

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/23/0084

Reference

1. In January 2023, the appellant made a placing request for the child at school B, a special school under the respondent's authority. In April 2023, the placing request was refused by the respondent, on the grounds specified in Schedule 2, paragraph 3(1)(g) and 3(1)(b) of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act). The appellant lodged a reference in June 2023. The appellant asks us to require the respondent to place the child in school B.

Decision

2. We confirm the respondent's decision:
 - a. We are satisfied that grounds for refusal of the placing request exist **(Education (Additional Support for Learning) (Scotland) Act 2004 (2004 Act), section 19(4A)(a))**. In particular, we are satisfied that:
 - i. placing the child in school B would breach the requirements in Section 15(1) of the Standards in Scotland's Schools etc. (Scotland) Act 2000 (the 2000 Act): **(2004 Act, sch. 2, para. 3(1)(g))**.
 - ii. The education normally provided at school B is not suited to the age, ability, or aptitude of the child: **(2004 Act, sch 2, para. 3(1)(b))**.
 - b. We are satisfied that it is, in all the circumstances, appropriate to confirm the respondent's decision to refuse the placing request **(2004 Act, sec 19(4A)(a))**.

Process

3. A case conference call took place in September 2023. A remote hearing was scheduled and I gave directions about pre-hearing procedure, including the lodging of witness statements and a joint minute of agreed facts (JMA).
4. The tribunal asked an independent advocate to carry out non instructed advocacy. The advocate spoke to the appellant in November 2023. They observed the child at school in December 2023 and spoke to the head teacher and the child's class teacher. The appellant, head teacher and class teacher were given the chance to review the summary of information provided by them. The independent advocate produced a report which included findings (T052-T057).
5. Witness statements were produced for all witnesses.
6. A JMA was lodged agreeing matters of fact and fact and law (T050-T051); and a second JMA was lodged to agree the contents of a medical report (T058).
7. The bundle (version 6) consists of page numbers as follows: T001-T058; A001-A077; and R001-R063. An additional document was added to the R section during the hearing, as discussed in para. 12, below.
8. Both representatives lodged outline written submissions in advance of the hearing: appellant (A067-A071) and respondent (separate from bundle).
9. The remote hearing was postponed from the original dates and took place in December 2023.
10. At our request during the hearing, the Respondent lodged an additional document about pupil profiles for school B and the scoring tool used to assess pupils. The information was produced by witness A. We heard from both representatives about the document. The respondent moved for the document to be added to the bundle, to which we agreed (R064-R068). The appellant's representative requested the opportunity to ask witness C questions about the document based on their experience as an educational psychologist. We allowed witness C to be asked questions about the document after they had been given time to consider the document.
11. The evidence was completed in the two allocated days and the parties made oral submissions to supplement their written submissions.
12. **[This paragraph has been removed by the Chamber President to maintain privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
13. We considered all of the evidence and written submissions and deliberated.

Findings in Fact

The child

14. The appellant is the parent of the child.
15. The child is five years' old with a diagnosis of Autism Spectrum Disorder (ASD) with associated Social, Emotional and Behavioural needs.
16. The child is pre-verbal.
17. The child is sensitive to sound and can become upset and distressed in loud and busy spaces.
18. The child can struggle with transitions between locations and tasks and can become dysregulated at these times.
19. The child requires close adult support to regulate their emotional response to transitions.
20. The child has no real understanding of the written word. The child has been learning to write by rote. They have no understanding of the use or context of the mark making they are undertaking. They are performing above their peers in relation to copying the spelling of complex words in the sandbox.
21. The child has no understanding of personal safety or danger awareness.
22. The child is impulse driven and unaware of the consequences of their actions.
23. The child uses a buggy when moving around to community outwith school to keep them safe.
24. The child's distressed behaviours include throwing themselves to the floor, crying and screaming.
25. The child sometimes displays an instantaneous verbal response when distressed, upset or angry, which is not screaming.

