

**Health and Education Chamber**  
First-tier Tribunal for Scotland



**Additional Support Needs**

**DECISION OF THE TRIBUNAL**

FTS/HEC/AR/24/0019

**Witness List:**

**Witnesses for Appellant:**

Appellant

Head of Education school A (witness D)

Learning Disability Link Nurse (witness E)

**Witnesses for Respondent:**

Principal Educational Psychologist (witness B)

Head Teacher school B (witness A)

**Reference**

1. This is a reference by the appellant following a refusal by the respondent to place the child in the school specified ('school A') in the placing request.
2. The appellant made a placing request for the child to attend school A, an independent school. A formal letter refusing the placing request was issued by the respondent in February 2024.
3. The respondent relied upon the grounds in Section 3(1)(f) of Schedule 2 of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act) in refusing the placing request.

## **Decision**

4. The tribunal overturns the decision of the respondent and requires the respondent to place the child in the school specified (school A) in the placing request within four weeks of the date of this decision or such other date as the parties agree; in terms of section 19(4A)(b)(i) of the 2004 Act. We are not satisfied that a ground of refusal exists. We therefore require the respondent to place the child in school A

## **Process**

5. The reference was conjoined with a co-ordinated support plan ('CSP') reference to allow oral evidence to be heard concurrently. The CSP proceedings have now been suspended pending the child's placement in school A.
6. A number of case management calls took place, with pre-hearing case management directions being issued. The hearing took place in person at the Glasgow Tribunal Centre over four days in June, August, and September 2024.
7. Written submissions were exchanged and provided by both parties following the hearing.
8. A joint minute of agreed facts were lodged at T040 – T044. The views of the child were sought via a direction for an advocacy report lodged at (T034- T039).
9. Witness C gave oral evidence only. The remaining witnesses gave oral evidence to supplement their written statements as follows:  
  
Statement of appellant at A035-A048  
Statement of witness A at R060 – R067  
Statement of witness B at R050 – R059  
Statement of Witness D at A049 – A057  
Statement of Witness E at A058- A061
10. Late documents were lodged by the appellant in the form of correspondence from occupational therapy ('OT') (at A065-A075). The respondent provided supplementary statements in response to this, which are lodged at R132-R149.

11. Before reaching our decision, we considered the oral and written evidence together with the written submissions.

## **Findings in Fact**

### *General Findings*

12. The appellant is the mother of the child. The child is 12 years old and lives with the appellant and his family.

13. The child has diagnoses of a severe learning disability, speech delay and autism spectrum condition ('ASC') with associated social, emotional and behavioural needs.

14. The child started Primary 1 ('P1') at school B in 2017. The child has not attended school B or any other school provision since June 2023.

15. In November 2023 the appellant made a placing request to the respondent for the child to attend school A.

16. In February 2024 the respondent refused this placing request in terms of paragraph 3(f) of Schedule 2 to the 2004 Act.

17. Both school A and school B have offered the child a place.

### *The child*

18. The child is non-verbal. The child struggles to express his needs and wants effectively to adults.

19. The child can use some objects of reference to communicate and these can also be used for others to communicate with him. The child also leads adults by the hand.

20. The child functions at a very young level of cognitive ability. The child is significantly behind his chronological peers due to his learning disability.

21. The child does not understand social norms or daily routines
22. The child requires to develop his independence, social, and emotional regulation skills.
23. The child seeks sensory play and feedback. The child will play with bright lights and music amongst other things.
24. The child is working on a Milestones/Pre-Early Level Curriculum of the Curriculum for Excellence. It is unlikely that the child will work towards First Level or beyond.
25. The child works toward complex milestones. These complex milestones involve more broken-down steps such as engaging in shared attention or indicating a preference for a specific resource.
26. The child has no understanding of personal safety, danger awareness or road safety awareness.
27. The child requires close adult support at all times.
28. The child is self-directed and will, generally, follow his own agenda.
29. The child does not understand demands placed on him.
30. The child has no understanding of ownership or turn-taking. The child will take items from others if the child wants them, with no awareness of social appropriateness.
31. **[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)]**
32. The child receives support from Learning Disability - Child and Adolescent Mental Health Services (LD-CAMHS). The child has an allocated Tier-4 CAMHS Nurse.
33. The child was the subject of a number of "Team Around the Child" ('TAC') meetings

where the appellant and professionals involved with the child were in attendance.

