



Additional Support Needs

**DECISION OF TRIBUNAL**

**The Reference:**

1. By application dated 6 July 2020 the appellant lodged a reference under Section 18(1) and 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004 ("**the 2004 Act**") against the decision of the respondents.
2. The reference is in respect of the decision dated 29 May 2010 whereby the respondents refused a place on request made by the appellant under paragraph 1 of schedule 2 of the 2004 Act for her son ("**the child**") to attend school B being a school in the home authority (the authority where the child resides).

**Decision of the Tribunal:**

3. The tribunal confirms the decision of the respondents to refuse a placing request, in accordance with Section 19(4A)(a) of the 2004 Act. The tribunal therefore does not require the respondents to place the child at school B.
4. The decision of the tribunal is unanimous.

**Process:**

5. Case management conference calls were held on 13 October 2020, 17 November 2020 and 7 December 2020. The hearing proceeded remotely by way of video conferencing on 13, 14 and 15 January 2021. Thereafter parties lodged written submissions.
6. The bundle consists of 100 pages. In addition a Joint Statement of Agreed Facts was entered into by the parties and an Advocacy Report dated 17 December 2020 was also lodged.
7. The witnesses were heard in the following order for the respondents:

- (a) Witness A – headteacher of the child’s former primary school ( **referred to as school A**).
- (b) Witness B – educational psychologist employed by the respondents.
- (c) Witness C – headteacher of the school which the appellant wishes the child to attend ( **referred to as school B**)
- (d) Witness D – headteacher of the school that the respondents have identified for the child ( **referred to as school C**)

For the appellant:

- (a) Witness E – the appellant.

### **Findings in Fact:**

#### The Child

1. The child is 13 years of age.
2. The child has additional support needs in terms of the Education (Additional Support for Learning) (Scotland) Act 2004.
3. The child has diagnoses of Epilepsy, Autism Spectrum Disorder (ASD) with associated social, emotional and behavioural needs. He also has hearing difficulties.
4. The child can lose focus at times troubling himself with something far more interesting to himself. He requires some adult prompting to keep him on track.
5. As with all children at his level the child needs clear and concise communication.
6. The child can have a tendency to overeat.
7. The child cannot tie his own shoelaces.
8. The child was in a class of six children at school A. He benefitted from the small group education with access to mainstream there.

#### Schooling to date of hearing

9. The child attended school A within a language communications school centre through his seven years of primary school. In primary 6 the school amalgamated with another primary school and became school A.

[The final sentence of paragraph 9 has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 101(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)]

10. The child was in a class of six – seven pupils with one teacher.

11. The child's primary school education was interrupted by the Covid pandemic but when he left he was working on early second level in literacy and numeracy. He has not been at school since March 2020. He was due to have entered high school in August 2020.

12. [This finding has been removed by the Chamber President for reasons of privacy of the child under rule 101(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)]

13. The child has good control of his motor skills but can find it difficult to remain still. He can bounce up and down the corridor, lean on walls and generally be constantly moving his body when walking. He likes to propel himself along the floor, enjoying a slide.

14. The applicant attended a meeting with witness A on 21 June 2019 to discuss transition to high school for the child. The applicant indicated she did not believe the child would cope in a mainstream provision.

15. The child was observed by the educational psychologist (witness B) on two occasions within the school setting at school A as part of her assessment of his needs.

16. Subsequently an application was made to the Allocations Panel and a decision was made that the child should attend a language and communications support centre within a mainstream secondary school.

17. The applicant submitted a request to the respondents to place the child at school C. By letter dated 29 May 2020 the respondents refused that request.

18. The reason for the decision as set out by the respondents was in terms of schedule 2 of paragraph 3(1)(a)(i), (ii) and (vii) of the Education (Additional Support for Learning) (Scotland) Act 2004 namely (i) make it necessary for the authority to take an additional teacher into employment, (ii) give rise to significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school or (vii) where neither of the tests set out in paragraphs (i)

and (ii) is satisfied have the consequence that the capacity of the school would be exceeded in terms of pupil numbers.

