



Additional Support Needs

DECISION OF THE TRIBUNAL

Reference

1. By application dated 13 February 2019 the appellant lodged a reference under section 18(1) and 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the Act”) against a decision of the respondent.
2. The reference is in respect of the decision dated 17 December 2018 whereby the respondent refused a placing request made by the appellant under paragraph 1 of Schedule 2 of the 2004 Act for her son (“the child”) to attend an independent special school (“school A”).

Decision

3. The tribunal overturns the decision of the authority and requires the authority to place the child in the school specified in the placing request to which the decision relates (school A), by the end of October 2019 in terms of section 19 (4A)(b)(i) of the Act.
4. The decision of the tribunal is unanimous.

Process

5. The bundle consists of pages T1-T64, A1-A66 and pages R1-R333. The respondent’s solicitor sought to lodge some documents on the day of the hearing. This was not objected to and we allowed them to be lodged. We numbered the pages R313-333. A joint minute of admissions was entered into by the parties, the final version of which is at

pages T61- T64. In addition, both parties prepared written submissions after conclusion of the evidence. The appellant's submissions were number A67-74. The respondent's submissions were numbered R313-327 in error and should be renumbered R334-348. We took into account all of the information in reaching our decision.

6. Oral evidence was heard over two days. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 53(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
7. The respondent led at the hearing and evidence was heard from:
8. Witness A. An unsigned affidavit of the witness is included at R201-208. The witness gave evidence in support of the affidavit and was asked questions by the solicitors acting for each party, and by the tribunal members.
9. Witness B. An unsigned affidavit of the witness is included at R196-200. The witness gave evidence in support of the affidavit and was asked questions by the solicitors acting for each party, and by the tribunal members.
10. The appellant's witnesses were as follows:
11. Witness C. A statement of the witness is included at A62-66. The witness gave evidence in support of the statement and was asked questions by the solicitors acting for each party.
12. The appellant, the child's mother gave evidence. Her statement is included at A134-139. She gave evidence in support of the statement and was asked questions by her solicitor and the solicitor acting for the respondent. The tribunal members also asked her some questions.
13. The parties agreed at the first case management conference call that due to his severe and complex needs the child was incapable of expressing his views and it was not considered appropriate to attempt to seek his views.

Issues in Dispute

14. The appellant asked the tribunal to overturn the respondent's decision to refuse the placing request for school A and the respondent asked the tribunal to confirm its decision. The respondent's position was that the ground of refusal relied on was established and that in all the circumstances it was appropriate to refuse the placing request. The appellant's position was that the ground of refusal was not established and the tribunal should use its power to require the respondent to place the child in school A.
15. The ground of refusal relied upon by the respondent is set out at paragraph 3(1)(f) of schedule 2 to the Act. It was a matter of agreement between the parties that conditions (i) and (iv) of the ground of refusal set out at paragraph 3(1)(f) of Schedule 2 to the Act applied. The dispute between the parties was whether conditions (ii) and (iii) applied.
16. Those conditions are:
- “(ii) the authority are able to make provision for the additional support needs of the child in a school (in this case the child's current school, school B) (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 (in this case school A) and in the school referred to in paragraph (ii), to place the child in the specified school.”
17. In reaching our decision, we had regard to all the available evidence and made the following findings in fact relevant to the issues in dispute.

Findings in fact

The child

18. The appellant is the mother of the child.

19. The child was 14 years of age at the date of the hearing.
20. The child has been educated continuously in the respondent's local authority area since 2014, when he entered primary five at primary school A.
21. The child moved to school B in August 2017.
22. The child lives with his mother and three-year-old sister.
23. English is not the first language spoken in the household. **[Part of this finding in fact has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
24. The child has a diagnosis of autistic spectrum disorder (ASD), has delayed cognitive development and has social and emotional behavioural difficulties.
25. The child is non-verbal. He will gesture to adults in request for support. His vocalisations can give an indication of his emotions and give a clearer understanding of his requests to those who are familiar with him.
26. The child displays sensory seeking behaviours. **[Part of this finding in fact has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
27. The child requires supervision and support with personal care. He is unable to clean himself properly after going to the toilet. He requires support to wash and dress.
28. The child's diet is extremely limited. He will only eat bread rolls with crisps. He participated in a tasting session in school and tried some new foods with limited success.
29. The child is overweight. He previously took part in riding for the disabled (RDA) but this ceased when the child exceeded the weight limit to be able to participate.

