

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

Reference Number: FTS/HEC/AR/24/0004

List of witnesses

For the appellant:

The appellant

For the respondent

Head Teacher of School B (Witness A)

Head Teacher of School A (Witness B)

Reference

1. The appellant made a placing request for the child at **school B** ASN provision, a special school under the respondent's authority. In November 2023, the placing request was refused by the respondent, on the grounds specified in **Schedule 2, paragraphs 3(1)(a)(i), 3(i)(a)(ii), 3(i)(a)(iv) and 3(1)(b) of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act)**. The appellant lodged a reference in January 2024. 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 the following ground for refusal of the placing request exists (**2004 Act, sec. 19(4A)(a)**):
 - i. 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 not satisfied that the following grounds for refusal of the placing request exist:

- i. placing the child in school B would make it necessary for the authority to take an additional teacher into employment (**2004 Act, sch. 2, para. 3(1)(a)(i)**);
 - ii. placing the child in school B would give rise to significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school (**2004 Act, sch. 2, para. 3(1)(a)(ii)**); and
 - iii. placing the child in school B would be likely to be seriously detrimental to the educational well-being of pupils attending the school (**2004 Act, sch. 2, para. 3(1)(a)(iv)**).
- c. 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 March 2024. A remote hearing was scheduled and directions were given about pre-hearing procedure, including the lodging of witness statements and a joint minute of agreed facts (**JMA**).
4. The tribunal instructed an independent advocate to support the child to express their views without asking specific questions. The advocate produced a report after a talking mats activity and discussion with the child at school A in May 2024 (**T038-T041**).
5. Written witness statements were produced for all witnesses.
6. A JMA was lodged agreeing matters of fact and fact and law, which was later revised (**T042-T045**).
7. The bundle (version 10) consists of page numbers as follows: **T001-T063**; **A001-A021**; and **R001-R125**.
8. Both representatives lodged outline written submissions in advance of the hearing.
9. The remote hearing was postponed from the original dates at the request of the appellant and took place early in October 2024, with an additional day required to complete the evidence later October 2024.
10. During the hearing, the Respondent lodged three additional documents, which were added to the bundle, with the consent of the Appellant and agreement of the tribunal (**R114-R125**).
11. After the evidence, the parties' representatives lodged revised written submissions .
12. We considered all the evidence and revised written submissions and deliberated took place in November 2024.

Findings in Fact

The child

13. The appellant is a parent of the child.

14. The child is eleven years old.

Additional Support Needs

15. The child has diagnoses of Attention Deficit Hyperactivity Disorder, Autism Spectrum Disorder, learning difficulties and sleep difficulties.

16. In April 2022, the child had a profile which was typical of being moderately dyslexic.

17. The child is verbal.

Academic

18. The child is in a mainstream Primary 7 class at school A.

19. There are 17 pupils in the child's class.

20. There is a class teacher and a Pupil Support Assistant (PSA) for the child's class.

21. In the 2023/24 session, the child achieved first level Curriculum for Excellence (CfE) in listening, talking and reading and continues to work at that level.

22. In the 2023/24 session, the child reached early level CfE for writing and numeracy and continues to work at that level.

23. In the 2023/24 session, the child was below track for Numeracy, Listening and Talking, Reading, Writing, and Modern Languages.

24. The child is academically behind the majority of their peers at school A.

25. The child has a Child's Plan and an Individualised Education Plan (IEP) which was last updated in May 2024, during the 2023/24 academic session, when the child was in Primary 6.

26. An updated IEP was not available in October 2024 but was due to be produced by school A at or about the end of October 2024.

Social and peer group

- 27. The child likes being with friends.
- 28. The child is worried about making new friends.

Independence and timekeeping

- 29. The child is able to follow familiar school routines independently.
- 30. The child understands time and can follow a timetable in the context of the school day.
- 31. During Primary 6, the child was able to participate in a residential school trip, including overnight stays.