**School B (the school which the appellant wishes the child to attend)**

19. There are currently 136 young people in the school from 1<sup>st</sup> year to 6<sup>th</sup> year. In senior 1 there are four classes currently comprising four pupils, eight pupils, nine pupils and nine pupils. In each class there would be a teacher and maybe at times an additional support needs member of staff.

20. In the senior 1 class that has four pupils they have complex difficulties.

21. In senior 1 the pupils are streamed for the subjects of literacy and numeracy but otherwise are taught in their main class.

22. The child would be academically far in excess of his peers in senior 1. He functions at a much higher level than his peers. He would not be working with likeminded pupils. In school he may find himself disengaged or bored.

23. Academically, socially and emotionally the school would be below his capabilities.

24. The child could not be placed in an older class. Older children may not be on the same level as the child academically and it is not right to mix the child socially with older pupils.

25. The expectation of pupils at school B is to leave with National 2 and National 3 qualifications.

26. School B is co-located with another significantly larger high school. The high school has over 1,300 pupils. Both the canteen and assembly hall are shared. There is no shared playground. They are separate schools but school B start five minutes earlier than the high school and both morning intervals and lunchtimes are five minutes earlier to allow the pupils at school B to get into the canteen earlier than the mainstream pupils.

27. School B is near a busy road but there is a controlled entry into the school. There are fire exit doors which are operated by a push bar and there is a back exit door which is unlocked.

28. Pupils do not have the option to sleep during the day. All the classrooms are used. There are two small sensory rooms if a child became overwhelmed.

### **School C (the school that the respondents have identified for the child)**

29. School C is a mainstream high school with a language and communication support centre (**LCSC**). Pupils in the LCSC follow a full timetable of subjects within mainstream classes in the school. They are supported by additional support needs assistants and LCSC teachers. Each child has an individual programme to suit their needs.

30. LCSC pupils will leave classes earlier than the mainstream pupils in order to avoid busy corridors and to access other areas earlier. Access to a quiet room is available if the pupil is feeling anxious.

31. The pupils are supported throughout the day when moving around the building. They are walked to classes, the canteen and the LCSC facilities. Some LCSC pupils wish to enter mainstream social areas including the canteen and are supported in this.

32. Class sizes will be up to 30 pupils but this comprises a varying level of pupil ability. The child would be accompanied to the mainstream class and would have the support of a teacher and an additional support needs assistant in that class.

33. If the child felt that he or she was unable to work in class there is the study base where the child could study and there is a teacher there throughout all the time. There is also available a quiet room at all times of the day. School C have never worked with the child as he did not take part in the transition programme. The child has not attended at school since the commencement of senior 1.

34. Any LCSC pupil working at level 1 could be supported in the school.

### **The child's views**

35. The child gave his views by way of advocacy statement dated 17 December 2020. The child described that he found his primary school "Sometimes fun.sometimes stressful.when I didn't get enough support I got anxious and stressed out".

36. In relation to school B he said "It is a smaller school with easier work and less noisy and I concentrate better in a smaller class and will be less stressed out and work better".

37. In relation to school C he said "It is too big and busy and the work is too hard to understand for me. I need more support and won't like big and busy classes and people there will make fun of me".

38. In conclusion he wrote that he wanted to go to school B.

### **The oral evidence**

39. All the witnesses had provided witness statements and witness E provided in addition a supplementary witness statement.

40. The evidence of witnesses A, B, C and D was accepted by the Tribunal. Their evidence was consistent with their witness statements. We found them to be credible and reliable witnesses.

41. In relation to witness E she clearly very much has the interests of her son at heart. She of course sees her son at home as opposed to at school. The evidence was clear that he was a different child at school from that at home. Witness E found it difficult to accept her son's ability at school in terms of his current level. She believed that he was at early level 1 which was contradicted by the other witnesses who knew the child. She did not think that he had the ability to cope in mainstream school whereas the evidence from the other witnesses was that he did and that in addition if he was not challenged by way of attending mainstream school he could regress.

42. Witness E perhaps was influenced to some extent by the experiences that she had had with an elder sibling who had struggled through school and ended up leaving. The Tribunal were of the view that these factors may have affected witness E in her assessment of schooling for her son.

