



Additional Support Needs

**DECISION OF THE TRIBUNAL**

**Reference**

1. This is a placing request reference, lodged with the Tribunal on 18 May 2020. It is made under section 18(1) and section 18(3) (da) (ii) of the Education (Additional Support for Learning) (Scotland) Act 2004 (the “**2004 Act**”). The appellant asks the tribunal to require the respondent to place the child in the specified school.

**Decision**

2. The tribunal confirms the decision of the respondent to refuse the placing request, in accordance with section 19(4A) (a) of the 2004 Act. The tribunal therefore does not require the respondent to place the child in the specified school.

**Process**

3. The child’s views were taken by an independent advocate and are contained within the bundle at pages 36-39. The appellant was unable to give evidence and accordingly it was agreed that we would hear from the child’s mother, witness E.
4. We considered all the written evidence numbered in the bundle. These included witness statements contained in the bundle as follows; witness B (pages169-170), witness C (pages 75-76), witness D (pages 65-68) and witness E (pages 69-74). Parts of the respondent’s case statement were based on the instructions of witness A and she adopted paragraphs 8 to 14 thereof at pages 79-80 of the bundle into her statement. A joint minute was agreed and is incorporated into the bundle at pages 171-172. Written submissions were made by parties (supplemented orally) and are contained at pages 183-189 for the appellant and 173-182 for the respondent. References in this decision to numbers in brackets are references to pages in the bundle.

## Findings in Fact

5. The appellant is the father of the child.
6. The child is 12 years old.
7. The child has Autism Spectrum Disorder (ASD), a Learning Disability, Hyperacusis and Anxiety. He has a short concentration span, is fidgety, and finds it difficult to sit still for long periods.
8. The child can become distressed in loud and busy environments. He can be very anxious.

**[Part of this paragraph 8 has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

9. The child is easily led by others which makes him vulnerable. He likes to follow rules and will do what another person says if he thinks it is a rule.
10. The child is very dependent on his parents, particularly his mother, and has separation anxiety. He spends a lot of time at home, which he feels is a safe place. He has been seen by CAMHS (Child and Adolescent Mental Health Services) in the past and is on a waiting list for CAMHS again because his anxiety has worsened. The family are going to receive help with strategies for coping with his anxiety from the Community Learning Disabilities Team.
11. The child is not currently on any medication. The child was prescribed Sertraline in the past, but stopped taking it because his school reported that it made him sleepy.
12. The child said to the independent advocate that the worst thing about being at school was “Just sitting, getting stuck in a classroom all day” and that being in a classroom all day made him feel “uncomfortable”. He described the perfect school day as quiet and calm and said he would like friends there.
13. The child attended mainstream primary schools in the respondent’s geographical area. He changed primary schools in primary six. The child’s parents decided to change primary schools due to concerns at the level of support the child was receiving and because the second primary school was smaller and they thought it would be more supportive of his needs. A dedicated Pupil Support Assistant provided support to the child from December 2019. The child was happier and better supported in the second primary school.
14. During primary school the child’s parents often found it difficult to get him to go to school due to his stress and anxiety.
15. Through primary seven the child spent significant time working out of the classroom environment due to him becoming stressed sitting in class for extended time periods. The child participated in gardening and helped with the nursery class. The child enjoyed these activities.

16. The child requires dedicated time in the school week to develop his independent life skills.
17. The child requires access to an individualised curriculum suited to his needs. He needs the opportunity to build his self-esteem and reduce his anxiety levels. He needs access to a small, nurturing and encouraging educational environment. He needs support to improve his social skills with peers. He needs regular focused opportunities to develop independent living skills.
18. The child benefits from being in a calm, quiet environment supported by trusted adults and visual supports. The child needs reassurance and support to help him engage in learning, manage social situations and support his emotional regulation.
19. The child is working within first level of Curriculum for Excellence across all areas.
20. The child significantly struggles with peer interactions.

