficulties in processing information contribute to his anxiety and stress and distress behaviours, exacerbated by his difficulties with attention and concentration. A major barrier to the child learning is his anxiety. The child requires specialist input to manage his anxiety and his emotions.

(12) The child requires significant opportunities for outdoor learning and practical activities to reduce his anxiety. That has been recognised and identified by the authority. In November 2016 it was agreed that to support the child to understand his emotions, he would be provided *inter alia* with Outdoor Woodland Learning School support in outdoor learning sessions twice per week (see page A48 of the papers). The child's anxiety is reduced considerably with outdoor learning. For a short period, the child was provided with one session per week and then two sessions per week. The OWLS outdoor support finished in March 2017 (page T27) without explanation. No further outdoor learning sessions have been provided since.

(13) The appellant arranged and paid for the child to attend sailing classes, where he achieved Level 1 and Level 2 qualifications in sailing.

(14) While at School C, the child exhibited aggressive behaviours on a number of occasions. The child was excluded from School C, even while attending on reduced

hours. The appellant's relationship with the head teacher broke down. In May 2017, the appellant stopped sending the child to School C.

(15) The appellant sought to have the child placed at School A. The authority refused that request. School A has indicated that the child would be a suitable candidate for School A.

(16) The authority worked with the appellant to facilitate the child's return to School C. In December 2017, the authority informed the appellant by telephone that it no longer intended to seek to facilitate the child's return to School C. The authority identified a number of schools in which it believed it could meet the child's additional support needs. Subsequently, the authority identified School B as the secondary school in which it could meet the child's additional support needs.

(17) The authority has identified that sensory (auditory) and information technology assessments in respect of the child require to be undertaken. No such assessments have yet been undertaken.

(18) School B is a mainstream local authority academy with enhanced provision to support children with additional support needs. School B is a new community campus which opened in or around 2016. School B has a roll of approximately 620 pupils, providing education to First to Sixth Year pupils. School B and School A are both approximately 25 miles from the child's home.

(19) School A is an independent charity offering education, care and therapy services for children and young people with autism and other additional support needs. It caters for approximately 43 young people, approximately 28 of whom have a diagnosis of autism. School A has a commitment to a holistic, nurturing, communal approach with an emphasis on a range of therapeutic interventions to help individuals lessen their anxieties and learn about themselves, others and the world around them, and has a great deal of experience in supporting individuals with autism spectrum disorder and other complex needs. The environment of School A would provide many outdoor opportunities for the child to de-stress and manage his anxiety.

10. Reasons for the decision

Is the authority able to make provision for the additional support needs of the child in School B?

(1) At the hearing, the authority offered to satisfy the Tribunal that it is able to make provision for the additional support needs of the child in School B.

(2) The Tribunal was not satisfied that the authority is able to make provision for the additional support needs of the child in School B. The Tribunal was not satisfied that the authority is able to make provision for the additional support needs of the child in School B, for the reasons given below.

(3) The Tribunal carefully considered all of the documentary and oral evidence before it. The Tribunal understood that School B is a mainstream school with enhanced provision.

(4) The appellant's oral evidence was that, while at School E, the head teacher of School E raised with the appellant that transition planning would be required for the child's transfer to secondary school and that such transition planning would commence when the child was in Primary 6. Witness A's evidence was that transition arrangements for pupils with additional support needs usually start at the end of Primary 6. The child transferred from School E at the end of Primary 5 into Primary 6 in School C in August 2016. The progress in transition planning for secondary school has been very limited. In the authority's statement of case of 21 November 2017 (at pages R1 to R4 of the papers before the Tribunal), the authority identified three schools at which it believed it could make provision for the child: School C Primary School, School F and School G. That remained the authority's position at the case conference referred to in paragraph 2(1) above on 1 December 2017. The evidence of the appellant and Witness C was that considerable work had been undertaken in respect of transition planning for the child's return to School C. The appellant's oral evidence was that in December 2017 she was informed in a telephone conversation that the authority no longer planned to return the child to School C. It appeared to the Tribunal that instances such as this undermined the appellant's confidence in the authority to make adequate provision for the child, as it did the Tribunal's. The Tribunal understands that the authority may well have been seeking to reach agreement with the appellant as to which school it would be

appropriate to transition the child to. Nevertheless, the Tribunal was concerned that the authority itself appeared not to have a clear focus such that, at the point it (was deemed to have) refused the placing request, it did not have an identified school in which it had offered to place the child in terms of paragraph 3(1)(f)(iv) and (i) of schedule 2 to the 2004 Act.