School B

- 32. There are 78 pupils in the ASN provision in school B.
- 33. School B is currently at maximum capacity in the 2024/25 session.
- 34. There are eight ASN classes at school B.
- 35. Seven of the ASN classes at school B have 10 pupils and the eighth class has eight pupils.
- 36. Each ASN class within school B has a class teacher supported by a class team of four, either Pupil Support Assistants, or Early Years' Practitioners.
- 37. The ASN provision at School B caters for pupils who have a range of additional support needs, from moderate to complex.

Whether placing the child in school B would make it necessary for the authority to take an additional teacher into employment

- 38. The national conditions of service for teaching staff (SNCT) specify that the maximum class size for a special school for moderate learning difficulties should be no more than 10. These conditions are incorporated into teachers' contracts, including teachers at school B.
- 39. The 10 pupil threshold for ASN classes for pupils with moderate learning difficulties has never been breached within school B.

40. In October 2024, there were 10 children in the Primary 7 class at school B.
41. In October 2024, there were five members of staff for the Primary 7 class at school B.
42. The respondent does not have any suitably qualified additional teachers who could be moved to school B.
43. School B is currently trying to recruit additional staff, irrespective of the child's placing request.
44. Even if there were a teacher available, or a teacher could be recruited, there is no physical space for an additional classroom at school B where they could teach the child.
45. Placing the child in school B would not make it necessary for the authority to take an additional teacher into employment.

Whether placing the child in school B would give rise to significant expenditure on extending or otherwise altering the accommodation at, or facilities provided in connection with, school B

46. School B is at full capacity in terms of pupil numbers and physical space.
47. There is no space on the campus to extend the accommodation at, or facilities provided in connection with, school B.
48. There is no space for another classroom in school B.
49. The respondent could not make plans to incur significant expenditure extending, or otherwise alter, the accommodation or facilities provided in connection with school B.
50. If the child were placed at school B during the 2024/25 school year, it would have to be within the existing accommodation at and facilities provided in connection with school B.
51. Placing the child in school B would not give rise to significant expenditure on extending, or otherwise altering, the accommodation at, or facilities provided in connection with, school B.

Whether placing the child in school B would be likely to be seriously detrimental to the educational well-being of pupils attending school B

52. If the child were placed at school B it would be in the existing primary 7 ASN classroom with the pupils already in that class.

53. An additional desk would have to be placed in the existing classroom.
54. Placing the child in school B would not be likely to be seriously detrimental to the educational well-being of pupils attending school B.

Education normally provided at school B and the child's ability and aptitude

55. Seven pupils (70%) of the primary 7 class at school B are non-verbal and use alternative and augmentative communication to communicate.
56. The child is a verbal communicator.
57. Eight pupils (80%) of the primary 7 class at school B are working at academic levels below that of the child.
58. One pupil in primary 7 has achieved Early Level CfE for Listening and Talking.
59. There is only one child in primary 7 at school B who is comparable academically to the child in that they have achieved Early Level CfE across subjects but they have complex social and behavioural needs with emotional dysregulation, which is why they were placed at school B. They are not typical of the cohort of pupils attending school B.
60. The child's ability and aptitude is greater than that of 90% of pupils in the primary 7 class at school B.
61. Almost all pupils at school B use hand over hand technique.
62. The child is able to hold a pencil without hand over hand technique.
63. All pupils at school B need direct one to one intensive support at all times.
64. The child does not need direct one to one intensive support at all times.
65. The child's peers at school B have no awareness of safety and do not have capacity for independence outwith the school campus.
66. The child has the ability to be independent outwith the school campus and has engaged in a residential trip, including overnight stays.
67. The child's peers at school B are unaware of the time.
68. The child can identify break and lunch times and other routine times by looking at a clock and can manage a timetable reliably.

Findings in fact and law

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

Reasons for the Decision

70. The respondent insisted on four grounds for refusal of the placing request:

Ground 1: 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));

Ground 2: 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));

Ground 3: placing the child in school B would be likely to be seriously detrimental to the educational well-being of pupils attending the school (para. 3(1)(a)(iv)); and

Ground 4: 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)).