30. The child requires constant supervision. At home, he would climb on furniture and jump from heights if given the opportunity. He has injured himself in the past.
31. **[This finding in fact has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
32. The child can become frustrated at home and has damaged furniture and broken iPads and computers. He does not have an awareness of his own strength. He can push past people if they are in his way and he has done this at home and at school.
33. The child has a sleep disorder. Until February 2019, he would be awake several times during the night. He would wander around the house and make a lot of noise. He would bang doors and make loud vocalisations demanding crisps He would try to get out of the house on occasion. His mother required to supervise him and often slept in the living room so she was available if he woke up. **[Part of this finding in fact has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
34. In February 2019, the child was prescribed melatonin to assist with sleep which helped for a period of time. His mother had disguised the medication in his juice so that he would take it when mixed with juice. However, around July or August 2019 the child appeared able to detect that something had been put in his juice and would refuse to take it. His sleep pattern deteriorated again and he started getting up during the night. On one occasion, his mother was wakened by the sound of the shower running. She found the child asleep on the bathroom floor with one leg in the shower, and the water running over his leg. The water was not hot so the child did not injure himself on that occasion.
35. The child's sleep disruption and behaviour through the night had an impact on his ability to attend school and engage in the curriculum. There have been several occasions when the child fell asleep at school.

36. The child can become overwhelmed in busy or noisy environments. He will often refuse to leave the house or to get out of the car if he is driven somewhere. He will attend school but at the weekends and during holidays often refuses to leave the house.
37. The child will refuse to attend hospital or GP appointments, and a dentist requires to visit him at home.
38. The child enjoys spending time on his iPad or computer. He is able to use the search function to identify programs or games that interest him such as Teletubbies. The child enjoys listening to music.
39. The child tends not to socialise or interact with other children but on occasion will observe other children with interest.
40. The child is able to follow direction to a certain extent and with repeated prompting can follow some set routines.
41. The child has the capacity to communicate in a more meaningful way but requires support to do so.

Schooling to date of hearing

42. The child attended nursery A in the respondent's local authority area for two years prior to moving out with the area. He then moved to another local authority area and attended nursery and then primary school locally. The appellant felt that he progressed well and was very active.
43. The child returned to the local authority area in 2014, when he entered primary five at primary school A.
44. While the child was at nursery A the staff utilised a picture exchange communication system ("PECS") and also provided the child's mother with the cards for use at home. No further cards have been issued and these are the ones that the child's mother still

uses. The cards are basic cards representing crisps, juice, toilet and computer.

45. While the child was in primary school A, attempts were made to explore other methods of communication for the child. The child had some speech and language therapy (SALT) input but after a few appointments no further appointments took place and no progress was made with identifying alternative methods of communication.
46. The head teacher of primary school A suggested to the appellant that she may wish to consider applying for the child to attend school A as she considered that the child required specialist input. The appellant was concerned that the child was too young to be sent away to school and wanted to keep him at home for as long as possible.
47. The child transitioned to school B in August 2017, when he started S1.
48. The child was placed in Enhanced Provision in school B where he remained as at the date of the hearing.

Circumstances surrounding placing request

49. The child is usually happy to attend school B, but over the course of his first year at school B his mother was concerned that he was not making any progress and found that his behaviour at home was becoming increasingly challenging.
50. The child travelled abroad with his mother and sister in the summer of 2018. The appellant arranged special assistance at the airport and the child coped reasonably well on the outbound journey. However, on the return journey there were delays and the child became overwhelmed in the noisy environment. When he got on the plane he refused to sit on the seat and fasten his seatbelt. The appellant and members of staff tried to persuade the child but after approximately two hours he was removed from the plane by security staff. The airline refused to allow him to fly. **[Part of this finding in fact has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
51. The child was very distressed by the incident and remained abroad with family members

while the appellant flew home to collect her car and drove back from to Scotland to collect the child. While abroad with family members, the child was very distressed and lay in a corner behind a sofa for several days. He slipped in the bathroom and cut his head. He required stitches but would not allow medical staff to touch him. Eventually eight members of staff had to hold him down to allow treatment, which has resulted in the child being very anxious if anyone touches his head. **[Part of this finding in fact has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

52. The child had to remain abroad until his anxiety had lessened and the appellant was able to drive him home. He missed the first few weeks of term in August 2018 and was unsettled when he returned to school. **[Part of this finding in fact has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

53. It was after reflecting on the incident over the summer and the child's behaviour on return to school that the appellant felt it was now essential that the child be given more intensive and specialised input.

