

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/23/0118

Witness List:

Witnesses for Appellant:

Private Occupational Therapist (witness B)

Speech and Language Therapist (witness D)

The appellant

Witnesses for Respondent:

Depute Head teacher at school A (witness A)

Head teacher at school B (witness C)

Reference

1. This is a placing request reference, lodged with the Tribunal in June 2023. The appellant asks the tribunal to require the respondent place the child in school B.

Decision

2. The tribunal confirms the decision of the respondent to refuse the placing request, in accordance with section 19(4A)(a) of the Education (Additional Support for Learning) (Scotland) Act 2004 Act (the 2004 Act).

Process

3. A hearing on this reference took place in person over four days in May, June and August 2024.
4. The written evidence we considered (the bundle), consists of: T1-T070; A1-A068 and R1-R266. In addition we considered written submissions from both parties.

5. Before reaching our decision, we fully considered all of the written evidence and the oral evidence.
6. We benefitted from learning indirectly of the child's likes and dislikes as communicated by the appellant, witness A and as detailed in the non instructed independent advocacy report (T041-059).

Findings in Fact

7. The appellant is the mother of the child.
8. The respondent is responsible for the child's education.
9. At the time of the hearing the child was 6 years of age. He resides with the appellant.
10. The child completed his nursery education at a mainstream nursery. At the time of the hearing he was in Primary 1 and attends school A.
11. Since his transition to school (P1) in August 2023, the child appears to have made progress in his levels of engagement (T069).
12. The child has a diagnosis of autism and early developmental impairment (A011). In addition he has impaired functional language (A069).
13. He has a restricted diet and is reluctant to try new foods (A011).
14. The child has additional support needs in terms of Section 1 of the 2004 Act.
15. The child works between the milestones and early level of the Curriculum for Excellence in literacy and numeracy.(R219)
16. The child has particular interests. Currently his main interest revolves around cars and vehicles. He loves construction in school and tells people what he has created. He enjoys imaginative play. He also loves the puppet theatre (R228).
17. The child was referred to Speech and Language Therapy ('SLT') in November 2020 by nursery staff. He attended a triage appointment in December 2020 and SLT assessment in October 2021. A therapy block following a Functional Communication Plan was offered which took place from November – December 2021. The child was then discharged from the SLT caseload and his care plan moved to a consultation model (A009-A010).
18. The appellant asked for a referral to be made for SLT and Educational Psychology input for Primary School (T069).
19. Witness A made a request for a consultation with school A's link SLT in November 2023.
20. A referral was made to Occupational Therapy by witness A in February 2024. The referral was made in relation to the child's motor skills, independence in self-care activities and sensory processing.

21. Following consultation with the link SLT for school A, two functional language training sessions were delivered to all support for learning workers in March 2024 (R220).
22. The child's use of language is delayed. He is starting to use language functionally. Now and next visuals are used to structure his tasks. (R249).
23. The child requires to be supported in an environment where all the adults around him understand how to support his communication and use strategies to support his communication (R216).
24. The child benefits from the use of simplified language. He makes attempts to communicate with staff. He can use gestures and physical touch combined with single words and short two-word phrases to communicate (T068). The child understands language when it is part of his routine and when adults use simple familiar language. He is able to initiate with an adult to get specific needs met (R216). He can use new words. He will then use those words subsequently. (R215)
25. The child can be physically active and can use sensory stimuli.
26. The child demonstrates some stimming behaviours (A007).
27. The child enjoys building activities and can play in parallel with peers (R213) (T070).
28. Parallel play alongside peers is an important developmental stage.
29. Additionally, the child is observant of the peers around him and has started on occasion to initiate interactions. (R212). The child is engaging in the next stage of play: associative play.
30. The child is starting to attempt to initiate play (R213). He will run about with other children when they are running (R215).
31. Play is an important aspect of the P1 and P2 curriculum in school A.
32. The appellant made a placing request for the child to attend school B. This was refused by the respondent in a letter dated April 2023 on the basis of Schedule 2, paragraph 3(1)(g) of the 2004 Act (T019).
33. The respondent added an additional ground they were relying upon, namely, Schedule 2, paragraph 3(1)(a)(iii) of the 2004 Act. 25. For the purpose of these proceedings, the grounds of refusal relied upon by the Respondent are at 3(1)(g) and 3(1)(a)(iii) of the 2004 Act.