71. The respondent has the burden of proving that each ground for refusal is established.

Ground 1: Whether placing the child in school B would make it necessary for the authority to take an additional teacher into employment (para. 3(1)(a)(i))

72. The respondent submitted that placing the child in school B would make it necessary for the authority to take another teacher into employment.

73. The appellant opposed the respondent's submission and submitted that the ground is not established.

74. We did not accept the respondent's submission in relation to the necessity to take an additional teacher into employment were the child to be placed at school B.

75. First, the respondent's submission was unclear about how and where this teacher would be employed.

76. Second, the submission proceeded on a hypothetical basis and contradicted the submissions in relation to the second ground of refusal, discussed below, in that even if a teacher could be recruited, there is no additional physical space at school B where they could teach the child.
77. Third, there was no causal connection – on the respondent’s own evidence and submissions - between placing the child in the school and the employment of an additional teacher, as this is something that is already being explored irrespective of whether the child is placed at the school.
78. The respondent’s submission began on the basis that the contracts of teaching staff in school B specify that the maximum class size for school B is 10. Whilst the respondent may be contractually bound to its teachers as a result, we were not satisfied that ‘class size caps are effectively mandatory’, as submitted by the respondent. However, we did not accept the appellant’s submission that the SNCT terms are merely ‘advisory’. We are satisfied that the respondent has a contractual obligation to teachers. However, we did accept that appellant’s submission that the terms cannot be construed as a definitive maximum student number for classes in special schools, as they are not primary legislation nor are they binding upon the tribunal.
79. We also accepted witness A’s evidence that the class size of 10 has not been breached at school A.
80. We were satisfied on the evidence that school B is at maximum capacity and that there is no space on campus to extend the accommodation, or facilities in connection with, school B, as further discussed in relation to the second ground of refusal. Given the respondent’s principal argument about class sizes and the campus, it appeared to be a purely theoretical suggestion that another teacher might be required were the child to be placed at school B and it was not clear on the evidence how and where that teacher might be employed.
81. In any event, witness A gave evidence, which we accepted, that school B was currently trying to recruit staff. Applying a ‘but for’ test, it was not established that the placing of the child in school B would make it necessary for the respondent to take another teacher into employment, given that the school was already trying to take additional teaching staff into employment.
82. We are not satisfied that this ground of refusal is established.

Ground 2: Whether placing the child in school B would give rise to significant expenditure on extending, or otherwise altering, the accommodation at, or facilities provided in connection with, the school (para. 3(1)(a)(ii))

83. The respondent submitted that placing the child in school B would give rise to significant expenditure on extending or otherwise altering the accommodation at, or facilities provided in connection with the school.
84. The appellant opposed the respondent's submission and submitted that the ground is not established.
85. The respondent acknowledges in its own submission in support of this ground of refusal that the argument is hypothetical. The respondent's stated position is that school B is at full capacity in terms of pupil numbers and physical space. There is no space on the campus to extend the accommodation at, or facilities provided in connection with, school B. There is no space for another classroom in school B.
86. We are satisfied on the evidence that there is no space on campus to extend the existing accommodation or facilities provided in connection with school B.
87. The submission about what would be required in a classroom, and the consequent costs, are therefore hypothetical, as there is no space available at school B to be converted into a classroom.
88. Given that there is no space for another classroom in school B, the respondent could not therefore make plans to incur significant expenditure extending, or otherwise altering, the accommodation or facilities provided in connection with school B. The child is in primary 7, so were the child placed at school B by the tribunal during the remainder of the 2024/25 school year, it would have to be within the existing accommodation at and facilities provided in connection with school B.
89. Placing the child in school B would not therefore give rise to significant expenditure on extending or otherwise altering the accommodation at, or facilities provided in connection with, school B.
90. We are not satisfied that this ground of refusal is established.

Ground 3: Whether placing the child in school B would be likely to be seriously detrimental to the educational well-being of pupils attending the school (para. 3(1)(a)(iv)).