### **Reasons for decision**

43. The legislative framework for the decision is contained within the Education (Additional Support for Learning) (Scotland) Act 2004.

44. The commencement point is section 1

45. 1. Additional support needs

- (i) A child or young person's additional support needs for the purpose 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 the young person.

**The parties were agreed in terms of the Joint Minute of Agreement that the child has additional support needs**

**Thereafter section 18 of the Act applies.**

(1) Any of the persons specified in subsection (2) may refer to the First-tier Tribunal any decision, failure or information specified in subsection (3) relating to any child or young person for whose school education an education authority are responsible.

(2) The persons referred to in subsection (1) are-

(a) Where the decision, failure or information relates to a child, the parent of the child

(3)(da) a decision of an education authority refusing a placing request made in respect of a child or a young person (including such a decision in respect of a child or young person for whose education the authority refusing the request are not responsible) –

(i) made under subparagraph (1) of paragraph (2) of schedule 2 in relation to a special school or

(ii) made under subparagraph (2) of paragraph 2 of schedule 2 in relation to a school mentioned in paragraph (a) or (b) of that subparagraph.

46. The legislative framework thereafter is set out in schedule 2, paragraphs 2 and 3 of the Education (Additional Support for Learning) (Scotland) Act 2004.

Paragraph 2 of Schedule 2 of the Act states –

(1) Where the parent of a child having additional support needs makes a request to an education authority to place the child in the school specified in the request, being a school under their management, it is the duty of the authority, subject to paragraph 3, to place the child accordingly.

Paragraph 3 of Schedule 2 of the Act states –

(1) The duty imposed by sub-paragraph (1) ...does not apply-

(a) If placing the child in the specified school would –

(i) make it necessary for the Authority to take an additional teacher into employment.

- (ii) give rise to significant expenditure or extending or otherwise altering the accommodation at or facilities provided in connection with the school.
- (vii) though neither of the tests set out in paragraphs (i) and (ii) is satisfied, have the consequence that the capacity of the school would be exceeded in terms of pupil numbers.

Paragraph 3(1)(b) of schedule 2 of the Act states -

- (b) If the education normally provided at the specified school is not suited to the age, ability or aptitude of the child.

47. Reference is then made to section 19(4A) of the Act\_

Where the reference to a decision referred to in subsection 3(da) 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.

48. It was also acknowledged by parties that if the Tribunal are satisfied that if one ground of refusal exists, the Tribunal must then go on to consider whether the placement sought by the appellant is, nonetheless, appropriate in all the circumstances.

49. Further the Tribunal acknowledged that the burden of proof is on the respondents to establish that school B is not suited to the child. The appellant does not need to establish that school B is suited to the child.

50. The respondents in written submissions made reference to the case of *M v Aberdeenshire Council* 2008 SLT (Sh Ct). It is noted that the proper time for assessing whether the conditions are met or not met is the date on which the hearing proceeds.

51. Reference was also made to the case of *The City of Edinburgh Council v Mrs M D N* (2011) CSIH 13 where it was set out that (when looking at a child's additional support needs) "These needs require to be stated in a more general, all encompassing and indeed "holistic" way rather than by endeavouring to separate out "educational support" on the one hand and "social work support" on the other.



## **Ground 1**

### **(i) Make it necessary for the Authority to take an additional teacher into employment.**

52. In his written statement the Head Teacher of school B ( witness C) confirmed that all spaces were filled and it was not possible to take on any additional students. The school roll had increased up to 140 pupils. The witness confirmed that there were ten pupils per class as that was the maximum permitted and that as a result of limit on class size, in order to accept the pupil, an additional class would have to be created which would mean employing an additional teacher.

53. Subsequently in oral evidence witness C confirmed that in senior 1 there were four classes. There are usually only two to three classes. The class sizes were four, eight, nine and nine. Accordingly there was a potential space for the child in an S1 class. It would not have been appropriate for the child to have gone into a year group beyond senior 1.

54. The issue was whether the child would be working at the same level as his classmates in senior 1 standing that less than 30% of the class were working at first level. Most were working at the lower level.