(5) The authority did not have an identified school in which it had offered to place the child, after the reference had been made, at the case conference on 1 December 2017 (referred to at paragraph 2(1) above). The authority only had an identified school – School B – in which it had offered to place the child later in the course of the proceedings before the Tribunal. While it was the case that the onus was on the authority to satisfy the Tribunal that it is able to make provision for the additional support needs of the child in School B as at the date of the hearing before the Tribunal (i.e. 28 and 29 March 2018), nevertheless it appeared to the Tribunal that in preparing to return the child to School C; after proceedings were raised before the Tribunal advising of three options (including School C) for educating the child; thereafter abruptly informing the appellant that it no longer proposed to return the child to School C; and thereafter identifying a further, fourth school in which it offered to place the child, is indicative of a poor approach to transition planning in respect of the child, particularly in light of the fact that transition arrangements for pupils with additional support needs usually start in the course of Primary 6 (the end of which in this case was June 2017).

(6) The appellant's oral evidence was that when she moved house and moved the child from School E to School C, she notified the head teacher of School C at the end of May or the beginning of June of the child's school move. The appellant's evidence was that the head teacher knew the child, as the head teacher and the appellant knew each other. The appellant's evidence was that it was the choice of the head teacher of School C not to make any transition arrangements other than that the appellant should take the child to School C on the first day of term. That evidence was neither challenged nor denied by the authority. The Tribunal was concerned that the authority took such limited steps in terms of introducing the child to School C.

(7) The Tribunal noted that the record of multi-agency meeting and action plan of 7 November 2016 (page A45 of the papers before the Tribunal) identified at page

A48 of the papers the agreement that support which allowed the child to understand his emotions would be provided in part by OWLS in outdoor learning sessions twice per week. The OWLS outdoor support finished in March 2017 (page T27 of the papers before the Tribunal). The appellant's oral evidence was that no explanation was given for the withdrawal of this support. Witness A was aware that this support had been identified and then ended, but was unable to shed light on why it had been brought to an end. The Tribunal was concerned that such support should be withdrawn without explanation at the time to the appellant and that the authority was unable to provide an explanation for the withdrawal of the support at the oral hearing before the Tribunal at the end of March 2018. It appeared to the Tribunal that instances such as this undermined the appellant's confidence in the authority to make adequate provision for the child, as it did the Tribunal's.

(8) The Tribunal was concerned that the restorative approaches, exit strategies, behaviour management plans, exclusions, reduced hours and exclusions, even when on reduced hours, put in place by the authority and its staff have failed to engage the child in regulating anxiety, stress and distress behaviours, contributing to the child ceasing to attend school in May 2017, since which time the child has not attended school.

(9) The Tribunal noted that in his letter of 11 September 2017 to the child's GP, copied to the Educational Psychology Service, Dr J wrote "I have now closed the case as the presenting problem is a matter for the educational authorities. I understand that Social Work have also withdrawn contact with the family for the same reason".

(10) The Tribunal was concerned that since the child ceased attending school, there has been limited involvement with him by the authority. There was limited 1:1 tuition with the new head teacher of School C, but that ceased due to staffing issues. Witness A acknowledged that the authority did not get matters right, as evidenced by the exclusions of the child from School C and the breakdown of the relationship between the appellant and the former Head Teacher of School C. The Tribunal was concerned that, taking account of the child's reduced timetable at School C and exclusions and then his ceasing to attend School C, the child has been out of school with extremely little, or no, educational input for more than a year.