54. The appellant discussed the matter with the then acting principal teacher for additional support needs at school B who indicated to the appellant that school A would be more suitable for the child given his complex needs. The teacher had previously worked at school A and was able to provide the appellant with a lot of information about school A including leaflets and brochures.

55. The appellant visited school A on two occasions. On the first occasion she went without the child and was shown what was on offer at the school. She was firmly of the view that the school was suitable for the child's needs.

56. The appellant was asked to bring the child with her on a second visit to the school. She was concerned that the child may not be willing to get out of the car on arrival. The staff were understanding of the situation and indicated they would be happy to have a meeting

in the car if that was required.

57. When she took the child to school A he was able to get out of the car and attend the meeting. He appeared reasonably comfortable in the surroundings.

58. The child was offered a place at school A following the interview on 04/10/2018.

59. The placing request form was completed by the appellant on 27/10/2018.

Decision making process

60. The decision to refuse the placing request was made by the respondent's principal educational psychologist, witness A.

61. Witness A took up his post in July 2018 and had no knowledge of the child prior to receipt of the placing request.

62. When the placing request was allocated to witness A, he investigated the child's current provision. He observed the child in school once in approximately November 2018. He had discussions with other professionals working with the child.

63. Witness A called a child planning meeting ("CPM") which was held on 03/12/2018. Witness A was not in attendance at the meeting.

64. Witness A was provided with minutes of the meeting and was given verbal feedback from some of those who attended the meeting.

65. Witness A decided to refuse the placing request and informed the appellant of this at a meeting on 06/12/2018. He had not met with the appellant prior to this date.

66. Witness A has not been to school A and his knowledge of school A is limited to what he has been told by colleagues.

67. Witness A did not have information regarding the costs of the provision at school A when

he reached the decision on the placing request.

68. A letter confirming refusal of the placing request was issued to the appellant on 17/12/2018.

Assessment of needs

69. Witness A did not carry out a formal educational psychology assessment on the child prior to refusing the placing request and no such assessment has been carried out by him or another educational psychologist either before or since.

70. In October 2018, a Child's Plan process was opened in respect of the child.

71. The first CPM was held on 03/12/2018 and an action plan was drawn up following the meeting.

72. Witness A thereafter instituted 4 weekly CPM to check progress with the action plan and with the aim of ensuring support from other agencies including SALT, Autism Service ("MAS"), Physiotherapy, Dietician, Child and Adolescent Mental Health (CAMHS), Paediatrician and Social Work.

73. In the letter refusing the placing request the respondent stated that a full assessment of educational needs will progress at a CPM in January 2019. The letter also stated that a full assessment of the child's care needs would take place and that consideration would be given to opening a coordinated support plan (CSP).

74. As at the date of the hearing no formal educational needs assessment had been carried out and no coordinated support plan had been opened for the child.

Current schooling – School B

Physical Environment

75. School B is a mainstream high school with an enhanced provision base. It has a roll of 680 pupils with capacity for approximately 900. It comprises of a main building over three

floors, with a separate block containing the games hall.

76. The enhanced provision base is attached to the main building. There is a sensory room in the base and a sensory garden which the child can access if he chooses to.

77. There is an alarm which sounds if the door to the sensory garden is open for more than 30 seconds and the alarm seems to startle the child and makes him reluctant to go out in the garden. The child is also very startled by the period bell which sounds at the end of each period within the main school and can be heard in the enhanced provision base.

78. As at May 2019 there were some areas of the enhanced base which were not secure and the child was at risk of absconding and reaching a main access road. The child requires 2-to-1 staffing support to access areas out with the main building and he is frequently unwilling to leave the base and has not attended at the games hall for several months.

79. The child is able to attend the school canteen at quieter times if supported by staff. He would sometimes wander off to walk round the base.

Staffing

80. Witness B was appointed deputy head teacher with responsibility for managing the enhanced provision department around December 2018. The enhanced provision department has 2 support for learning teachers equating to 0.4 full-time equivalent and three pupil support assistants ("PSA"). The child has a key worker who is a PSA whom he knows well.

81. The child requires one to one PSA support for his whole day but this is not always available. He requires 2-to-1 support to access areas out with the school building.