34. The child has a CSP which was finalised in November 2023.

*The child's progress at School B*

35. Since around Primary 4 the child has not made progress in line with his peers.

36. The child has a tendency to display distressed behaviours in school. These behaviours became more consistent and prevalent over the past four years of the child's attendance at school B.

37. From around January 2022 the child would sleep for large parts of the school day and would at times refuse to eat or drink. The child would generally arrive at school in a highly distressed state and would remain in that state throughout the day.

38. Over the course of school term 2022/23 when the child arrived at school B the child would tend to be in a very distressed state. The child would at times drop to the floor. On occasion would refuse to leave the taxi taking him to school. The child would require significant support and staff intervention to even enter the school building. School B's staff required to use a buggy to take the child to and from different locations in the school and from the taxi when he arrived in the morning, as the child was resistant to entering the building or being moved.

39. When in a distressed state the child would often lie on his front on the classroom floor and refuse to move. The child would often fall asleep after such a presentation.

40. Over the course of the school term 2022/23, the child continued to display distressed behaviours in school B for a majority of the time. Staff at school B sought and tried different methods to engage the child and reduce his levels of distress, generally without success.

41. The child's self-injurious behaviours over the course of his attendance at school B included the child hitting himself; punching himself on the temple, under his eyes and on his forehead; scratching his own face and neck; kicking his own legs; and striking his

head against the floor. These self-injurious behaviours often lead to significant bruising and swelling on the child's face and body and were harmful for the child.

42. The triggers for the child's distressed behaviours at school are unknown.

43. The extent of the child's highly distressed behaviours at school were not mirrored by the child when the child was at home. The child was more often than not contented and happy when at home or out of the house with family.

44. The child would on occasion display distressed behaviours within his home; with these incidents being for a minority of the time.

45. The child's behaviours escalated further in June 2023 and extended to home as well as school. In June 2023 the child hit two staff members to their injury when in a highly distressed state.

46. The child was treated for a medical condition in the summer of 2023. It is likely that the child's deteriorated behaviours in June 2023 were as a consequence of discomfort caused by that condition.

**[Part of this paragraph has been altered 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)]**

47. The child did not return to school B after June 2023.

48. On or around June 2023, the respondents offered to have the child access education through school B by offering the child access to a local building where the child would be supported by non-teaching staff from a third sector community care provider.

**[Part of this paragraph has been altered 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)]**

49. In the event the child was to return to school B, there would require to be a period of further assessment in order for school B to provide a safe learning environment for the child.

50. School B is a purpose-built special school which provides primary and secondary education for pupils with a variety of complex additional support needs. There are 214 pupils in the school which includes pupils with ASD who are non-verbal.
51. In the event the child were to return to school B the child would be in a class of a maximum of six to eight pupils within Secondary 1.
52. A room has been identified within school B as an individualised learning environment for the child. This room is located near the front door to minimise the child's transition from the taxi to the school. The room is also located near to different play areas and closer in proximity to therapy areas than previous rooms the child had attended.
53. Staff within school B have training in trauma informed practice, Promoting Positive Behaviour ('PPB'), hydrotherapy and rebound therapy, emotion works, Call Scotland training, attention autism, the development and production of social stories, and Makaton to support communication.
54. School B has a number of amenities including a hydrotherapy pool, rebound therapy, two gym halls, extensive school garden and grounds, a sensory garden, a pitch, bikes and other wheeled items, two purpose built play areas and swings to support sensory regulation.
55. The outdoor areas at school B are accessible from the main building and from the playground. Most classes have 2 doors, one of which leads to a play area or an outside area.
56. School B can refer its pupils to NHS Speech and Language therapy ('SALT') or other allied health professionals.

#### *School A*

57. School A is not a public school. School A is an independent school providing education to children and young people with severe and complex ASN including ASD.

58. School A has provision for 25 children. The child would be placed in a class with three other pupils.
59. Most of the children and young people at school A are working towards Early Level Curriculum for Excellence.
60. Staff at school A are trained in de-escalation, Crisis Aggression Limitation Management ('CALM') which is refreshed annually, autism practice and play training, sensory based behaviours training and moving and handling. Some staff at school A are trained in minibus training ('MIDAS') and first aid.
61. Children and young people at school A have access to the main classroom and a number of breakaway spaces for that class.
62. School A teaches young people who can struggle in a class group, with around half of the pupils at school A requiring an individual space.
63. All classrooms at school A have doors which go out into the garden space. School A has a number of specialist rooms, including a soft play area, a life skills suite, a multi-sensory room, a hall used for music and assemblies and a cafeteria for parties and other group events.
64. Pupils at school A are grouped with young people with similar interests that are socially cohesive.
65. A number of pupils within school A have a tendency to self-injurious behaviours.
66. School A has significant experience in managing self-injurious behaviours and outwardly challenging behaviours towards others.
67. If the child were to attend school A, the child will be provided with a staffing ratio of two to one.
68. School A has a dedicated SALT service, accessible by all children and young people at



school A.