55. Although the respondents in their submissions set out that an additional class would have to be created which would mean employing an additional teacher that was not accepted by the Tribunal. As was narrated by witness C a space could be made available in the class. The issue would be whether it was age and stage appropriate but it could be done. As a result there would be no requirement to take an additional teacher into employment.

**Accordingly the tribunal were of the view that this ground of refusal was not made out.**

## **Ground 2**

**If placing the child in a specified school would give rise to significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school.**

56. As has been referred to previously the child could be placed within a current S1 class. There are four classes. In the event that the child was placed into one of those classes there would be no requirement to extend or otherwise alter the

accommodation at or facilities provided in connection with the school. Class sizes can be as many as ten pupils.

**Accordingly the Tribunal were of the view that this ground of refusal was not made out.**

### **Ground 3**

**Though neither of the tests set out in paragraphs (i) and (ii) is satisfied, have the consequence that the capacity of the school be exceeded in terms of pupil numbers.**

57. Witness C has spoken to this. Witness C has indicated that the maximum school number had increased to 140. There were currently 136 young persons at the school. His position was that there were spaces between S3 and S6 but not between S1 and S3. However it was acknowledged that the class sizes in senior 1 were four, eight, nine and nine and that a child could be placed in one of those classes. If a child was placed in one of those classes pupil numbers would not exceed 140.

**Accordingly the Tribunal were of the view that this ground of refusal was not made out.**

### **Ground 4**

**If the education normally provided at the specified school is not suited to the age, ability or aptitude of the child**

58. In considering this ground of refusal the Tribunal were referred to the case of *Coates v Lothian Regional Council* 1999 Fam LR at paragraph 8-05. It is acknowledged that in the use of the words “age, ability or aptitude” that the word “or” in that subsection fail to be construed disjunctively. That lack of suitability on any of the three variables will suffice.

59. Giving these words their ordinary meaning the term “ability” refers to current capability while “aptitude” refers to potential capability.

### **Age**

60. At present the child is 13 years of age. If he had commenced his senior education in August 2020 he would have been 12 at the time.

The appellant in her written submissions referred to children in senior 1 at school B being of the same or similar age to the child. The respondent did not make any submission in relation to the child's age. Accordingly the child is of an age to attend in senior 1 at school B. Accordingly it cannot be said that the child would not be suited to school B on ground of age.

## **Ability**

61. As previously mentioned ability refers to current capability. It was acknowledged in the submissions for the appellant that the child's ability is disputed. Witness A set out in her evidence that in primary 7 when the child left he was working on early 2<sup>nd</sup> level in literacy and numeracy. He was confidently working at early 2<sup>nd</sup> level. She was referred to the child's learner report for 2019-2020 dated April 2020 in which in terms of literacy the child was referred to as being level 1<sup>st</sup> into 2<sup>nd</sup> and in numeracy and mathematics level 1<sup>st</sup> into 2<sup>nd</sup>. In that report it notes "(the child) for the most part works at 2<sup>nd</sup> level for literacy but to cover those gaps in learning he will initially work through those at 1<sup>st</sup> level". In terms of numeracy and mathematics it was noted "this year (the child) has continued with "Number talks" further developing strategies to aid mental agility in number work for addition, subtraction, multiplication and division. He has shown good understanding of the different strategies but will often play things safe and needs encouragement to challenge himself". Further on it is noted "(the child) has shown good understanding of all numeracy concepts and vocabulary use this year".

62. Witness A noted that there were a lot of pupils in primary 7 at mainstream schools who would have been working at the same level as the child. There will also have been children working beyond and below this level too.

63. The educational psychologist witness B had indicated "When observing (the child) I noted "the child" was able to engage at 2<sup>nd</sup> level stage with support in mainstream and base classes. (the child's) GIRFME plan was very detailed and thorough. It noted that with support he was able to access the level of work that his peers in mainstream classes were able to, and that he coped well with support in place during his time spent in mainstream classes".