Timetable/Curriculum

82. The child's timetable from the start of the new term includes a mixture of one-to-one and group sessions. Each session lasts 50 minutes apart from the last session of each day which is one hour. There are seven sessions every day apart from Friday when there are only five sessions as the school closes early.
83. First thing each morning the child has a registration communication group which is a teacher led group session.
84. His second period of each day is designated as communication, lifeskills, skillbuilders and involves a walk to the canteen. Two of the sessions are one-to-one with a teacher, the other three days are with a PSA.
85. The third session every day is designated as a community walk in the school and is always taken by a PSA.
86. The fourth and fifth session each day are a mixture of theme, sensory and enterprise group sessions, led by either a teacher or a PSA.
87. The sixth session on Monday to Wednesday is a TACPAC session led by a PSA and the sixth session on Thursday is a music session with two in the group also led by a PSA.
88. The final session each day lasts for an hour and is a home routine with a PSA.
89. The child has 2 x 50 minute one-to-one sessions with a teacher each week.
90. The child is working at the pre early to early level of the curriculum for excellence ("CFE"). Children without additional support needs would normally be expected to be working at this level at the nursery stage.
91. The child has an Individual Education Plan which was created in May 2018 and was due to be updated in November 2019. The plan's targets were for the child to make progress in using pictures or symbols appropriately to indicate his needs and preferences and to participate in group activities.

92. In May 2019, it was reported that the child had increasingly opted out of group work and was resistant to the activities on offer. He was restless and repeatedly trying to leave the area and managing behavioural issues was taking up significant time. At that point, activities were based on the child's mood with the focus being on participation.
93. Some staff use PECS to communicate with the child. They also use a now and next board, a sand timer and a visual timetable. The child engages with this to a limited extent and will not use the appropriate symbol to indicate his needs or preferences. He tends to pick any card if he wants something.
94. The child was observed in the classroom by the respondent's Autism Service in June 2019. A report was produced detailing the observations and making recommendations.
95. It was noted that the child was the only pupil in the classroom during his activities as the presence of other people pupils caused him to leave the room.
96. It was also observed that the visual timetable and now and next visual were at his workstation but were not always utilised by him or in a place where he could see them. It was noted that the child did not take an active role in the visual timetable or now and next board. It was also noted that the visuals were entirely absent from the social area.
97. It was also observed that the child needed coaxing to take part in a new activity and that some staff were more inclined to use objects of reference than symbols. No pictorial choice board was available. The sand timers were noted to be effective for transitions.
98. It was noted that the child was happy to engage in personal care activities and sensory activities such as a foot massage and playing with sand. He was less happy to engage with other activities such as a jigsaw and a story and he was noted to pace about until the activities were put away. He was noted to wander from room to room when the room was too busy or he did not want to complete the task.
99. The child was happy to walk to the canteen with PSA support to collect his snack and put his cup in the sink when he had finished his water. He appeared to have a good relationship with staff.

100. It was noted that staff had different ways of communicating with the child. Some used visuals, some use objects of reference, some used verbal prompts and some used Makaton.

101. The child would benefit from consistency in communication. Speech and language therapy were re-engaged for the child in approximately March 2019. It was accepted that the child clearly wished to communicate and had the ability to communicate but an appropriate mechanism to achieve this was not in place.

102. It was recommended that a pragmatic organised dynamic display (“PODD”) book be created for the child. As at the date of hearing, the book was still in production and was not available for use. The appellant was given a sample of the book around 13 August 2019 and provided photographs for inclusion in the book. There are plans for school staff, the appellant and the child’s carer to be trained on the use of the PODD, although no specifics were available at the date of the hearing.

Peer group

103. There are five other pupils in the enhanced base, two of whom have ASD. The child tends not to interact with the other children, although shortly prior to the hearing the child began to show an interest in a new pupil who had recently started. On two occasions, he sought the pupil out and sat next to him. The child has not developed any friendships with other children at school.

Physical activities and therapy opportunities

104. The child has very limited opportunity to engage in physical activities. He has gained weight in part due to his lack of physical activity.

105. The appellant bought the child a trike which is left in the sensory garden for him. In the period between January 2019 and the hearing the child only rarely used the trike.

