Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/23/0004

Reference

1. The respondent refused the appellant's placing request for the child to attend school A. In this reference, the appellant seeks to overturn that decision.

Decision

2. We overturn the respondent's decision to refuse the appellant's placing request and we require the respondent to place the child in school A by 24 April 2023, or by such other date as the parties may agree.

3. The respondent's decision to refuse the appellant's placing request falls under s. 18(3)(da)(i) of the Education (Additional Support for Learning) (Scotland) Act 2004 (**2004 Act**). Our decision is made under section 19(4A)(b)(i) of the 2004 Act.

Process

4. The placing request reference was lodged with the Tribunal in January 2023.

5. The legal member managed the reference in two case management calls (**CMC**) that took place in January and March 2023. During the latter CMC, two hearing dates (17 and 18 April 2023) were agreed, as were a number of deadlines leading up to that hearing.

6. On 14 April 2023, the appellant's representative e-mailed the tribunal on behalf of both parties, seeking the discharge of the hearing, due to the reference having been substantially settled, and asking for the reference to be suspended for a period of two weeks. The reason for the suspension request was to allow for arrangements to be made for the child to start attending school A.

7. The legal member advised the parties that, given the very late intimation of the request to discharge the hearing, the hearing would start on 17 April 2023, but witnesses would be placed on stand-by until the tribunal made a decision on the suspension request.

8. During the weekend prior to the hearing, the respondent's representative lodged a Chronology in which he set out an account of communications he had entered into with his client, with a Family Outreach Worker (witness A) and with the appellant's representative from 30 March 2023 to date. The appellant's representative, having had a chance to read that document, was content with its accuracy.

9. In reaching our decision, we took account of the content of the bundle, containing document numbers T001-057, A001-042 and R001-010, (including the respondent representative's Chronology).

Findings in fact

10. The child was born in 2008, and lives with his mother, the appellant.

11. The child was placed in school B, a residential school, on 26 April 2022. The child was placed there mainly since he had been running away from home.

12. On 10 August 2022, a children's panel hearing took place for the child. The children's panel varied the compulsory supervision order in place for the child, to allow the child to return home and reside with his mother. Since then, the child has been living at home with his mother. When making that decision, the children's panel believed that the child had been offered a place at school A and that he was due to start attending there in August 2022.

13. The child has not attended school since he left school B on 10 August 2022.

14. School A has a maximum pupil capacity of 1200. The current school roll stands at 1203 pupils.

15. On 4 August 2022, the appellant made a placing request to the respondent for the child to attend school A, a mainstream secondary school managed by the respondent.

16. On 16 August 2022, the head teacher of school A wrote to the appellant, refusing her placing request.

17. On 30 March 2023, the respondent intimated its decision to make the child an offer to attend school A.

Reasons for the Decision

18. The child is looked after by the respondent within the meaning of section 17(6) of the Children (Scotland) Act 1995, as he is the subject of a supervision requirement under section 70(1) of that Act. The child therefore has additional support needs under section 1(1A) of the 2004 Act. The respondent is the education authority responsible for the child's school education under s.29(3) of the 2004 Act. These are all matters of agreement between the parties.

19. In this reference, the respondent relied upon a single ground of refusal, namely that, though the tests in certain other grounds of refusal do not apply, placing the child in school A would have the consequence that the capacity of school A would be exceeded in terms of pupil numbers (2004 Act, Schedule 2, paragraph 3(1)(a)(vii)).

The parties' positions

20. It only became apparent to us on the first day of the hearing that a settlement agreement with respect to the main part of the reference had been reached on 30 March 2023. On

that date, the respondent's representative wrote to the appellant's representative indicating that he had instructions to offer the child a place at school A. The only matter that required to be agreed between the parties was the start date. The respondent representative's Chronology outlines how that matter was discussed between the parties in the subsequent weeks.

21. The respondent confirmed that the school roll and capacity figures (the latter for the purposes of the ground of refusal) are, as far as he is aware, the same as indicated in the bundle (at A030, namely 1203 pupils and 1200 pupils respectively).

22. On the question of what had changed in order to cause the change of mind of the respondent on the placing request (from refusing it to now offering a place in school A), the respondent representative stated that the process was a dynamic one. He explained that the respondent had re-appraised the situation and, taking account of all factors, had decided on reflection, that an offer of a place at school A should be made.

23. The respondent representative argued that an enhanced transition process would be needed for the child to attend school A. He explained that meetings were due to take place this week in order to take that forward. He stated that consideration was being given to the possibility of the child being able to attend the school from as early as 24 April 2023. The appellant's representative explained that his client and the child are anxious for the child to attend school as soon as possible, but that the appellant accepts that a transition process is necessary.