69. School A has a safe space which is provided for pupils who bang their head excessively.

### **Reasons for the Decision**

70. Parties have agreed that the child has ASN in terms of section 1 of the 2004 Act. The tribunal was satisfied that this is the case.

71. The respondent's refusal of the placing request is based solely on schedule 2, paragraph 3(1)(f) of the 2004 Act.

72. The onus of proof lies with the respondent.

73. The assessment point is at the date of the hearing.

74. Even if a ground of refusal exists then we still have to consider whether in all of the circumstances it is appropriate to confirm the decision (section 19(4A)(a)(ii) of the 2004 Act).

### *The ground of refusal*

75. There are four constituent parts to schedule 2, paragraph 3(1)(f), numbered in paragraphs (i) to (iv). The respondent must satisfy us that each of the parts is applicable to the facts of the case, as at the date of the hearing.

### *Paragraph 3(1)(f)(i) – the specified school is not a public school*

76. There was no dispute between parties that the specified school (school A) is not a public school. Accordingly, this part of the ground of refusal is met.

### *Paragraph 3(1)(f)(ii) – the authority are able to make provision for the additional support needs of the child in a school other than the specified school*

77. The application of this paragraph is disputed.

78. This paragraph requires that the respondent is able to make provision for the child's ASN in a school other than the specified school. In this case, that other school is school B. We are not satisfied that school B can make provision for the child's ASN. Accordingly this condition does not apply.
79. We accepted the submission of the appellant's representative that in making a decision on the child's additional support needs the tribunal must consider the young person's needs in their entirety. We were referred to the reasoning in the Inner House case of *City of Edinburgh v Mrs MDN* [2011] CSIH 13, where the court concluded that when looking at a child's additional support needs, 'these needs required 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.'
80. We accepted the evidence of witnesses A and B that school B has good additional support needs provision. We also accepted the evidence of witness B that this provision can meet the needs of many children with additional support needs including those with a diverse level of need including non - verbal pupils with a similar profile to the child.
81. We did not agree with the evidence of witnesses A and B who suggested that school B was equipped to meet the needs of the child. In particular, we did not consider that school B would be able to safely manage the child's emotional dysregulation, distress levels and self-injurious behaviours.
82. Witness A conceded in oral evidence that if the child's triggers remained unidentified then it would be expected that these triggers may continue. Witness A stated that staff at school B would continue to work with the child to identify possible triggers. The tribunal rejected this suggestion. The evidence from all of the witnesses was that all of those who had been working with the child over the course of 2022 and 2023 had been unable to identify the triggers for the child's distress. This included the staff at school B who knew the child well, along with the child's learning disability nurse (witness E) and the appellant.
83. Witness E undertook a number of observations of the child over the course of Spring 2023 with a view to identifying the possible triggers for the child's distress. On the majority of these observations the child was observed by witness E as being in a highly

distressed and dysregulated state. Staff at school B, despite significant efforts, had been unable to alleviate the child's levels of distress or identify any triggers for this distress. We heard unchallenged evidence from witness E that she could not be clear about the exact cause of the child's dysregulated behavior. Witness E was of the view that the child's distressed behaviours were generally only present in school and not at home having observed the child in both environments. The appellant's evidence was that although the child would at times have distressed behaviours at home, these behaviours were intermittent and not to the same extent as those displayed at school. The tribunal considered that the appellant's evidence was credible and reliable. The appellant's evidence was corroborated by the evidence of witness E. The tribunal concluded that the child's emotional dysregulation was generally evident from the point when the child would arrive at school until he left school each day.