106. The child will not leave the enhanced base to attend the gym hall.

107. The child was previously given the opportunity to attend swimming sessions which he enjoyed. The child would on occasion remove his swimwear while in the pool and it was not considered appropriate for him to continue to attend the pool. Occupational therapy were asked to investigate appropriate swimwear which the child could not remove. They provided the appellant with a website address and advised her she would have to purchase swimwear herself.
108. Swimming sessions were stopped for all the children in the enhanced provision base due to availability of the pools but it was hoped that this could be recommenced. It had not recommenced by the date of the hearing.
109. The child had previously enjoyed sessions out with the school with RDA but this was stopped in April 2018 as the provider indicated the child was too heavy for any of the available horses.
110. Rebound or trampoline therapy was recommended as an activity which would be of benefit to the child but the school had not been able to ensure a safe provision of the service for the child prior to the date of the hearing.
111. The child had previously enjoyed visits to the school from "Therapets". He engaged well with the animals, however the funding for the contract between the respondent and the therapy providers had ceased. As at the date of the hearing, the school were looking to re-engage with an alternative provider.
112. Staff in the enhanced provision base have sought to develop some circuits for the child to do within the base. They encourage him to walk to the canteen and the staff and office areas close to the base. They encourage him to pass a ball backwards and forwards which he sometimes engages with.
113. The school liaise with healthcare services and have assisted with referrals to physiotherapy in the past. The school arranged for a consultant paediatrician to visit the child at school on 23/05/2019 as he was refusing to go to clinic appointments.

114. Occupational therapy have provided some advice in relation to the child's home environment and assisting with provision of safety and hygiene equipment.

Respite

115. The child previously had respite two hours each week after school which was provided by a carer, witness C. She worked with the child for approximately three years and developed a good relationship with him. She collected the child from the house and initially took him to his horse riding until the sessions ceased.

116. Once the riding sessions stopped, witness C would drive the child around for two hours. Occasionally she would be able to persuade the child to get out of the car for a short period of time if she went to a quiet location.

117. As the child got bigger and stronger, witness A became more concerned that she would be unable to manage the child alone. The child did not show any physical aggression towards her but on one occasion he pushed past her to get her out of his way. She requested a second member of staff be allocated but this did not happen. She was told around March 2019 that she was no longer to work with the child.

118. Around March 2019, new respite workers from H1 Healthcare were appointed to provide respite in the appellant's home. 2:1 provision was provided on a Thursday, Friday and Saturday. Saturday respite was from 12 noon until 6 pm and it was recommended that the appellant leave the house to allow the carers to work with the child.

119. The appellant noticed a deterioration in the child's behaviour and was concerned regarding the level of care and service provided. Due to the appellant's concerns about the standard of care provided to her son, the service was withdrawn at the appellant's request around May 2019.

120. Following on from the removal of H1 healthcare, it was agreed that the appellant would be allocated a self-directed support budget. The appellant identified a family friend who was prepared to act as a carer for the child. The appellant was allocated funding for 17 hours per week and the carer started working with the child from 15/07/2019.

121. The carer is a family friend who knows the child well and the child has a good relationship with her. He is comfortable going out in the car with her and is happy to engage with her two dogs. The friend has no teaching or caring qualifications and has no experience of supporting children with autism.

Costs

122. The cost of the child's placement at school B is approximately £42,848 per annum

The Specified School – school A

Physical environment

123. School A is an independent school. It provides education care and therapy services for children and young people with additional support needs on a day or residential basis.

124. It has two estates with school buildings, therapy rooms and gardens. There is a working farm, a large vegetable allotment, indoor and outdoor horse-riding facilities, wooded areas, climbing, balancing swinging and play areas. There are also two gymnasiums, a physiotherapy room, a swimming pool and a dedicated therapy building.

125. There are 10 houses providing residential care.

Staffing

126. There is a large complement of staff led by a Head of Education and a Head of Care. There are teachers and teaching staff, residential care staff and volunteer support workers. They are supported by an autism trainer, a project development lead, a communication support facilitator a massage therapist and speech and language therapists.

127. The staff have a wealth of experience in terms of dealing with children and young people with a diagnosis of autism and complex and severe needs such as the child.

Timetable/curriculum

128. School A is accredited by the National Autistic Society of Scotland.

129. School A is committed to a holistic nurturing communal approach with an emphasis on a range of therapeutic intervention to help individuals lessen their anxieties and learn about themselves others and the world around them.

130. Sensory assessments are undertaken by school A in order to create sensory profiles for its pupils.

131. School A offers pupils an individual holistic educational experience.

132. Residential pupils have access to a 24-hour curriculum to meet their educational and well-being needs.

133. The class sizes range from 2 to 9 pupils. The pupils follow their own learning pathway with a balance of class group and individual activities.

134. The pupils range from early third level learners.

Peer groups

135. As of January 2018, there were 51 children on the school roll, between the ages of six and 18. 17 children do not have additional support needs but the remaining children all do have additional support needs.

136. 20 of the pupils are diagnosed with an autistic spectrum disorder.

137. 20 pupils are placed at the school on a residential basis for at least 40 weeks of the

year and nine pupils are placed on a 52-week basis.

138. Most pupils attend school class groups with peers of a similar age although some people pupils follow individualised programs within the school building and the wider estate if necessary.