24. Both the appellant and respondent representatives maintained their request for a two-week suspension, to allow an agreement on transition arrangements and a start date to be reached. The respondent's representative stated that it would be 'unsafe' for us to make a final decision on the reference today. He also relied upon the views expressed by witness A as set out in his Chronology document about the need for a proper transition process. The appellant's representative indicated that the appellant accepts that there needs to be a transition process in place for the child to successfully attend school A. He expressed the fear that, in the absence of a proper transition, the viability of the child's attendance at school A could be put at risk.

25. In discussing the meaning of the wording in s.19 (4A)(a)(i) of the 2004 Act: '..and require the [respondent] to place the child…in [school A]', the appellant's representative expressed the view that the tribunal may only specify the date by which the child should be placed in the school, not the way in which that is to happen (for example, how any transition process is to take place). He explained that a decision by the tribunal under that provision would mean that the appellant could insist on the child attending school A on a full-time basis from that date.

Our analysis

26. The respondent no longer seeks to rely on the existence of the sole ground of refusal advanced in this reference, having conceded the reference and having offered the child a place at school A. This means that no ground of refusal under paragraph 3(1) or 3(3) of Schedule 2 of the 2004 Act exists, and that we may not confirm the respondent's decision to refuse the placing request (s.19(4A)(a)(i) of the 2004 Act). In these circumstances, we must (as long as we can identify a date for the child to be placed in school A) overturn that decision (s.19(4A)(b) of the 2004 Act).

27. We are not persuaded that it is appropriate to suspend this reference to allow the parties more time to make transition arrangements for the child to attend school A. We accept that such arrangements appear to be necessary, and that is the view of both parties. However, looking at all of the circumstances, it is fair and just that we conclude the reference by making a decision now, and to require the respondent to place the child in school A within a short period. There are three reasons for this.

28. **Firstly**, the respondent has had ample time already to consider how the child should be educated. The respondent is the education authority with statutory responsibility for the education of the child. The position has been static since August 2022, namely that the child has not attended school. The ground of refusal employed appears to apply equally today as it did when the respondent refused the placing request on 16 August 2022. The respondent could, at that stage, have granted the placing request instead of refusing it. The children's panel decision on 10 August 2022 was based, in part, on the panel's understanding that the child would imminently be attending school A. The respondent's representative was unable to indicate any specific change related to the ground of refusal between August 2022 and the decision to concede the reference on 30 March 2023, to justify the respondent waiting so long to change position. Providing further time would only lead to a heightened risk that the child could miss out on yet more valuable education.

29. **Secondly**, we agree with the appellant representative's interpretation of the powers of the tribunal and the impact of a decision by us to require the respondent to place the child in school A by a certain date. However, both parties recognise the need for a transition process to take place before the child can attend school A on a full-time basis. It is not for us to comment on what that transition process should comprise, but we see no reason for delaying the child's start date at school A, given how long he has been out of school. It is within our knowledge as a specialist tribunal, that a transition process can take place in the context of a child who is already a pupil enrolled in a new school, and whose attendance and integration into the new school grows over a period of time.

30. **Thirdly**, we are obliged to make a decision on a reference in such a way as to avoid delay, so far as compatible with the proper consideration of the issues (rule 2(2)(e) of The First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (Schedule to SSI 2017/366). We have sufficient evidence in the bundle, combined with the points made by the party representatives at the hearing, to make a decision on the only outstanding matter: the date for the child to start attending school A. The respondent's representative indicated that 24 April 2023 is being considered by the respondent as a possible earliest start date for the child, suggesting that this date is not inherently unrealistic. This date fits with the respondent's intention to hold transition meetings this week. Given all of this, if we agreed to suspend the reference until a later date, this would involve delaying the conclusion of the reference unnecessarily.

Additional comments

31. The comments in this section do not form part of the reasons for the decision in this case. These are optional comments, which are designed purely for the assistance of the party representatives.

32. During the hearing, we expressed concern over two matters of process.

33. The first is the failure by both parties to follow all of the directions issued by the legal

member following the CMC that took place on 8 March 2023. While we understand that the parties were, since 30 March 2023, in negotiations around start date and transition arrangements, it is important that where a party intends to not comply with a direction, a variation of the direction is sought in advance, with reasons.

34. The second is the failure of the party representatives to inform the tribunal that settlement agreement had been reached on the substantive part of the reference more than two weeks before the hearing date. This led to resources being needlessly applied in preparing for a two-day substantive hearing. While we accept that settlement agreement on all of the reference was not possible prior to the hearing, as a matter of courtesy, the tribunal expects to be informed straight away of any settlement agreement that will affect the scope, length and likely need for a hearing.

35. Both representatives acknowledged these points and offered their apologies. We are satisfied that these issues are unlikely to arise in future.