**[Part of paragraph 20 has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

21. The child does not like being in a classroom for long periods. The child requires movement breaks. The child enjoys outside learning and being physically active. He benefited from forest school learning sessions in his primary school. When the child becomes distressed going outside can help him to calm down.
22. The child would find it difficult to cope in a mainstream high school setting.
23. The child was due to transfer to the Enhanced Support Base (“**the ESB**”) being part of a larger, newly opened in 2020, mainstream school (school A). The ESB itself opened in August 2020 and is currently staffed by a teacher, supported by staff from the Additional Support for Learning Service and the Educational Psychology Service. A Pupil Support Officer and Pupil Support Assistant are currently being recruited to work in the ESB.
24. School A has approximately 950 pupils.
25. School A is a six-year non-denominational comprehensive school offering education for young people and adult learners.
26. The ESB is located on the third floor of school A. To reach the ESB the child would require to use a staircase or lift.
27. The ESB has a teaching room, sensory room, accessible toilet and break out space. The teaching room has individual workstations, areas for group work and areas for soft start. The sensory room is equipped with calming activities and resources. It is furnished with sofas and beanbags and has facilities for making toast, tea and coffee which are used at soft start time and for teaching life skills. As the ESB is a new unit, staff are in the process of adding to its resources.
28. The purpose of the ESB is to cater for children with complex needs including learning

disability and autism. All children placed within the ESB have been diagnosed with an autistic spectrum disorder and/or a learning disability.

29. There is space within the ESB for a maximum of 10 pupils from S1 to S3.
30. Six children are currently placed in the ESB.
31. Most of the children in the ESB are working at early or first level of Curriculum for Excellence.
32. The child enjoys teddy bears and Thomas the Tank Engine. At least one other child in the ESB has similar interests. Other children at the specified school have similar interests.
33. Another child in the ESB has hyperacusis. Strategies have been developed to support this child. Other pupils in the ESB have anxiety, which manifests itself in different ways.
34. The ESB has no dedicated outdoor space. Use of two outdoor spaces to the side of the building is still in the planning stage. It is expected that an outside area dedicated to the ESB will be available from summer 2021.
35. The appellant made a placing request for the specified school, being a school in the respondent's area.
36. The specified school opened in 2008. It is a special school providing education for secondary-aged learners with a wide range of learning disabilities including Autism Spectrum Disorder (ASD). The school is set in an attractive campus, in a wooded area which is shared with a mainstream secondary school. The specified school has a roll of 80 learners. Every class has at least one Pupil Support Assistant.
37. The specified school has easy access to outdoor spaces beside classrooms. There is a trim trail and a garden area.
38. Two S1 children in the specified school are working within first level of Curriculum for Excellence in some areas of the curriculum. There are no S1 pupils working within first level of Curriculum for Excellence across the whole curriculum.
39. The child has a higher cognitive function than the majority of children who attend the specified school.
40. Children within the specified school generally have more severe comorbidities than the child, including some being non-verbal, having physical disabilities, serious medical conditions and mobility difficulties. Many of the children display very challenging behaviours on occasions.
41. The national conditions of service for teaching staff specify that the maximum class size for a special school for moderate learning difficulties should be no more than 10 and for language and communication difficulties no more than six. These conditions are incorporated into teachers' contracts. Classes within the specified school are at this maximum capacity.
42. Were the child to attend the specified school at least one additional teacher would require

to be employed by the respondent.

43. The respondent does not have any spare suitably qualified teachers who could be moved to the specified school.
44. The specified school has no spare classrooms that could be used to accommodate another classroom.
45. The specified school has no room in its grounds to accommodate a classroom in an additional hut.
46. The only space in the specified school that could accommodate a further class would be a breakout space which is currently used for 1-1 sessions with children and to take children to if their behaviour becomes dysregulated.
47. Were the specified school not to have the designated breakout area, dysregulated behaviour could not be managed effectively and unsafe and violent behaviours among children could spread through the school. This would result in a disruption of learning and significant distress for pupils.
48. The appellant's placing request was refused on 8 April 2020 on the basis of Schedule 2, paragraphs 3(1)(a)(i), 3(1)(a)(v), 3(1)(a)(g) of the 2004 Act.