84. Witness E also referred to a school observation of the child in March 2023. Throughout this observation witness E observed the child as being unhappy, crying and distressed. Witness E noted in her observation report (A025) that a staff member advised witness E during this visit that the staff member felt that the child did not want to be in school and the behaviour presentation has been going on for the last four years. The tribunal considered that although hearsay evidence, in that the Tribunal did not hear directly from that member of staff, weight could be attached to this statement. In oral evidence witness E was clear that she tended to write down verbatim what is said to her as such statements that would be important to any report. The tribunal concluded from this that the child's triggers were not known and that the child was distressed and dysregulated when he attended school B. The tribunal did not accept the evidence of witness A that staff at school B, should the child return, would be able to further identify the child's triggers at school B.

85. Witness A stated that if the child was provided with a highly personalised learning environment which was fully resourced, that the child would be able to access education at school B. No details were offered to the tribunal around the provision of any such learning environment at school B. Witness A suggested that there would require to be a dialogue with the child's parents and partner agencies regarding what this learning environment would look like. This suggested to the tribunal that an appropriate and safe learning environment for the needs of the child was not in place at school B.

86. The evidence of all of the witnesses (including witness A) was that there had been a number of meetings (TAC) and engagements with both the appellant and other agencies over the course of the child's attendance at school B since Primary 1. A CSP had been finalised in November 2023, albeit by this time the child was no longer attending school B. Witness E had conducted an assessment of her observations which had been made available to the respondent. Despite these engagements and the available information, no clear plan was placed before the tribunal on how the needs of the child would be safely met at school B.

87. Witness B in oral evidence referred to there being a number of possibilities and proposals for the child returning to school B. These included use of support staff from a third sector organization creating what witness B referred to as a "bespoke programme" for the child in relation to their own particular needs. It was suggested by witness B that this support could commence at the building which was apart from school B. There was again no detail provided to the tribunal on how this arrangement would meet the child's ASN. Witness B suggested in oral evidence that it would be for the third sector organization to advise on the details of such a plan once they had completed a well-being assessment for the child. The tribunal was not satisfied that this proposal would meet the child's needs. This appeared to the tribunal to be a suggested approach which lacked detail, specification or objectives on how school B would meet the child's ASN particularly around the pressing issue of the child's self-harming behaviours.

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88. Witness B also suggested that in order to identify triggers for the child at school B, there required to be further work and a "testing of hypothesis", with a view to narrowing down the scope of the triggers for the child at school B. Witness B advised that testing the child in different environments after completing well-being assessments would be an option for the child. Witness B also suggested additional tools such as PPB and Call Scotland techniques could be used to support the child at school B. Witness B considered that the foregoing approaches should be tried in order to give the professionals involved with the child at school B a chance to really test what was making the child "tick".

89. The tribunal concluded from the evidence of witnesses A and B that further time was

required to allow school B another opportunity to test out different strategies and approaches with a view to properly ascertaining and meeting the child's needs. The tribunal concluded from this that at the date of the hearing school B were unable to meet the needs of the child. Although it was clear that staff at school B, including witnesses A and B were committed in trying to seek approaches and strategies to help school B to be able to meet the child's needs, the evidence from both of the respondent's witnesses suggested that further work and assessment required to take place which would involve, in witness B's words, a period of "testing out". Considering this together with the fact that for a prolonged and sustained period school B had been unable to meet the child's needs, the tribunal concluded that school B was unable to meet the child's needs at the date of the hearing.

90. The tribunal accepted that staff at school B had worked very hard in challenging circumstances to support the child as best they could to access education. The tribunal also accepted the evidence of witness B that some progress had previously been made in respect of milestones that had been broken down in order for the child to achieve and make progress. This progress however required to be considered in the context of the child's exposure to high levels of risk around self-harming over the course of the child's school day particularly in 2022/23. The tribunal took the view that any achievements the child might have made in respect of academic milestones must not be placed before the more fundamental requirement for the child to be safe, healthy and happy in their learning environment. The child was not safe, healthy or happy for the majority of his time in school B in particular over the course of 2022 and 2023.

91. Accordingly, we conclude that the authority are not able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school.

*Paragraph 3(1)(f)(iii)*

*It is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified school and in the school referred to in paragraph (ii) to place the child in the specified school.*

Suitability

92. In considering the matter of suitability the tribunal considered the provision offered at each school. The tribunal accepted the respondent's submission that both schools cater for pupils with ASN including those with the child's diagnoses. Both schools offer their pupils access to outdoor areas, with access available from classrooms. Both schools utilise forms of intervention when necessary (CALM and PPB). Both offer individualised curriculums; implement play pedagogy and encourage outdoor learning. Both could offer the child space within the school, should he require it. Both schools offer appropriate facilities which, when and if the child is regulated, he would be able to access and benefit from. The tribunal did not consider that there was a significant difference in terms of the physical access that might be offered to the child.