64. Witness C described that in school B that in 1<sup>st</sup> to 3<sup>rd</sup> year around 95% of young people are functioning at early or 1<sup>st</sup> level. In literacy and numeracy there is one pupil working on aspects of 2<sup>nd</sup> level. As a criteria for entry to school B a young person would require to be working at early and 1<sup>st</sup> level. Operating at 2<sup>nd</sup> level would normally mean that the child would be able to function well at a mainstream secondary school.

65. Witness E the appellant (the child's mother) was of the view that the child was working towards level 2. She was of the view that the limited amount of homework

that he had received was about “drawing a picture”. She said that he struggled at simple addition. When doing “tower sums” he could not get the answers and that he was simply guessing. She did not believe that he was working at an early level 2. She thought that he was at early level 1 and accordingly between P4 and P5.

67. We accepted the evidence of the professionals here namely witness A and witness B. Both were aware of the child whilst he was at school A. These witnesses have first hand knowledge of the child. Their assessment was based on his work at school A.

68. Witness C made it clear that for a child at that level he would not be suited to school B. The children there worked at a much lower level. The child would stand out as a result of his intellectual ability.

### **Possible regression due to Covid and non-attendance at school.**

69. The child has not been at school since March 2020. As a result concerns were raised as to whether he would have maintained the levels as described in the Learner Report and spoken to in evidence by witness A and witness B. Witness A confirmed that children do regress when not in education and that she had not seen the child since he left and there could have been a potential for this however she remained of the view that school B would not be suited to the child’s needs as the children at school B were working academically at a lower level from the child and were both socially and emotionally at a lower level. Witness B confirmed that if the child had not been at school for such a period of time there was a possibility that the child would have regressed however if a child was not working at the right level that could cause the child stress i.e. if he was working below the level that he should be at. She maintained that school B was not suited to a child with the academic ability of this child. Witness C at school B said it was more important to take into account the child’s potential rather than how much he had forgotten.

### **SUITABILITY OF THE LEARNING ENVIRONMENT**

70. The child was at school A in the Language Communications School Centre and in the last school session to which he attended was in a class of six to seven pupils with one teacher. Were the child to attend at school B then class sizes would be at a maximum of ten pupils. School C’s LCSC is part of the mainstream high school and pupils are attached to the mainstream classes. They are supported by additional support needs assistants/LCSC teachers. There is access to a key worker and also during the day access to a quiet room if necessary. There is also a study base. The child could be supported within that environment. Appropriate planning to ensure support is tailored to each pupil to ensure their needs are met within the mainstream class is available for each pupil.

71. Witnesses A and B agreed that the child would be able to manage in class sizes that were significantly larger than the ones that he was used to. Although the class sizes would be bigger the child would be fully supported within the classroom. He could take time out if he needed it. He could work in the base if required.

### **The child's behaviour at school and at home.**

72. It was acknowledged in the Transfer of Information Summary Form Session 2019/20 that the child presents differently in school from home. It was noted "He is more than willing to join in with things in school and understands that in school there are certain things that have to be followed but at home he exerts total control over his own environment and largely chooses to remain at home, rarely venturing outside." Witness E described his hobbies as being toys including "My Little Pony". She was of the view that these behaviours demonstrated that he was not suited to mainstream schooling. The child liked to watch cartoons over and over again. The child's twin brother was far more mature. The child asked for certain toys at Christmas that were significantly less mature than that of his twin brother.

73. Again witnesses A and B did not see him as a reclusive boy. He was very sociable. At school he played with mainstream children as well as his own class. There were no toileting issues at school. She was not aware of him rolling or sliding on the floor. Witness A had never been aware that the child had brought in "My Little Pony". She simply thought that would have been written down in the transition document if it had happened. She had witnessed him playing a gaming video called "fortnite" which was a game suited to older children. She was aware of toys that children brought in because she was in and out of the classes.

74. We accepted the evidence of witness A. Whereas it had already been noted that the child's behaviour at home could be different from that in school it was noted that in school he was a sociable boy who chatted to teachers and was capable of progression into a mainstream school.

### **Aptitude**

75. Witness A gave evidence that the child could go on in mainstream school to sit examinations including highers. She said that at mainstream school he would get to pick subjects that would motivate him. Witness C, the headteacher of school B, described that the expectation was that pupils would leave with National 2 and National 3 qualifications. However witness C also set out that the children at school B tend to function at a primary school level in terms of intellectual capacity.