(11) The Tribunal was concerned that even at the hearing at the end of March 2018 there was no formal (written) plan addressing how the child's transition to School B would take place, specifying for example the staff with whom the child would have contact, when, for how long, what elements of the curriculum he would undertake and when, and so forth. The Tribunal recognises that no such plan could be written in stone and that adjustments would require to be made as the child began to attend school. Nevertheless, that no such plan existed was a matter of concern to the Tribunal. This concern was all the greater because Witness A informed the Tribunal that her own formal role would cease once the child started at School B. Witness B has had no direct contact with the child.

(12) While Witness A and Witness B were able to tell the Tribunal in general terms the measures which would be available at School B to facilitate the child's transition to School B – such as providing a key worker, a flexible curriculum, a soft start to the day, 1:1 tutoring off campus, linking the child with a child who could model good social behaviour – and to explain that the transition period could be extended as required, the Tribunal was concerned that matters such as the curriculum to be undertaken had not yet been planned. That lack of detail was brought sharply into relief by the fact that Witness A provided more detailed evidence about the specific cohort of pupils whom the child would join at School A than she did about the cohort the child would join at School B. Witness A acknowledged that the list of measures that could be provided to support the child in Witness B's written statement at page R61 of the papers were only bullet points which required to have flesh put on their bones.

(13) That failure at this stage, taken along with the authority's previous failure to successfully engage the child in regulating his anxiety, stress and distress behaviours, the identification of OWLS outdoor support and its provision for a short period and then its abrupt withdrawal without explanation for its withdrawal either at the time or before the Tribunal, contributed to the Tribunal not being satisfied that the authority is able to make provision for the additional support needs of the child at School B.

(14) Other factors contributing to that conclusion were the failure of the authority yet to have carried out a sensory assessment of the child or an information

technology assessment, the requirement for a sensory assessment having been identified at least by 9 November 2017 in the placement options appraisal at page R15 of the papers and the information technology assessment having been identified by Witness A in the seventh paragraph of her witness statement at page R64 of the papers, with Witness A indicating in her oral evidence to the Tribunal that she would wish a formal technology assessment.

(15) Witness A stated in her witness statement at page R64 of the papers:

> "[The child's] curriculum will require a great deal of opportunity for outdoor learning and practical activities."

while Witness B in her witness statement at R61 of the papers stated:

> "Further outdoor learning opportunities may be possible through Owls Forest Schools if appropriate.

The apparent gap in the understanding of how the authority required to address the child's needs in respect of outdoor learning as between Witness A and Witness B was a concern to the Tribunal which further contributed to its conclusion that it was not satisfied that the authority is able to make provision for the additional support needs of the child in School B.

(16) It appeared to the Tribunal that there has been a long history of the authority failing to provide adequate support to engage the child, and that failure continues with the child being out of school and his 1:1 engagement with the Head Teacher of School C having ended due to staffing issues and the child being provided with no educational support other than the provision of homework and the offer to mark any homework which the child completes.

(17) For the foregoing reasons, the Tribunal was not satisfied that the authority is able to make provision for the additional support needs of the child in School B.

Is it not reasonable, having regard to the respective suitability of the provision for the additional support needs of the child in School A and in School B to place the child in School A?

(18) At the hearing, the authority offered to satisfy the Tribunal that it was not reasonable, having regard to the respective suitability of the provision for additional support needs of the child in School A and in School B, to place the child in School A.

(19) Even had the Tribunal been satisfied that the authority was able to make provision for the additional support needs of the child in School B (which it was not), the Tribunal was not satisfied that it was not reasonable, having regard to the respective suitability of the provision for additional support needs of the child in School A and in School B, to place the child in School A.

(20) The Tribunal was not satisfied that it was not reasonable, having regard to the respective suitability of the provision for additional support needs of the child in School A and in School B, to place the child in School A, for the reasons set out below.

(21) The Tribunal was satisfied that School A would be a suitable and reasonable placement for the child in terms of curriculum, staffing, therapies, teaching and ethos. School A is a respected institution with well qualified staff, support available to pupils on campus, and offering a wide range of therapies that may be of benefit in reducing the child's anxiety, engaging the child in communication and social interaction and providing the child with academic and vocational opportunities.