## **Reasons for the Decision**

### *General remarks on the oral evidence*

49. We considered the evidence of all witnesses to be both credible and reliable. There was no material difference between witnesses on any factual matters or on the needs of the child, although there were, of course, different views on how suitable the provision at the ESB would be for the child. There was some concern raised in submissions for the respondent regarding evidence witness E had given in relation to an outdoor area which the ESB could use being beside a car park and the height of the gates at an entrance to the school, being points not put to the respondent's witness. We did not consider it necessary to come to a conclusion on the factual position on either of these matters.

### *General remarks on the legal tests*

50. As pointed out by the appellant (and as set out in the case of *M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126 (Sheriff Court)), the appropriate assessment point is at the time of the hearing. We accept that the onus of establishing the ground of refusal lies with the respondent. We also accept that (again arising from the *M* case), consideration should be given to the assessment of the child's needs that happened closest to the hearing. We have evidence of such an assessment in the witnesses' oral and written evidence.
51. It was agreed between the parties that the child has additional support needs in terms of the 2004 act.

### **2004 Act, schedule 2, paragraph 3 (1) (a) (i)**

52. The national conditions of service for teaching staff specify that the maximum class size for a special school for moderate learning difficulties should be no more than 10 and for language and communication difficulties no more than 6 (145). These nationally agreed conditions are incorporated into teachers' contracts (witness A). Accordingly, the respondent would be acting unlawfully were it to make any of the classes at the specified school larger. All classes within the specified school are at maximum capacity. Placing the child in a class at the school would exceed the class capacity making it necessary to employ at least one and probably more than one additional teachers (due to teachers' contractual class time being less than the class time pupils receive as well as different subjects being taught). The respondent does not have any suitably qualified additional teachers who could be moved to the specified school.
53. In submissions, the solicitor for the appellant suggested that as there was no applicable legislative maximum class size it was open to the tribunal to find that an additional teacher need not be employed and that the child could simply be added to an existing class. However, we are of the view that the respondent requires to honour its legal obligations including those incorporated into teachers' contracts. Accordingly, as the child's attendance at the specified school would cause a class to be larger than the limit, an additional class would need to be created making it necessary for the respondent to employ at least one additional teacher.

**2004 Act, schedule 2, paragraph 3(1) (a) (v)**

54. As discussed above, were the child to attend the specified school an additional class would require to be created. The school has a lack of space for any additional classroom. There is one hut in the school grounds and there has been – per the evidence of witness A – a recent assessment that there is no room for a further hut to be used as a classroom. The existing hut is utilised. Within the school itself there is no spare room and witness A gave evidence that were the child to be placed in the school the only place for a further class would be in the only existing breakout space which would then not be available for other children.
55. Witness A described in detail what the detrimental impact on the education of other children would be in the event of the breakout space being used as a classroom. The breakout area is used for 1-1 sessions with children, and the space is used to take children to if they become “dysregulated.” She explained that in a special school with children with a variety of difficulties children becoming dysregulated is a regular occurrence and the breakout space is used to enable a dysregulated child to leave the classroom to calm down. She explained that in a special school dysregulated behaviour within a classroom creates a domino effect with other children becoming distressed and dysregulated, not just within the particular class but spreading between classes. She indicated it would lead to unsafe and violent behaviour as well as tears. Loss of the breakout space would impact on the learning of other children and have an impact on their emotional and physical health.
56. We considered carefully the evidence of what would happen were the breakout area no longer available and concluded that there would be a seriously detrimental impact on the educational wellbeing of children attending the school. The disruption to learning would

be great given the frequency of dysregulated behaviour, the spread of such behaviour and the difficulty in restoring a calm learning environment in the school.

57. Consequently, we have found this ground established. Put simply, for the child to attend the school the breakout area would be required as a classroom – there being no other options- and the removal of that facility would have a seriously detrimental impact on the educational wellbeing of children attending the school.

58. The appellant's representative argued that some space might be found in the future when COVID-19 restrictions are lifted, but he accepted on questioning that this was based on hope. We require to base our decision on evidence and the evidence is that the child attending the school could only be accommodated as described above.