91. The respondent submitted that placing the child in school B would be likely to be seriously detrimental to the educational well-being of pupils attending school B.
92. The appellant opposed the respondent's submission and submitted that the ground is not established.

93. The respondent submitted that there would be potential overcrowding were an additional desk to be placed in the primary 7 classroom but this was not based on any evidence about how that detriment would occur to other pupils, or in what way it would be serious.
94. The appellant submitted that no risk assessment had been carried out to consider whether it would be detrimental to the educational well-being of pupils attending school B were the child to be placed there.
95. There was no evidence of detriment to the educational well-being of other pupils, let alone serious detriment, were the child to be placed in the school.
96. Accordingly, we are not satisfied that this ground of refusal is established.

Ground 4: Whether 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)).

97. The Respondent accepted that the education normally provided at school B is suited to the age of the child but submitted that the education normally provided at school B is not suited to the ability or aptitude of the child and submitted that the ground is established.
98. The appellant opposed the respondent's submission and submitted that the ground is not established.
99. The principal evidence about the education normally provided at school B came from witness A, the head teacher of school B. The tribunal accepted that witness A has an in depth understanding of the education normally provided to pupils at school B and the broad span of abilities of the current pupils. In particular, they were able to speak about the profile of the children in the current Primary 7 cohort at school B, who are the same age as the child.
100. We are satisfied on the evidence that seven pupils (70%) of the primary 7 class at school B are non-verbal and use alternative and augmentative communication to communicate, whereas, the child is a verbal communicator.
101. We are satisfied on the evidence that eight pupils (80%) of the primary 7 class are working at academic levels below that of the child.
102. One pupil has achieved Early Level CfE for Listening and Talking. There is only one child in primary 7 at school B who is comparable academically to the child in that they have achieved Early Level CfE across subjects but they have complex social and behavioural needs with emotional dysregulation, which is why they were placed at school

B. They are not the norm. The other pupils in Primary 7 at school B are not working on CfE levels.

103. In relation to the child's ability and aptitude, the appellant invited us to prefer her evidence to that of witness A, on the basis that witness A has never met the child or discussed his level of need. However, witness A was able to give evidence about the education normally provided at school B and also considered documentary evidence about the child and gave evidence about the child's ability and aptitude based on that evidence. While the appellant as the child's parent has a very good understanding of the child's needs, ability and aptitude, she could not speak directly to the suitability of school B for the child's ability and aptitude.
104. We did think that it was unfortunate that at the time of the hearing, school A was yet to complete an update to the child's IEP. As a result the most up to date documentary evidence was from the Primary 6 academic year, supplemented by the evidence of witness B, the head teacher of school A. It would have been preferable for the IEP to have been updated before the end of October 2024. We were told that this had not been done because of restrictions on staff resources.
105. The child has greater abilities with holding a pencil than the education normally provided at school B.
106. The child has greater social and independent ability and aptitude than the education normally provided at school B. This was evidenced in the report from the school residential trip at school A. The peers at school B do not have capacity for independence outwith the school campus.
107. The pupils at school B are unaware of the time; whereas the child can identify break and lunch times and other routine times by looking at a clock and can manage a timetable reliably.
108. Having considered all the relevant evidence, we are satisfied that while the child has additional support needs, they are significantly less complex than the pupils of similar age at the specified school and that the child's ability and aptitude exceeds that of 90% of pupils of a similar age in school B, with the other pupil not being the norm.
109. We are satisfied that the education normally provided at school B is not suited to the ability or aptitude of the child.
110. We are satisfied that this ground for refusal of the placing request exists: **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)).

111. 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, ...”

112. 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.

113. 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 exists, namely **section 19(4A)(a)(i) of the 2004 Act**.

114. In addition to the discussion above, it is relevant that this reference relates to a child who is now halfway through primary 7 at school A. The postponement of the hearing which was fixed in the summer was at the request of the appellant. The child will be transitioning to mainstream secondary school in August 2025. We heard evidence that transition planning is already underway. If the child was placed by the tribunal in school B, they would have to deal with a transition for half an academic year and then transition again to mainstream secondary.

115. We were 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**.