(22) The authority maintained that it was not reasonable to place the child in School A for the reasons given by Witness A. Whilst Witness A agreed that School A has a great deal of experience in supporting individuals with autism spectrum disorders and other complex needs and that the environment of School A would provide many outdoor opportunities for the child to de-stress and to manage his anxiety (see page R65), Witness A was of the opinion that it was not reasonable to place the child at School A. The reason for Witness A's opinion was three concerns which Witness A set out in her oral evidence. The first concern was about the peer group which the child would be joining at School A. The second concern was about issues raised in the Autism Accreditation Peer Review (at pages A10 to A23 of the

papers before the Tribunal). The third concern was about the academic opportunities available to the child at School A.

(23) In considering whether the condition at paragraph 3(1)(f)(iii) applied, even if the Tribunal had been persuaded that there was significant force in the concerns raised by Witness A (which, having carefully considered Witness A's evidence, it was not, for the reasons set out below), the Tribunal would still have found that this condition does not apply. The reason for that is that the appellant appeared to the Tribunal to be an experienced, sensible, caring mother who wished to do only what she reasonably assessed was best in the child's educational and developmental interests. The appellant knew of the concerns raised by Witness A set out in her written witness statement and in her oral evidence. Still the appellant sought to have the child placed at School A. The Tribunal was satisfied that the appellant had properly considered the issue of the potential peer group at School A, the terms of the Autism Accreditation Peer Review and the academic, vocational and other opportunities available at School A and at School B and, having considered those issues and weighed them (along no doubt with other issues such as the staff, staffing arrangements, support, therapies, curriculum and the range of the student body available at School A and at School B), it was reasonable for the appellant to have the child placed at School A.

(24) Witness A's first concern was that as the child was an able boy, School A would not provide a suitable peer group for him. Witness A advised that the current cohort in School A which the child would be likely to join would consist of approximately seven young people: six boys and one girl with ages ranging from 10 to 13 years, with a range of abilities. Two of the children are pre-verbal and the other five are at various levels of verbal ability. Witness A's evidence was that academically the group was working at a level below the ability level which the child would be expected to be working at. Witness A's view was that it would be unlikely that he would identify with this group of young people and this would therefore be likely to cause the child greater anxiety (see page R65 of the papers).

(25) It appeared to the Tribunal that being part of such a cohort would not necessarily cause the child greater anxiety. The Tribunal noted that the children with whom the child resides at home, being 19, 16, 14, 6 and 5 years of age, have a wide

range of abilities and levels of communication. For example, the 19 year old was mute until the age of 15½ and the 14 year old is autistic and has autism spectrum disorder. While it was clear that the child's home life has various challenges, not least the unpredictable and aggressive behaviour towards the child exhibited by the 14 year old, nevertheless it appeared to the Tribunal that the child identifies with his family group. There was no indication that the child was caused anxiety by a lack of his identifying with that family group.

(26) The Tribunal noted that it did not appear to the Tribunal that the child requires to identify with the group that he is part of in order to make progress. In this respect, the Tribunal noted the appellant's evidence concerning the child successfully undertaking sailing training with a group of children. The appellant's evidence was that the child, having satisfied himself through questions as to the nature of the children who were also undertaking the course, in fact engaged primarily directly with the sailing teacher, who the appellant indicated was a very calming influence, giving praise to the child in a way that he was able to accept and had been aware not to touch the child.

(27) The child undertook sailing classes with ten to twelve other children. He attended 2 days per week for 3 weeks to achieve Level 1 and then 2 days per week over a further 3 weeks to achieve Level 2. All of the children were under 16, of mixed ages and stages of development. One child had a physical disability, while some had no issues at all. Throughout the time the child attended this course, there was only one hitting incident. The appellant was impressed by the sailing teacher, who was very calming, who gave praise to the child in a way in which he was able to accept it and who knew not to touch the child. The appellant explained that the child would either sail alone or with one other child, but essentially he engaged with the teacher rather than with the other children.

(28) Further, it appeared to the Tribunal that being part of the cohort at School A identified by Witness A may in fact be an advantage for the child, present the child with opportunities and reduce his anxiety, because one of the child's issues is an issue of delayed processing of information and so a cohort such as that identified by Witness A at School A may allow the child's delayed processing to be less prominent in group activities. The Tribunal found it telling that in her oral evidence the appellant

explained that the child was “singled out” at School C, a mainstream primary school. The Tribunal was not satisfied that this concern justified the conclusion that placement of the child at School A was inappropriate or not reasonable.