General Findings on School A and the child

34. School A is a mainstream school. The head teacher and the depute head teacher, witness A, have been in post since 2008. The school received an inspection in March 2024 where the leadership of the head and depute head teacher was described as outstanding (R252).

35. The child's attendance at school A is very good. In February 2024 it was 95%.
36. In school A, the child is accessing learning and he is progressing.
37. The child benefits from a communication rich environment in school A.
38. The child has been able to learn from both the adults and children in school A.
39. The child officially has 1:1 support allocated for about 90% of the school day by a support for learning worker (SFLW). The support is provided from school A's existing budget. Although the SFLW is there at other times they also support other children.
40. He has his own workstation in the classroom.
41. He spends 80-90% of the day in the classroom. He can also work outside the classroom when required.
42. The child uses an area out-with the classroom for work at times (A020). He can access a quieter area if he needs to concentrate on a learning task.
43. The child can concentrate on his learning tasks for 10-15 minutes at a time with adult support. He has made progress in all areas (R226).
44. The child has an individualised learning plan. He can participate with support in some whole class activities.
45. The child is generally happy in school A. He is comfortable and generally settled there. He has positive relationships with staff and pupils. If he becomes unsettled, he can be quickly reassured.
46. Children in the child's class work at different levels and the class teacher is skilled at differentiating the curriculum. There are other children in primary 1 working at the same level as the child. There is a diverse learning community within the school.
47. The child is not disturbed by the noise of his class. It can at times distract him.
48. He has a learning/calm zone within the classroom. This is an area designated for the child. He recognises this and takes himself to this learning zone if he needs a break (R222).
49. He participates in physical education (R220).
50. The supports provided for the child are flexible and reviewed frequently. The outreach team, speech and language therapist and educational psychologist have provided advice and staff training. The school has implemented this advice.
51. The Early Years Outreach Team have visited school A on several occasions and have provided strategies related to communication and development of the child's learning. These have included some sensory strategies, not all of which the child will tolerate. For example, he will not use ear defenders.

52. The child may benefit from Sensory Circuits being incorporated into his daily timetable. Participation in a short sensory motor circuit prepares children to engage effectively with the day ahead. Implementation of this was being planned at the time of the hearing.
53. At present school A is supporting the child to use 5 key verbs, to support the development of his language, and to support him to start building early sentences. (R100, R212).
54. The child has a risk assessment in place which is regularly updated. A number of the initial risks have been removed and the rest have now been downgraded to trivial.
55. The child has a Wellbeing Action Plan which is regularly updated. The last update was in March 2024 (R167).
56. The child manages his lunch tray and eats independently. He attends lunch with his peers (R249).
57. He attends a gross motor skills group weekly, along with two other children with similar developmental profiles. The school has been spending time working on supporting development of his fine motor skills (R249).
58. The child is supported to hold a pencil but is managing to do this more independently, at times. A range of activities are provided for the child to develop these skills (R 221).
59. Moving forward the 1:1 support required for the child will continue into P2 (R226).
60. There is no additional expenditure required to support the child. The SFLW allocated to the child come from the school's core allocation of support staff (R225).

General findings on school B and the child

61. School B supports primary aged children. Mainstream activities are not appropriate for children in the lower 3 classes. (R236). It has a national reputation.
62. School B provides small class sizes with a high staff to pupil ratio. It provides opportunities for integration into mainstream if a pupil is ready to do so.
63. Health professionals visit the school regularly.
64. The classrooms themselves are minimal, with little on the walls, reducing any distractions for the children.
65. Children in early year's classes in school B are working at pre-milestones level. The majority of the children in P1 and 2 are non-verbal.
66. The school has 18 children in total. The classes each have 6 children and 1 class teacher and 1 Pupil Support Worker. The P1 and 2's are in groups based on their needs. There is one class with all P1 children, one which is P1 and 2 combined, and one which is P2 and 3 together. All the children have autism, some have developmental impairment.
67. The children are not at the stage of being able to parallel play.