School A

26. The child is currently placed at school A, a mainstream school run by the respondent.

27. The child began Primary 1 at school A in August 2023.
28. There are 24 children in the child's primary 1 class.
29. In the child's class there are eight children with a registered additional support need. Other children in the class have a similar additional support needs profile and similar academic ability to the child.
30. The class occupies a double-sized classroom.
31. There are a minimum of three adults in the child's classroom, with four on occasions.
32. There are two teachers, one for the core class and the other to provide additional support for a number of children with learning difficulties, of which the child is one.
33. There is one Early Years Practitioner (EYP) and one Advanced Pupil Support Worker (APSW).
34. The EYP supports play-based pedagogy in the class.
35. The APSW, although allocated in response to another pupil with complex health needs, supports the child as an individual, in smaller groups and as part of the whole class.
36. The child variously has the opportunity to be supported by the class teacher, the second teacher, the EYP and the APSW in varying group sizes. The child undertakes tasks with one or two other children, supported by the class teacher. The child is supported by the APSW in activities involving the whole class. The child has opportunities to undertake group work with the EYP.
37. There are high handled doors on entrance to the classroom and a high release on the external door to the building. The external gates to the playground are locked.
38. A bench is used as a physical and visual barrier in the playground to separate the Primary 1 playground from the Primary 2 playground. There are two adults supervising the Primary 1 playground, one at each end of the playground.
39. There are toilets both within the child's classroom and outside the classroom.
40. The child uses the disabled toilet outside the classroom and is provided with adult support to do so.

41. The child can make their needs known when he needs to go to the toilet with verbal cues and physical actions.
42. **[This paragraph has been removed by the Chamber President to maintain privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
43. The child is supported by an adult for all transitions, when moving around the school building, and when accessing the disabled bathroom.
44. The child can make their needs known through verbal cues and physical actions when he wants assistance with opening food wrappers.
45. The class has a play-based approach which allows free flow learning.
46. There are two small group settings within school A which are not currently used by the child but are available should they need them in the future.
47. There are multiple quiet spaces in the school, including the Lunch Club.
48. The child accesses the Lunch Club at lunchtime. It is in the Support for Learning room. This is a quiet room with a high adult ratio. There are two adults with around seven children. The child is supported by an adult from the classroom to the Lunch Club, and from the Lunch Club to the playground.
49. The child has an Individualised Educational Programme (IEP) which was created with the class teacher and the ASN team to assist them to access the curriculum. The child's happiness and safety and wellbeing were prioritised.
50. The child has developed peer relationships at school A. The child's tolerance of others coming into their space has increased and the child has made progress in their interactions with peers since starting primary 1.
51. The support provided to the child at school A will be reviewed at Child Planning Meetings.

The child and the Transition Scoring tool in nursery

52. The child was scored by the respondent while they were in nursery school using a Transition Scoring tool, which produced a score of 6.

53. If the child had scored 8 or above in the Transition Scoring tool he would have been placed by the respondent at school B.

School B

54. School B is a special school which provides education for children aged 5 to 18 years old.

55. Close adult support at school B can allow for early intervention and redirection of pupils.

56. The majority of the children at school B are non-verbal.

57. The majority of the children at school B have medical needs.

58. The children at school B have more complex needs than those of the child.

59. School B is a loud environment.

60. The current children in primary 1 at school B scored 8 and above on the Transition Scoring tool when they were assessed by the respondent.

Placing request

61. In 27 January 2023, the appellant made a placing request for the child to be enrolled at school B.

62. The appellant's placing request was refused by the respondent in 27 April 2023 on the basis of Schedule 2, paragraphs 3(1)(a)(i), 3(1)(a)(ii), 3(1)(b) and 3(1)(g) of the 2004 Act.

Ability and aptitude of the child and school A

63. The child attends school A and there are no concerns about their attendance.

64. A risk assessment has been completed by school A in relation to the child's flight risk and the measures which have been put in place at school A mitigate the risk as far as practicable.

65. There are four members of staff generally available in the classroom to meet the child's various educational, welfare and additional support needs. The level of support with which the child is provided is appropriate to allow them to develop their communication skills. The support varies depending upon the task being undertaken and any perceived risks.

66. The larger sized classroom creates opportunities for free flow and self-directedness by the child.

67. The child's ability to follow routine and instruction has increased since they began primary 1 at school A.

68. The child's interaction with peers has increased since they began school A.

69. The child is well supported in school A.

70. The child appears happy while attending school A.

71. School A is suited to the ability and aptitude of the child.

The provision of efficient education for the children with whom the child is educated

72. The child is making good progress alongside their peers at school A.

73. The child has integrated well into their classroom.

74. The child is seen to be engaging with their peers and showing enjoyment in learning.

75. The child does not pose a safety risk to the children in their class with whom they are educated.

76. The child's distressed behaviours are not disruptive to the education of other children at school A.

77. When the child displays an instantaneous outward verbal response when distressed, upset or annoyed it does not upset the children around them.

Whether unreasonable public expenditure would be incurred which would not ordinarily be incurred

78. The cost of placing the child at school A is zero to the respondent.

79. All supports provided to the child at School A are met within existing budgets allocated to the school.

80. Any equipment assessed as being necessary for the child will be purchased from the Devolved School Budget.

81. The placement of the child at school A does not result in unreasonable public expenditure being incurred which would not ordinarily be incurred.