(29) Witness A’s second concern arose from a number of matters which she identified in the Autism Accreditation Peer Review at pages A10 to A23 of the papers before the Tribunal. Those matters included the following findings:

> “The very high number of adults supporting pupils, can also give rise to a “prompt” dependency with opportunities for independent problem solving missed” (at page A12 of the papers before the Tribunal).
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> “Across the wider school there were lots of missed opportunities for problem solving, too much adult led intervention and at times pupils were disengaged and seemingly unaware of, or motivated by what they were being asked to do. There was very little indication regarding start, finish and duration of the sessions… In a number of sessions the complexity and quantity of verbal instructions was seemingly beyond the capabilities of the pupils” (at page A13).
>
> “School does not at this point have effective systems that capture and demonstrate pupil progress across the many areas that they do make progress. Consideration might be given to how they monitor and analyse incidents of “challenging behaviour” with a view to demonstrating how pupils do make progress (by decreasing number of incidents)…” (at page A13).
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> “…there appears to be an inconsistent understanding of how best to support pupils doing the more “academic” element of the curriculum offer that which takes place in the school setting” (at page A22 of the papers before the Tribunal).

(30) Witness A was clear that she did not seek to cherry pick but that the matters which she highlighted caused her to conclude that placement in School A was not appropriate for the child.

(31) While the Tribunal noted the parts of the findings to which Witness A referred the Tribunal, the Tribunal noted that they came from the “Actions for development”

section of the review. Even bearing that in mind, the Tribunal noted that at page A12 in the "Emotional Well-Being" action for development it was noted that:

> "…the staff know the pupils well and the holistic approach does support and enable pupils to experience a sense of control, calm and well-being. Many of the pupils have come from often stressful former placements which did not meet their complex needs. The impact of CSA [School A] is recognised by families and the young people themselves. It is nurturing, safe, motivating and has given pupils access to a wide range of stimulating experiential, learning opportunities."

(32) When the Tribunal looked to the "Specific areas of strength" at page A14 of the papers, the review identified:

> "<u>Enabling the autistic person</u>
>
> Strand 2: Self-Reliance and Problem solving E4
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> Development of a practical, meaningful skills based approach to learning that results in a real life contribution to the wider community. This is structured (using visual support) and organised in a way that maximises independence and autonomy and serves as a role model for good practice across the estates"
>
> and
>
> "<u>Positive outcomes for the autistic person</u>
>
> Strand 4: Emotional Well-Being P29
>
> The School A model provides a secure nurturing accepting inclusive environment for some very complex and vulnerable young people. This has a significant impact on quality of life for the young people and their wider families."

(33) With regard to the specific area of strength at Strand 4 above, the Tribunal noted that the reasoning given in the review was that:

> "Attending CSA [School A] results in positive outcomes for young people and their families. Young people arrive often from a point of trauma or disengagement, from placements that have not been able to fully meet their

needs with the ensuing pressure this puts on the wider family unit. The holistic, therapeutic, nurturing, supportive and environmentally magnificent surroundings give young people a second chance!"

(34) The Tribunal noted that in the conclusion of the review it was stated:

"There is a commitment to providing a range of therapeutic inputs to help stabilise and enable young people to lessen anxiety and increase understanding of themselves and others" (at page A23).

(35) Given the foregoing, given the child's experience of attending primary school, his current lengthy absence from primary school, his specific needs in particular in respect of his autism and anxiety, the significant transition the child is now at between primary and secondary school and the importance to his development and education that he be returned to full-time education and engage with secondary education, and having considered the Autism Accreditation Peer Review at pages A10 to A23 as a whole and the appellant's oral evidence that School A promotes reduction in stress levels, the Tribunal was not satisfied that this concern justified the conclusion that the placement of the child at School A was either inappropriate or not reasonable.