93. It is clear from the evidence however that school B is not able to meet the social, emotional and behavioural needs of the child. We have provided our analysis and reasoning on this issue above at paragraphs 79-92.

94. School A has access to in-house SALT. The tribunal accepted the submission from the appellant that there was a lack of clarity regarding the involvement of any SALT for the child at school B. The tribunal noted that the child had been referred by school B for SALT in 2017. The child however had had no further access to this service since that time. It was suggested by witness A that this lack of input may be due to staffing issues. The child has not progressed beyond objects of reference and struggles with communication. The tribunal concluded that the child would benefit from the SALT input available at school A.

95. School A can provide 2 to 1 staff support to the child which they have assessed the child as requiring. Witness D's evidence, which was not challenged in any material way, highlighted the proactive approach of staff at school A in managing dysregulated and self-injurious behaviours. Witness D explained that the staff would take things at the child's pace. Witness D stated that school A would be flexible in both the space that the child will occupy and the pace the child wishes to follow. Witness D was aware that the child was only able to communicate via objects of reference or by his behaviour and explained the plan for the child was to seek to embed and extend the child's current use of objects of reference in the first stages of his placement. Critically, witness D spoke of the Crisis and Aggression Limitation Management (CALM) approach which is

important for dealing with highly distressed behaviours such as those exhibited by the child and of the ongoing training arrangements in place for all staff.

96. The child has visited school A on five occasions. Over the course of these visits the child moved freely around the corridors and engaged in activities. The child enjoyed the outdoor courtyard space, which he requested to go to on his second visit. The child was happy in four out of five of the visits and was noted to be distressed on one of the visits. The evidence suggested that the child was experiencing a flare up of his medical condition during this visit which made him irritable.

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97. The tribunal concluded that school A is more suitable for the child's ASN than school B for these reasons.

#### Cost

98. The tribunal accepted the respondent's evidence on costs. The provision of the additional support needs of the child in school A are the cost of fees (£106,626) and transport costs of £38,623 (taxi fares) plus £16,960 (taxi escort salary). This would result in an approximate total annual figure of £162,209 for a placement at school A.

99. The average cost of educating a child or young person in school B is estimated to be £8,763 and transport costs of £16530. It was submitted by the respondent and accepted by the tribunal a Pupil Support Assistant employed by the local authority escorted the child to school and as such there were no additional costs to the respondent for a taxi escort.

100. Given that we do not think that school B can meet the child's needs, the costs are justifiable and reasonable considering the child's complex needs and, in our view, the ability of school A to meet these needs. The tribunal also considered the ongoing harm to which the child was exposed to at school B and the lack of any cohesive plan should the child return to school B as being material factors in determining that the suitability of

school A outweighs the cost in all of the circumstances.

101. We conclude that it is reasonable having regard both to the respective suitability and to the respective cost including necessary incidental expenses of the provision for the additional support needs of the child in the specified school and in the school referred to in paragraph (ii) to place the child in the specified school.

102. Accordingly, this condition does not apply

103. We had regard to Section 1 of the 2004 Act in making our decision. School education includes, in particular, such education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential.

104. Accordingly, we conclude that the respondent has not satisfied us that all four constituent conditions of the ground of refusal are met in this case.

#### *Appropriateness in all of the circumstances*

105. Having concluded that the grounds for refusal of the placing request have not been established by the respondent, upon whom the onus of proof falls, the tribunal was not required to consider the second stage of appropriateness in all the circumstances. However had we been required to do so, the tribunal would have decided that it would not be appropriate to confirm the decision to refuse the placing request.

106. The child had more often than not been in a state of emotional dysregulation and self-injurious behaviours whilst attending school B over a prolonged period of time. Although the triggers for this are unclear, the child exhibited consistent distressed behaviour on the way to school, on arrival and over the course of the school day. These behaviours were not mirrored at home. Staff at school B were latterly unable to safely manage the child in this environment. The child was unable to engage in any learning and was coming to harm by attending school. This situation was neither sustainable, acceptable or safe for the child. For these reasons the tribunal would not, had it been required to do so, have confirmed the decision of the respondent to refuse the placing request.



107. Accordingly, we overturn the respondent's decision to refuse the placing request and we require the respondent to place the child at school A within four weeks of the date of the decision or by such date as the parties agree.