76. Although there is no given that the child can achieve higher qualifications his opportunity to do so is clearly made out in mainstream schooling. His natural ability

would set him apart in school B. He would be significantly more able than his fellow peers.

### **Conclusion of the ground of refusal.**

77. Taking each of the factors we have reached the view that school B is not suited to the ability or aptitude of the child. School B is a school for children that have a learning difficulty or disability or difficulty which range from global developmental delay, children with cerebral palsy, chronic illness that impacts on their learning and Downs' Syndrome. The child operates at a level significantly above this in terms of his academic work but also socially and emotionally. At school B the child may well simply disengage and suffer the consequences of that. He would not be able to fulfil his academic potential.

### **In these circumstances the ground of refusal relied upon by the respondents exists.**

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

78. Having concluded that a ground of refusal exists we require to consider whether, it is appropriate in all the circumstances, to confirm the decision to refuse the appellant's placing request.

79. In considering the question we require to consider all the circumstances including those which may be relevant to the consideration of the ground of refusal, as well as any other circumstances as they relate to the child.

### **Suitability of school C.**

80. Witnesses A and B spoke to the academic ability of the child. It was noted that he was secure at level 1 and progressing into level 2. That would be appropriate for school C. In school C in senior 1 there were a mix of abilities. Some pupils may not have achieved the same as the child in terms of his current level of ability. Academically accordingly school C was suitable for the child.

### **Lack of suitability of school B.**

81. This has been previously referred to. The children in school B in S1 are likely to be studying at early years towards level 1. They are significantly below that of the child. Academically he would be "on his own". He would not be working with likeminded children. He would have the support of a teacher but not necessarily an additional support needs assistant.

### **Security of schools.**

82. At school A the school was secure and pupils could not leave the grounds. School B exists near to a busy road and there is a controlled entry into the school however the fire exits are a push bar door and there is a back exit door which is unlocked. In school C there is a main front door which can be seen and monitored. The pupils on the LCSC are monitored throughout the day and in particular when moving around the building. At breaktimes pupils in the LCSS either return to the base or are able to enter the mainstream social area. If they do so they are then supervised by mainstream staff. Accordingly it can be seen in respect of neither school B or C is there a “completely” secure school. What is important is that it was not noted that at school C that any LCSC pupil had “gone missing”.

### **Level of support.**

83. In school C the child would be accompanied to mainstream classes and whilst in that classroom there would be a teacher and an additional support needs assistant present. He would have an individual timetable and would be supported to each period. If the child felt overwhelmed in class then he could be escorted away by LCSC staff back to the base. There was in addition a quiet room available for him. He could work at the base. When the child felt ready they could return to the mainstream classroom. This contrasted with school B. In school B there was not necessarily an additional support needs assistant within the classroom. In some of the classes there are pupils with medical needs wthat require classroom support. Only in literacy and numeracy were the pupils in school B streamed. Otherwise they remained in their main class. Accordingly it was viewed that school C would provide significant support to the child.

### **Bullying**

84. Both school B and school C acknowledged that conflicts can arise. At school B it was noted that learning disability can create difficulties in communication and for the child how they get on with their peers. It may not be regarded as bullying but conflicts do arise. Likewise at school C it was noted that all school children can fall out and have disagreements but that the school works closely with parents with children who have social and communication difficulties. Neither school accepted that there was a significant issue of bullying at that particular school and accordingly the issue of bullying does not make it more appropriate to place the child in school B.

**Friendships**

85. At school A the child had friends a few of whom have already gone onto school C LCSC. One of the boys from his class was also given a placement at school C LCSC. Witness E said that her son did not have friends but did have a friend in senior 4 at school B. However it was also noted that the child has a positive attitude and was always seeking out other pupils or members of staff when at school A. He had an ability to make friends at school A.

86. This factor is not such a significant one as to determine where a child should be educated.

**Conclusions of appropriateness**

87. Taking all these points together it is appropriate in all the circumstances to confirm the respondents' decision to refuse the placing request.