(36) Witness A's third concern was that placement at School A would reduce the academic opportunities available to the child. Witness A explained that she did not mean "academic" in the narrow sense, but was referring to academic or vocational qualifications. Witness A had noted in the placement options appraisal at R15 of the papers that some of the child's interests were "in animals, Natural Science and the Outdoors". Witness A explained that at School B the child would be able to do three Highers and the Land Skill course. She made clear that her aim is not an academic career for the child but to give him options, indicating that if the child wishes to be a wood carver, that would be available to him at School B. Witness A acknowledged that School A can be very flexible and has offered Highers but that, in her view, attendance at School A would be limiting. However, Witness A accepted that if the child wished to do three sciences at School A, he would be able to do so, although in her view he would find it more difficult there and he would not have a peer group to discuss his work with.

(37) The Tribunal understood the desire for the child to undergo only a single transition into secondary school and thereafter remain at that secondary school without having to undergo a further transfer. It appeared to the Tribunal that if the authority continued to fail to address, successfully, the child's anxiety, stress and distress behaviour at School B, then it may be that at a future date a further transfer, perhaps to School A, may be required. Equally, it appeared to the Tribunal that if the child was placed in School A and School A was successful in addressing the child's anxiety and stress and distress behaviours, then it may be (if it was necessary for the child to transfer to another secondary school to pursue subjects not, or not readily, available to the child at School A) that the child may be in a better position to undergo such a transfer. Alternatively, it may be that the child would wish to continue to stay at School A or that work to address his anxiety, stress and distress requires to continue to be undertaken there.

(38) It appeared to the Tribunal that the critical matter is for the child to be engaged in a way that facilitates his return to full-time education and his transition to secondary school and, in light of the past and continuing failures of the authority to appropriately engage the child, a new approach – namely placing the child in School A – is justified and is reasonable.

(39) For the foregoing reasons, the Tribunal was not satisfied that it is not reasonable, having regard to the suitability of the provision for the additional support needs for the child in School A and in School B, to place the child in School A.

Is it not reasonable, having regard to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in School A and in School B to place the child in School A?

(40) At the hearing, the authority offered to satisfy the Tribunal that it was not reasonable, having regard to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in School A and in School B, to place the child in School A.

(41) The Tribunal was not satisfied that it was not reasonable, having regard to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in School A and in School B, to place the child in School A, for the reasons given below.

(42) At the case conference on 1 December 2017 referred to in paragraph 2(1) above, the convener raised the issue of costs of the school in which the authority proposes that the child be placed and School A. The note of the case conference call of 1 December 2017 stated at paragraphs 11 and 12:

> "11. It was noted that in the third paragraph at page R3 of the papers there are two "£" signs but with no figures. Solicitor for respondent undertook to remedy this.
>
> 12. Once the oral hearing has been scheduled directions will be issued requiring the lodging of … a minute of agreed facts (which will require to address in detail the respective costs of the school in which the respondent proposes that the child be placed and School A…"

(43) On 26 January 2018, the convener made directions (1) and (2) which directed:

> "(1) The appellant and the authority agree between them and lodge with the First-tier Tribunal a statement of agreed facts and matters remaining in dispute no later than 23 February 2018;
>
> (2) The statement of agreed facts and matters in dispute referred to at (1) above identify the school in which the authority has offered to place the child … and *inter alia*, addresses the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in School A and in the school in which the authority has offered to place the child."

(44) By correspondence via email on 15 March 2018 from Solicitor for respondent to the Tribunal's Administration and Solicitor for appellant, Solicitor for respondent wrote:

> "…The statement and evidence of Witness A will cover the provision at both schools and confirm the authority position regarding the suitability/cost comparison."

(45) The witness statement of Witness A at pages R65 to R66 of the papers stated:

> "The cost of [the child] attending School A would therefore be a minimum of £22,370 and possibly as much as £32,300. The cost of meeting his additional

support needs at School B would be the transport costs, which would be similar to the costs of him attending School A."

(46) In its written submission lodged after the oral hearing, the authority stated:

"With regard to respect of cost of the provisions, the evidence from the education authority was that with the exception of OWLS and possibly some outdoor riding this would be met by staff within [School B]. It is submitted that any costs incurred by the Education Authority in meeting the [child's] additional support needs would be relatively small – in the region of £3-4,000 per annum.