Age, ability and aptitude of the child and school B

82. The needs of the children in school B are much more complex than those of the child.

83. The children educated at school B will continue to function around the milestones level of their education and are unlikely to progress further academically.

84. The child would be restricted in their educational and personal development at school B.

85. School B will not provide the child with a language rich environment to develop their communication and language skills.

86. There is a risk of significant regression or a plateau of learning for the child if placed at school B.

87. There is a lack of appropriate peer group for the child at school B.

88. The children at school B are not readily able to engage with the child as they are unable to socially engage with their peers and are assessed as being unlikely to progress beyond that level of communication.

89. The behaviours of children in school B result in a loud environment.

90. School B is not suited to the ability and aptitude of the child.

Findings in fact and law

91. The child has additional support needs in terms of Section 1 of the 2004 Act.

Reasons for the Decision

92. The respondent insisted on two grounds for refusal of the placing request:

- i. placing the child in school B would breach the requirements in Section 15(1) of the Standards in Scotland's Schools etc. (Scotland) Act 2000 (the 2000 Act): **(2004 Act, sch. 2, para. 3(1)(g))**.

- ii. The education normally provided at school B is not suited to the age, ability, or aptitude of the child: **(2004 Act, sch 2, para. 3(1)(b))**.

93. The respondent did not insist on the other two grounds of refusal included in the refusal letter (placing the child in school B would make it necessary for the authority to take an extra teacher into employment **(2004 Act, sch 2, para 3(1)(a)(i))**); or that placing the child in school B would give rise to significant expenditure on extending or otherwise altering the accommodation or facilities provided in connection with the school **(2004 Act, sch 2, para (3)(1)(a)(ii))**).

94. The respondent has the burden of proving that the grounds for refusal are established.

First ground of refusal - Placing the child in school B would breach the requirements in Section 15(1) of the Standards in Scotland's Schools etc. (Scotland) Act 2000 (the 2000 Act): (2004 Act, sch. 2, para. 3(1)(g)).

95. Section 15 of the Standards in Scotland's Schools etc. Act 2000 (the 2000 Act) states that:-

(1) Where an education authority, in carrying out their duty to provide school education to a child of school age, provide that education in a school,

they shall unless one of the circumstances mentioned in subsection (3) below arises in relation to the child provide it in a school other than a special school.

(3) The circumstances are, that to provide education for the child in a school other than a special school —

(a) would not be suited to the ability or aptitude of the child;

(b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or

(c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred, and it shall be presumed that those circumstances arise only exceptionally.

96. Section 15 is sometimes referred to as '*the presumption of mainstreaming*'.

That is to say, unless one of the circumstances arises, the respondent as education authority shall provide the child's education in a mainstream school. The circumstances in subsection (3)(a) to (b) are alternatives and there is a presumption that they arise only exceptionally.

97. The respondent submits that none of the circumstances arise and that the presumption of mainstream education should apply.

98. The appellant says that all three circumstances arise.

99. We considered each circumstance in turn, having regard to the evidence and submissions made by each party:

Section 15(3)(a) – whether [mainstream] would not be suited to the ability or aptitude of the child

100. The respondent submits that school A is suited to the ability and aptitude of the child.

101. The appellant submits that school A is not suited to the ability and aptitude of the child.

102. We accepted the evidence of the respondent's witnesses about the provision of education and support in mainstream education in school A. We were persuaded that the child has improved during the time that he has already spent in primary 1, including interactions with their peers and communication with staff. We are not satisfied that there are any safety risks which cannot be managed with the assessment and measures which are already in place. If the environment becomes too loud for the child, there are quiet spaces open to them, including the Lunch Club. The child is able to access toilet facilities with staff support, currently the disabled toilet outside the primary 1 classroom.

103. The child appears to staff to be generally happy at school A and is learning alongside their peers.

104. We considered the evidence from the appellant about the child sustaining some minor injuries while at school. We do not consider that any of the evidence about minor injuries is outwith what would be expected for a primary 1 child in mainstream school, as a result of the normal play based activities for that age group, or that it would lead to the conclusion that the provision was not suited to the ability or aptitude of the child. We were asked in submissions on behalf of the appellant to disregard the evidence which the appellant gave after closing submissions in December 2023. The respondent invited us to draw an adverse inference about the appellant's credibility and reliability as a result of the comments which were made. Having considered matters in context and having regard to both parties' submissions, we accept that the appellant's response at that stage of the hearing was made spontaneously after a long day, in which they had also given evidence and that the comments were made out of concern for the child. On reflection, the appellant did not seek to attribute the marks on the child's face on that date as something suggesting that school A was not suited to the child's ability and aptitude. We therefore

disregarded the evidence given after closing submissions and did not form any adverse view of the appellant's credibility and reliability generally.