Reasons for the Decision

68. The parties agree that the child has additional support needs, as defined in section 1 of the 2004 Act. We agree, as supported by our finding in fact at paragraph 13 above.
69. The appropriate point in time for consideration of the evidence is at the date of the hearing: the law is clear on this. The burden of establishing that the respondent's decision should be confirmed falls on the respondent.
70. We accept the submission of the appellant that it is appropriate for us to consider the child's additional support needs in their entirety, following the Inner House case of *City of Edinburgh v MDN* [2011] CSIH 13. In refusing this appeal the court found no error in law in the tribunal's approach to determining that 'these needs required to be stated in a more general, all-encompassing and indeed "holistic" way' [para 32].
71. On the evidence, a few points are worth noting. Firstly, we place particular weight on witness A's evidence. He clearly knows the child extremely well. He based his position on 9 months or so, of observing the child every day of the school week. He was consistent and knowledgeable. He knows school A and the child well. He detailed in his evidence that in relation to both the private and the NHS SLT recommendations that school A continues to use key strategies outlined within both reports. In addition he has accessed OT support. He has taken the chance to up skill himself regarding suggested interventions.
72. Witness B had not observed the child in school and many of the observations in her report do not match the child that is described by those witnesses who have done so.
73. Witness D, the SLT provided views on mainstream schooling which were general in nature and did not specifically refer to school A. The respondent had provided written evidence from the link SLT. There was little real deviation between the views of the 2 SLTs. They were both of the view that being in a predictable environment would help the child, whether he has a language disorder or is severely delayed in his use and understanding of language. Witness D accepted the training provided to school A by the link SLT was appropriate. Whether the child has significantly delayed language or whether he presents with a language disorder, the tribunal is satisfied that at the moment the school A are implementing all of the SLT suggested strategies appropriate for the child's age/stage and development, and this is working well for the child. The tribunal were more persuaded by the view that when a child has a diagnosis of autism, and language delay or disorder, that the intervention should be based not on the diagnosis, but on the child's profile, severity and functioning in their current environment.
74. The appellant is clearly a parent who is worried about her child and wants what is best for him. He is her only child. She does not however, seem to accept that the child is making the progress described by the link SLT, OT and educational psychologist or the detailed progress reported by witness A in the mainstream environment. Her descriptions of the child's reactions to noise in busy places, his lack of awareness of danger, and his ability to cope with transitions and to concentrate on tasks, are not what are being seen now in school A. She stated in her evidence that she "imagined" that the child would not be spending a lot of time in the classroom. We also believe that her views of school B, and what it will provide for the child, also appear to be misconceived. Much of her factual evidence related to how the child presented at home and not in a school environment.

The tribunal accepted that school B was geared to supporting children with more complex needs than the child.

75. In the circumstances of this case, the respondent is required to meet the fees and other necessary costs of the child's attendance at school B unless one of the circumstances in paragraph 3(1)(a)(iii), or (g) is established.
76. There is a two stage test in terms of section 19(5) (a) of the 2004 Act: firstly the Tribunal requires to determine if the authority has established either of the circumstances in paragraph 3(1)(a)(iii) or (g); then, the Tribunal has to consider whether in all the circumstances it is appropriate to confirm the decision of the authority.
77. It was accepted that the child is a pupil with additional support needs and that school B is a special school, the managers of which are willing to admit him.