Physical Activities and therapy opportunities

139. School A has two gymnasiums, a swimming pool and indoor and outdoor horseriding facilities. They have horses that would be suitable for the child to ride.

140. School A has outdoor play equipment to allow opportunities for climbing and swinging.

141. School A has large grounds and a working farm and the pupils are allowed access to the animals. Where appropriate lessons are built around the outdoor environment.

142. School A provides various therapies aimed at meeting the sensory needs of its pupils which includes music therapy, movement therapy and rhythm therapy.

143. School A has a physiotherapy room and a massage therapist. School A has a medical centre on site.

Costs

144. The exact cost to the respondent to place the child in school A was not known at the date the placing request was refused or by the date of the hearing. Estimated costs based on the child attending 39 weeks per year were in the region of £136,000 per annum. This estimate is based on the child being placed at school A 7 days per week for 39 weeks. We were not given information on what the cost would be if the child were only to attend Monday to Friday during the 39 weeks.

Reasons for the Decision

145. The tribunal found the witnesses to be largely credible and reliable and their evidence

extremely helpful. We considered all of the evidence and we were satisfied that there was sufficient evidence available for the tribunal to reach a decision on the reference.

146. In reaching our decision, we considered the statutory provisions of the Act relevant to this reference.

Section 1

147. Section 1 of the Act provides:

“(1) A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person.

(2) In subsection (1) the reference to school education includes, in particular, such education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential.

(3) In this Act, “additional support” means –

(a) in relation to...a child of school age or a young person receiving school education, provision (whether or not educational provision) which is additional to, or otherwise different from, the educational provision made generally for children, or as the case may be, young persons of the same age in schools (other than special schools) under the management of the education authority.

148. It was a matter of agreement between the parties, and we found as a matter of law, that the child has additional support needs in terms of s.1 of the Act.

149. The remaining parts of section 1 detail the meaning of school education and additional support needs and we applied those meanings when reaching our decision as more fully explained below.

Schedule 2, Paragraph 2(2)

Paragraph 2(2) of Schedule 2 of the Act provides:

"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...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."

150. The appellant made a placing request to school A which is not a public school and the managers of school A confirmed by letter dated 10/10/2018 they are willing to admit the child.

Schedule 2, Paragraph 3 (1)

151. Paragraph 3(1) of Schedule 2 of the Act provides:

(1) The duty imposed by paragraph 2(2) does not apply –

... (f) if all 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 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 special 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).

152. This is the ground of refusal relied upon by the respondent and we will turn to each constituent part of the test below. The tribunal's powers in relation to the reference are contained in section 19.

Section 19 (5)

153. Section 19(5) of the Act provides:

"Where the reference relates to a decision referred to in subsection (3)(e) of that

section, the First Tier Tribunal may –

(a) confirm the decision if satisfied that –

(i) one or more of the 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, and by such time as the First-tier Tribunal may require”

154. There is a two-stage test in terms of section 19(5)(a) as set out above: Firstly the tribunal requires to determine if the respondent has established the grounds of refusal in paragraph 3(1)(f). Secondly, the tribunal has to consider whether in all the circumstances it is appropriate to confirm the decision of the respondent.

Ground of refusal: Schedule 2 Paragraph 3(1)(f)

155. The onus is on the authority to satisfy the tribunal that all the conditions in Paragraph 3(1) (f) are met in order to establish that the ground of refusal exists. Parts (i) and (iv) are not in dispute but for completeness we will now deal with each branch of the relevant ground of refusal in turn.

a. the specified school is not a public school

156. It is agreed that school A is not a public school. We find that this branch of the ground of refusal is established.

(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.

157. This branch of the ground of refusal is in dispute. The respondent’s position is that they are able to make provision for the additional support needs of the child in school B. The appellant’s position is that the respondent has not demonstrated that they are able to make provision for the child’s needs in school B.