105. Having regard to our findings in fact on the basis of the evidence, we are satisfied that the mainstream provision in school A is suited to the ability and aptitude of the child.

Section 15(3)(b) whether [mainstream] would be incompatible with the provision of efficient education for the children with whom the child would be educated;

106. There was no evidence that any of the child's behaviours are disruptive to the education of other children at school A.

107. It was agreed between the parties that the child's distressed behaviours can include throwing themselves to the floor, crying and screaming. However, we also heard evidence from witness B, the head teacher at school A, that the child can display an instantaneous outward verbal response when distressed, upset or annoyed, which is not screaming and does not upset the children around them.

108. We also accepted the evidence of witness A that the child is making good progress alongside their peers at school A and has integrated well into their classroom. They are seen to be engaging with their peers and showing enjoyment in learning. The child does not pose a safety risk to the children in their class with whom they are educated.

109. Taking into account all of our findings in fact, we are not satisfied that mainstream would be incompatible with the efficient education of children with whom the child would be educated.

Section 15(3)(c) whether [mainstream] would result in unreasonable public expenditure being incurred which would not ordinarily be incurred,

110. We accept the evidence of witness A that there is no additional cost to the respondent of placing the child at school A. All supports provided to the child at school A are met within existing budgets allocated to the school. Any equipment assessed as being necessary for the child will be purchased from the Devolved School Budget.

111. We are satisfied that the placement of the child at school A does not result in unreasonable public expenditure being incurred which would not ordinarily be incurred.

Second ground of refusal - The education normally provided at school B is not suited to the age, ability or aptitude of the child: (2004 Act, sch 2, para. 3(1)(b)).

112. The Respondent submitted that the education normally provided at school B is not suited to the ability or aptitude of the child and that the ground is established.
113. The appellant opposed the respondent's submission and submitted that the ground is not established.
114. We accepted the evidence of witness A about school A, with which she was very familiar having previously held a post there as head teacher.
115. When assessed in their nursery year, the child scored 6, rather than the required score of 8 on the Transition Scoring tool, which would have been required for placement in school B.
116. The late evidence produced by the respondent included pupil profiles for the children in the primary 1 stage in school B. Each had a score of 8 or above.
117. We also heard and accepted evidence from witness A that the children who attend the specified school require healthcare support and have more profound needs than the child.
118. The children educated at the specified school are mainly non-verbal and will continue to function around the milestones level of their education and are unlikely to progress further academically. The child would be disadvantaged educationally by being placed at the school.
119. We are satisfied that while the child has additional support needs, they are significantly less complex than the pupils of similar age placed at the specified school.
120. If the child was placed at the specified school they would be restricted in opportunities for language and communication development.
121. The behaviours of the pupils at school B create a loud environment which might be distressing for the child.

122. We weighed the appellant's evidence and submissions about why they considered that school B was suited to the aptitude and ability of the child. The appellant has not visited the school during the school day and their knowledge of the provision was limited. Their views appeared to be based on a number of factors including a feeling that there would be better security and that the class sizes would provide more opportunities for one to one support. There was also a perception that there would be less noise than school A. While we have no doubt that the appellant has the child's best interests in mind in making this reference, we preferred witness A's evidence based on her direct knowledge of the school environment, the peer group and the educational provision and reached a number of findings in fact about school B on the basis of that evidence.

123. We are satisfied that the education normally provided at school B is not suited to the ability or aptitude of the child.

124. We are satisfied that this ground for refusal of the placing request exist **(Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act), section 19(4A)(a)(i)).**

Whether it is in all the circumstances, appropriate to confirm the respondent's decision to refuse the placing request (2004 Act, sec 19(4A)(a))

125. Section 19(4A) 2004 Act provides that:

"Where the reference relates 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 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, ..."

126. It is a two part test and we need to be satisfied in relation to both parts before we can confirm the respondent's decision to refuse the placing request.

127. In relation to the first part We are satisfied that one or more grounds of refusal specified in paragraph 3(1) or (3) of Schedule 2 exist, namely.

128. We are also satisfied that it is appropriate in all the circumstances to confirm the decision of the Respondent to refuse the appellant's placing request, in terms of Section 19(4A)(a) of the 2004 Act.