### **2004 Act, schedule 2, paragraph 3(1) (a) (g)**

59. We determined that this ground was not established. Reference was made by the appellant's representative to the ESB being a special school within the meaning of the 2004 act where it is defined in section 29(1) as "a school, or any class or other unit forming part of a public school which is not itself a special school the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs". The purpose of the unit, situated in school A, is "to cater for children with complex needs, including learning disability and autism" (163). Witness B said all the children in the ESB have an autistic spectrum diagnosis and/or learning disability and she described at length facilities provided with a view to meeting the additional support needs of the children attending. Accordingly, the ESB is a special school within the meaning of the 2004 act.

60. Given the respondent's proposal is for the child to attend a special school we did not consider the presumption of mainstream ground of refusal could be used to refuse a placing request to another special school.

61. In addition, the professional opinion of a Consultant Child and Adolescent Psychiatrist, was that the child would find it difficult to cope in a mainstream high school setting (52) and witness C also considered the child required a small nurturing environment. Accordingly, it did not appear to us that mainstream schooling was a reasonable possibility for the child.

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

62. Having concluded that grounds of refusal exist, we require to consider whether it is appropriate in all of the circumstances to confirm the decision to refuse the appellant's placing request, or whether we should overturn the decision and place the child in the specified school. In considering this question, we must take account of all of the circumstances, including those which are relevant to the consideration of the ground of refusal, as well as any other circumstances that are not. In this decision we detail the factors that were material to us in coming to the conclusion that it is appropriate to uphold the respondent's decision.

63. As well as considering the circumstances narrated in considering the grounds of refusal, we considered the respective suitability of both the specified school and the ESB to meet the child's needs. With regard to the specified school there are a lot of positives in relation to the facilities and opportunities available for the child and witness A stated that the specified school could meet the child's needs. The principle negative in relation to that school was the peer group the child would be educated with. The child is working within first level of Curriculum for Excellence across the whole curriculum, whereas only two of the other children in S1 were working at that level in any subjects (witness A). The child has a higher cognitive ability than the vast majority of the children who attend the school. Other children within the specified school have much more severe comorbidity including some being non-verbal, having physical disabilities, serious medical conditions and mobility difficulties. Many of the children have very challenging behaviour on occasions.
64. We heard evidence about the ESB that convinced us that the indoor physical facilities there are good and suitable for the child. The child's mother was clear that her (and the appellant's) difficulty with the ESB was not the facility itself but rather: 1. its situation within a much larger mainstream secondary school, and 2. the lack of availability of outdoor teaching, learning and play space. The main advantages of the ESB are in relation to the peer group: all the children within the ESB have autism and/or a learning disability and the clear evidence of witnesses B and D was that the child has a similar profile to other children in the ESB. Most of the children are working at early or first level of Curriculum for Excellence and there is at least one child in the ESB who has similar interests to the child (teddy bears & Thomas the Tank Engine). Another child in the base has hyperacusis and the staff to child ratio is higher at the ESB than the specified school. Several of the other children in the ESB have anxiety issues. From the evidence of witnesses B and D it was clear to us that the ESB has the potential to provide a calm, nurturing environment for the child.
65. We do not consider it necessary to undertake a detailed comparison of the physical facilities in the two potential provisions, which we considered in both locations to be well suited to the child achieving his potential. Similarly, both provisions would allow the child to pursue an individualised curriculum. Both facilities teach children life skills as well as academic subjects. Both provisions have small classes and a high staff to pupil ratio. Both provisions are small, nurturing environments. While we heard submissions comparing the facilities, staff ratios and size of each provision, there was an acceptance by the respondent that the specified school could meet the child's needs (witnesses A and D) and as indicated above the child's mother clearly said the issue was not the ESB itself, but rather the environment of the larger high school in which it is situated and the lack of outdoor space for teaching, learning and play.
66. In our view, the peer group (and all the natural advantages that follow from an appropriate peer group) was the principal advantage of the ESB to the child over the specified school.
67. However, the child has some very specific needs, which mean we cannot be certain that the ESB is suitable for the child. In particular there is the child's need for appropriate outdoor space and outdoor learning opportunities and his anxiety, in particular the difficulty the child would experience in attending the ESB located on the third floor within a large secondary school of approximately 950 pupils. These factors, which we will



expand on below, gave concerns about whether a placement at the ESB could be successful.