Presumption of mainstream schooling

78. The respondent relied on two grounds for refusing the placing request: (i) in terms of the 2004 Act Schedule 2 para 3(1)(a)(iii), that placing the child in school B would be seriously detrimental to the continuity of his education; (ii) in terms of the 2004 Act Schedule 2 para 3(1)(g) that placing the child in school B breached the respondent's duty to provide education in a mainstream school. It was submitted that the child is appropriately placed in the mainstream school where his additional support needs can be met, that his attendance there is not incompatible with the provision of efficient education for the other children with whom the child will be educated, and that placement in school A did not result in unreasonable public expenditure being incurred which would not normally be incurred. The respondent submitted that the statutory grounds for refusal of the placing request were established.
79. The Tribunal first considered the provisions of para 3(1)(g). This was described as "the presumption of mainstream". In effect, only if one of the exceptions set out in section 15(3) of the Standards in Scotland's Schools Etc Act 2000 apply, can the presumption be rebutted. We carefully considered the evidence of the witnesses and the documents relating to the child's aptitude and ability. We were satisfied that a mainstream school is suitable for the child's aptitude and ability. He can access the curriculum with support, and that support was available. He has grown in confidence, he has an understanding of the school routines and he is developing independence skills at lunch time, play time and when he makes a choice. He is developing his social skills and language skills. He is parallel playing and now initiating play with other children. He has achieved many of the targets of the milestones curriculum and is working within the early level of the curriculum in a number of areas. Although his curriculum and learning pathway are personalised he is also accessing education broadly with his peers. Having the child in the school is not incompatible with the provision of efficient education of the other pupils. Although there is a cost involved, for the provision of learning support, we were satisfied that this was not unreasonable public expenditure and came within the budget already allocated for school A.

Placing the child in the specified school would be seriously detrimental to the continuity of the child's education

80. Having concluded that para 3(1)(g) applies, we can confirm the decision of the authority to refuse the placing request. However, as we have to consider in an exercise of discretion if in all the circumstances it is appropriate to confirm the decision of the authority, we proceeded to assess the criteria for the other ground relied on by the authority. We had to consider whether or not the placing of the child in school B would be seriously detrimental to the continuity of his education. This ground is found in the 2004 Act, Schedule 2, paragraph 3(1)(a)(iii) *if placing the child in the specified school would be seriously detrimental to the continuity of the child's education*
81. "Seriously detrimental" is a high test. 'Detrimental' taken alone suggests 'detriment' or 'harm' but requires to be read together with 'seriously': minor detriment or harm to the continuity of the child's education will not suffice
82. The respondent is required by the statutory scheme to demonstrate that placing the child at school B would be seriously detrimental to the continuity of the child's education.
83. It is the position of the appellant that the respondents have failed to prove that it would be detrimental to the child's education to place him in the specified school and on the contrary it would be beneficial to him to do so.
84. After careful consideration of all the written and oral evidence, the Tribunal have come to the clear view that placing the child at school B would be seriously detrimental to the continuity of the child's education for the following reasons;
- The child would be moving from an appropriate placement to an inappropriate placement which would be seriously detrimental to the continuity of the child's education.
 - In school B the child will have no peer group in learning with a similar ability; he will have less likelihood of social interaction or modelling as a consequence.
 - The curriculum in school B is not appropriate for the child and the child will not have the same opportunities.
 - The child would be isolated in school B.
 - The distressed behaviours exhibited by the children in school B would not support the child's learning.
 - In school A the child is successfully accessing the mainstream environment and benefits from the more inclusive conditions there.
 - He is very settled in school A and has formed a bond with his peers. He is with a larger peer group and immersed in a language rich environment.
 - He is showing an increase in his language and communication skills.
 - The child has demonstrated consistent and identifiable progress at school A from September 2023, achieving, milestones in literacy and numeracy; health and wellbeing.
 - The child's additional support needs are well supported in school A. Education supports children to build life skills to prepare them for independent living. Given that the child is progressing in a mainstream setting, continued attendance at that school will best meet those long-term objectives
85. The tribunal has considered pursuant to sub-section 19 (4A) (ii) of the 2004 Act whether in all the circumstances it is appropriate to confirm the decision of the respondent to refuse the placing request for school A. The tribunal has concluded it is appropriate to

confirm the decision for the reasons specified herein. The child has a place at school A which on the basis of the evidence presented to us we are satisfied can meet his needs. Education supports children to build life skills to prepare them for independent living. Where a child is progressing in a mainstream setting continued attendance at that school will best meet those long-term objectives.

86. In all the circumstances, it is appropriate to confirm the decision of the authority to refuse the placing request.
87. The tribunal is grateful to the representatives for their helpful and constructive approach.