158. It was the appellant's position that in order to establish this branch of the test had been met, the respondent was required to demonstrate to the tribunal that they had carried out an assessment of the child's needs in their entirety. The case law referred to by the appellant in the written submission confirms that the question is to be answered on the basis of the needs as they exist at the time of the hearing.
159. The case law referred to by appellant also supports the proposition that those needs required to be stated in a more general all-encompassing and holistic way, rather than by endeavouring to separate out educational support on one hand and, for example, social work support on the other. The meaning of additional support in section 1(3) referred to above makes it clear that additional support (to benefit from school education) includes provision which is non educational as well as that which is educational.
160. In reaching our decision, we assessed all the evidence and made the findings in fact detailed above. In applying those facts to the legal test as set out in the legislation and case law, we came to the conclusion that this branch of the test was **not** met.
161. While we considered that the respondent's witnesses were broadly credible, we noted that both were relatively new to their roles and did not have a lot of direct experience of the child and his family. While it was each witnesses' opinion that the child's needs were met, there was a tendency by both to focus on educational needs rather than the broader needs of the child.
162. Section 1(2) of the Act referred to above refers to school education as education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential. We did not consider that the evidence supported a conclusion in law, when we have regard to the statutory definitions and case law, that the respondent was able to make provision for the additional support needs of the child in school.
163. We came to this conclusion for a number of reasons. We noted that the child had been known to the respondent for a number of years, and following return to the local authority area had been in primary school A for 3 years before his transition to school

B. Notwithstanding the fact that the respondent was clearly aware that the child has severe and complex needs and a family background where English is the second language, it appeared from the evidence that little of substance had been done to make provision for the child's additional support needs prior to the receipt of the placing request.

164. We considered that the respondent should have had robust plans and strategies in place long before the placing request came in with clear targets evident in IEPs and a CSP in place to coordinate the significant additional support for the child.

165. Witness A first became involved with the child when the placing request was received. He confirmed that no formal educational psychology needs assessment was carried out on the child. We also noted that prior to making the decision on the placing request, witness A had limited information on the child and his needs. He had only observed the child briefly in school and had not met with the appellant.

166. He had received feedback from colleagues and the minutes of the CPM (R284-285). Those minutes showed a significant number of serious ongoing issues and concerns including around limited communication skills, issues with diet, toilet habits, health and hygiene, sleep patterns, safety, a lack of activity and a lack of respite for the family. Given the number and severity of the concerns, we did not consider that it could be said that the child's additional support needs when considered in a holistic manner were being met at that time.

167. Neither did we consider that the evidence supported the conclusion that the child's additional support needs were being met in school B by the date of the hearing. While we noted that witness A, witness B and other professionals in the team around the child ("TAC") had made efforts to address issues and concerns raised at the initial CPM, we considered that by the date of the hearing there were still significant outstanding concerns and unmet needs.

168. As noted above, we considered that the child should have had a CSP a long time prior to the placing request being made. We considered it was of particular significance that even after acknowledging the range of issues and concerns raised at the CPM that no

CSP had been opened by the date of the hearing notwithstanding the fact that the respondent had committed in writing (in the letter refusing the placing request) to giving consideration to opening a CSP.

169. It was also of concern that notwithstanding the recognition by various professionals in the TAC that the child had capacity to communicate, by the date of the hearing the PODD system was not yet operational. The respondent's witnesses appeared unwilling to accept that the report prepared by MAS (and lodged by the respondent) highlighted what could be regarded as a very significant concern that there was still an inconsistent approach to communication methods used by staff in the enhanced provision base.

170. We also considered that the child's needs around physical activity were not being met in school B. By the date of the hearing, he was doing very little physical activity and his health was suffering as a result.

171. We also considered that the child's sensory needs were not being fully met either. In particular, we were concerned to note that he was startled by the period bell which would sound approximately seven times per day.

172. We also considered that the evidence showed little progress in the child's modest targets in his IEP and that the child often refused to engage with the curriculum. Diaries showed a pattern where the child could not be encouraged to engage with activities and there appeared to be an over reliance on computer use and self-directed activity, which was also highlighted in the MAS report.

173. It was also of concern that there were limited opportunities for therapy and despite the witnesses indicating that there would be steps taken to reintroduce such therapies, we were not confident that it was likely that this would be resolved in the near future.

174. We also considered that the lack of consistent and effective respite was of concern. Without effective respite, the circumstances for the whole family were far from desirable and the child's behaviour and anxieties became more severe. We considered that in order to benefit from school education, the child needed to be supported in all aspects of his day to day life, in and out of school.

175. The respite was effective to an extent while it lasted but was very limited in terms of time. The H1 Healthcare respite was terminated very quickly and indeed the appellant was of the view that the care provided was substandard and detrimental to the child's wellbeing. The care provided on the basis of SDS was appreciated by the appellant, but the carer has no qualifications in education or autism and it was considered unlikely that such an arrangement would be sustainable in the longer term.

176. We did note that the appellant expressed appreciation for efforts made and support provided to date but she was also extremely concerned about the slow pace of effective change for the child and therefore pessimistic that this would be addressed soon enough to meet his complex needs.