68. The advantage to the child of having easy access to appropriate outdoor space was clearly articulated and not disputed. The child stated that the worst thing about being in school was getting stuck in a classroom all day. The child's mother expanded on this, articulating his preference for outdoor work but also his need for movement breaks as well as time and space to calm down. She spoke of his need for an environment that he is comfortable in. She considered that breaks away from the classroom worked well in his second primary school and that easy access to outdoor space calms the child down. The specified school has an abundance of easily accessible outdoor provision including courtyards outside classrooms, a gardening area, trim trail and woodlands.
69. By contrast, access to outdoor facilities at the ESB is limited. There are plans for a dedicated outdoor space, but that will not be until the demolition of the previous school A, which is planned to be completed in the summer of 2021. As at the date of the hearing there are no outdoor learning opportunities at the ESB. Use of two spaces to the side of the building is still in the planning stage and the ESB is situated on the third floor which would make immediate access to an outside area impossible, should that be required.
70. The child also has anxiety issues which manifest in busy noisy environments (as well as other situations). The ESB is contained within a large school, and to reach the ESB the child would require to take a lift or staircase within school A. To access some of school A's facilities the child would have to travel through school A. It was clear that the ESB could and would put in place strategies to assist the child to manage his anxieties such as making provision for lunch to be taken within the ESB, staggered start/finish times, having the child escorted by a familiar adult into the ESB and when visiting other parts of the school or having lessons with specialist teachers. However, given the extent of his anxiety issues as primarily evidenced by the child's mother who spoke about the capacity of such environments to cause the child to panic and become hysterical, it cannot be said with certainty that the child would be able to access the ESB. The child's mother is also very familiar with school A, having an elder child who currently attends, and accordingly is in a good position to form a view on the issues the ESB being part of school A would cause the child. In addition, one of the potential strategies to assist the child with anxiety would result in the child remaining in the ESB for lunch, which would impact on the concerns the child articulated about being in class for extended periods.
71. It was not just the child's mother who had these concerns. Witness D, who had done a lot of successful individual work with the child, was positive about the ability of the ESB to meet the child's needs. However, he qualified that positivity by saying that as he had not seen the anxiety issues that the child's mother described he could not comment on how the child would manage in the big school environment.
72. To be explicitly clear, we have not concluded that placing the child at the ESB would not work but rather that to have the best chance of success careful planning and transition work would be required, in close partnership with the child's family. It was clear that the child has built a strong relationship with witness D who, as part of the Additional Support

for Learning Service is involved in setting up the ESB. Witness D hoped to continue working with the child, and in our view that support could be very beneficial.

73. Accordingly, and in summary, we considered there to be lot of positives with the ESB but also significant risks to the possibility of a successful placement there. On the other hand, the specified school, while not having the appropriate peer group for the child, would be capable of meeting his needs. However, in order to overturn the placing request decision we would be making an order that, because the respondent could not lawfully breach the maximum class sizes incorporated into the contracts of teachers, would require the respondent to use the breakout space within the specified school as a teaching space. This would be to the serious detriment of the educational well-being of pupils attending the school. We do not consider that to be appropriate and accordingly are satisfied that in all the circumstances it is appropriate to confirm the decision of the respondent.

### **Additional Comments**

**74. The comments in this section do not form part of the reasons for the decision in this case. These comments are designed purely for the assistance of the parties and the child.**

75. As indicated above, we are concerned that given the child's particular needs the respondent's proposed provision for the child may not be successful. We are also concerned that the child has not been in receipt of school education for some time. Accordingly we would expect that should it not be possible for the child to attend the ESB or the placement not be successful parties will work together to promptly identify a provision that will meet the child's particular needs.