The cost of [the child] attending School A was accepted to be a minimum of £23,370 per annum. However this is the base cost and any additional provision required by School A will add to this cost. Even using the base figure it is clear that the cost of [the child] attending School A is significantly greater than attending School B. The likely cost of travel between each is similar and can be discounted."

(47) It appeared to the Tribunal that the figure of "£3–4,000 per annum" as the costs incurred by the authority if the child was to attend School B is a matter of submission and not of evidence. The Tribunal was told in evidence given on behalf of the authority that the cost of an OWLS session is £350 per session, whether the session lasts for 1 or 4 hours, and so the costs of such sessions could be apportioned between the child and other children. The evidence of the appellant, when discussing the child still being excluded from school even when he was on reduced hours at school, was that things were better when the child attended OWLS. The appellant's evidence was that for a period he attended OWLS on one day a week, then it was put up to two days a week, and then it was abruptly stopped.

(48) It was not clear to the Tribunal how the figure of £350 per session would result in additional expenditure at School B in respect of the child of only £3,000 or £4,000 per annum.

(49) Witness A stated in her witness statement at page R64 of the papers:

"[The child's] curriculum will require a great deal of opportunity for outdoor learning and practical activities."

while Witness B in her witness statement at R61 of the papers stated:

> "Further outdoor learning opportunities may be possible through Owls Forest Schools if appropriate.

(50) The authority did not provide the Tribunal with evidence as to the extent of OWLS outdoor support required or restrictions to be imposed on its provision. Witness B in her oral evidence told the Tribunal that an OWLS session cost £350 whether for 1 or for 4 hours. It appeared to the Tribunal that if the child was provided with two full OWLS sessions per week (or the equivalent of two full OWLS sessions per week), then this would incur a cost of £700 per week at School B. If this cost was incurred each week throughout 38 weeks of term time, that would amount to a cost of £26,600. If that cost was incurred for only 30 term time weeks, that would still amount to a cost of £21,000. Without a detailed transition plan addressing matters such as the provision of OWLS outdoor sessions or detailed oral evidence on that issue, the authority was simply unable to satisfy the Tribunal that it is not reasonable, having regard to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in School A and in School B, to place the child in School A.

(51) Given the failure of the authority to provide the Tribunal with clear detailed evidence as to the cost of the provision for the additional support needs of the child in School B, the authority failed to discharge the onus upon it and the Tribunal was not satisfied that it is not reasonable, having regard to the respective cost of the provision for the additional support needs of the child in School A and in School B, to place the child in School A.

(52) Accepting the cost of placement at School A of £23,370 per annum (indeed even accepting the higher figure of £32,300) and even if the Tribunal accepted that the cost of the provision for the additional support needs of the child in School B was only "£3-4,000 per annum" (which it did not because it did not have a detailed assessment of the level of OWLS outdoor support that was required or any restrictions which would be placed on the provision of such support), given the stage of the child's development, his age, the stage the child has reached in his education and the importance to the child's family and the society in which he will live in future, that the child has the opportunity to make the best possible progress in his

educational development (in a broad sense), the Tribunal is not satisfied that it is not reasonable, having regard to the respective costs (including necessary incidental expenses) of the provision for the additional support needs of the child in School A and in School B, to place the child in School A.

11. Decision

(1) For the reasons given above, the Tribunal is not satisfied:

- in terms of paragraph 3(1)(f)(ii) of schedule 2 to the 2004 Act that the authority are able to make provision for the additional support needs of the child at School B
- in terms of paragraph 3(1)(f)(iii) of schedule 2 to the 2004 Act that it is not reasonable, having regard both to the respective suitability and the respective costs (including necessary incidental expenses) of the provision for the additional support needs of the child in School A and in School B, to place the child in School A.

(2) The decision of the Tribunal was unanimous.

12. Disposal

(1) In terms of section 19(4A)(b) of the 2004 Act, the Tribunal overturns the decision of the authority refusing the appellant's placing request and requires the education authority to place the child in School A no later than August 2018.