177. Overall, we considered that despite what may have been the best efforts of the TAC, they were not able to meet his severe and complex additional support needs at school B at the date of the hearing.

(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 special school and in the school referred to in paragraph (ii), to place the child in the specified school,

178. As we did not find that part (ii) of the test was met, the respondent has failed to establish the ground of refusal having not met one of the component parts of the test. It is therefore unnecessary for us to go on to make a determination on part (iii). However, even if we had found that the respondent was able to meet the additional support needs of the child at school B, we would not have found this part of the test was met.

179. The test is essentially a negative test, and the onus is on the respondent to show that it is not reasonable, when having regard to the respective suitability and costs, to place the child in school A.

180. In reaching a decision on this part of the test, the tribunal has to firstly look separately at both the suitability and the cost of the provision in each of the schools. Secondly the

Tribunal is then to consider the suitability and the costs together and to make a decision on reasonableness.

Respective suitability

181. In terms of respective suitability, we considered a number of factors and the findings in fact above in relation to each school are grouped according to some of the factors considered. The factors listed were not exhaustive but represented some of the major areas considered. Taking the factors together, we consider that school A was overwhelmingly more suitable for the child and the education provided there was significantly more likely to be directed to the development of the personality, talents and mental and physical abilities of the child to his fullest potential.

182. We considered that the physical environment at school A was more suitable for the child than the environment in school B. School A was able to provide residential care for the child and had significant facilities including a swimming pool and riding facilities. It had a farm and access to animals.

183. We also considered that the staffing at school A would also be more suitable for the child as there were a range of professionals available with significant experience in dealing with children with severe and complex needs such as the child.

184. We also considered that the timetable and curriculum at school A was more suitable to the child's needs. There was a greater focus on a holistic approach and therapeutic interventions. There was also a focus on developing a sensory profile for each child. Furthermore, the child would benefit from a 24-hour curriculum to ensure that his well-being needs were met as well as his educational needs.

185. We also considered that it was likely that the peer group at school A would be more suitable to the child and the physical activities and therapy opportunities at school A were much more suitable for the child than the limited activities available at school B.

186. We also considered that limited respite available when the child was at school B would have a detrimental impact on his well-being and his ability to fulfil his learning potential.

No respite was considered necessary for the child if he was placed in school A as it would not be necessary when he was provided with a residential placement with 24 hour care for 39 weeks of the year.

187. We considered the fact that in most cases it would be considered more suitable for a child to be placed in a school close to his home where he could continue to live with his family. However, in this case we were satisfied that it was much more suitable for the child to be provided with a residential place at school A. The appellant had clearly agonised over the decision and had been reluctant for him to go away to school when it was first suggested to her. She was, however, realistic that it was not possible to meet his severe and complex needs at school B. Her hope was that by placing the child in school A, he would have what she perceived to be his last chance to make progress, particularly in life skills for the future.

Costs

188. We noted that the parties had agreed that the estimated cost to the respondent for the provision of the child's placement at school B is approximately £42,848 per annum.

189. We were surprised to note that witness A, when he made the decision to refuse the placing request on the grounds stated in paragraph 3(1)(f), did not have available to him costs of a placement in school A. We were even more surprised to note that the costings provided to the tribunal at document R190 were not specific to the child. The witness explained that he had based the information on the cost to the respondent in respect of another pupil who attended school A. The cost was based on a 52-week placement and the tribunal had to estimate the cost for 39 week placement on the basis of a pro rata calculation. The tribunal considered that the best estimate available would be costs in the region of £136,000 per annum. There was no information on what the costs would be if the child were only to attend Monday to Friday as his mother had originally requested.

190. The tribunal considered that even although it was significantly more expensive for the child to be placed at school A, that it was reasonable to do so having regard to the overwhelming conclusion on suitability. In the circumstances where the child's needs were not being met at school B and school A was very suitable for the child's needs, the

tribunal considered that in all the circumstances it could not be said that it was not reasonable to place the child in school A.

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

191. It is agreed that the respondent has offered to place the child in school B. We find this branch of the ground of refusal is established.

Conclusion

192. As we did not find the ground of refusal relied upon by the respondent to have been established, it was not necessary to consider the overall appropriateness of the placement. We have overturned the respondent's decision and require the respondent to place the child in school A by the end of October 2019. The precise details of his attendance there (ie whether Monday to Friday or full time for 39 weeks) to be agreed between the appellant, the respondent and school A.

193. We are grateful to the parties for the manner in which the case was presented and hope they can work together in achieving as smooth a transition as possible for the child.