Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/22/0037

List of witnesses

For the appellant:

The appellant

For the respondent

Deputy Head Teacher school A - witness A
Interim ASN manager, respondent - witness B

Reference

1. The appellant made a placing request for the child at school B, a special school under the respondent's authority, in October 2021. The placing request was refused by the respondent in March 2022, on the grounds specified in **Schedule 2, paragraph 3(1)(g), 3(1)(b), 3(1)(a)(i), (ii) and (vii) of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act)**. The appellant lodged a reference in April 2022. 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 (the 2004 Act), section 19(4A)(a)(ii))**. In particular, it is 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 ability or aptitude of the child: (**2004 Act, sch 2, para. 3(1)(b)**).

iii. placing the child in school B would have the consequence that the capacity of the school would be exceeded in terms of pupil numbers (**2004 Act, sch 2, para 3(1)(a)(vii)**).

b. We are not satisfied that:

i. 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

ii. 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).**

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(5)(a)(ii)**).

Process

3. A case conference call took place in August 2022. The appellant requested to amend the reference which was unopposed by the respondent and allowed. Dates for a remote hearing were fixed and directions given about pre-hearing procedure, including the lodging of witness statements and a joint minute of agreed facts (**JMA**) by a specified date.

4. An independent advocate met the child in August 2022 and obtained her views (T031). A summary of the child's views on relevant matters, which we took into account, is referred to in our reasons, below.

5. An amended case statement was lodged by the respondent in September 2022, giving notice (R013-014, paras 7, 9 and 10) that they might reintroduce three of the original grounds of refusal if school B reached capacity, which they anticipated would occur at or about the time of the hearing. Those grounds were paragraphs 3(1)(a)(i), (ii) and (vii), in addition to those in paragraphs 3(1)(g) and 3(1)(b) in schedule 2 of the 2004 Act.

6. The bundle (version 5 plus additional documents added during the hearing) consists of page numbers as follows: T001-T044, A001-A150, R001-R061, plus additional documents added during the hearing.

7. The respondent raised two preliminary issues. The first was to lodge a late document, which was unopposed, allowed by us and added to the bundle (R048). The second was to add three additional grounds of refusal which had been in the original refusal letter

(T019), referred to above (paragraph 6). The respondent explained that school B was expected to reach capacity later that week and that he wished to lead evidence about it. The amendment and related evidence was opposed by the appellant. We agreed to allow evidence relating to the question of capacity and for the respondent to produce further evidence and make a motion to amend the grounds in due course, if and when the factual situation changed. We asked parties to make submissions after any evidence had been led.

8. Parties agreed to consider whether amendment of the JMA was required in light of school B's capacity and an updated JMA was produced in October 2022.

9. The evidence was not fully completed in the two allocated days. The respondent wished to reserve its right to rely on three additional grounds of refusal based on the capacity of school B, as intimated in its amended written case. The respondent stated that a meeting was due to take place the week after the hearing at which it was likely that the school would reach full capacity.

10. With our agreement, a supplementary statement of witness B and additional documentary evidence in relation to the capacity issue was lodged by the respondent in early October 2022 and added to the bundle. Written submissions, as directed, were exchanged and lodged by the end of October 2022, together with a revised JMA. On 25 October 2022, an amended case statement was lodged by the Respondent (R048-R051).

11. We considered all of the evidence and written submissions and deliberated in October 2022.

Findings in Fact

General findings

12. The appellant is the mother of the child.

13. The child is a twelve-year-old girl who has additional support needs in terms of section 4 of the Education (Additional Support for Learning)(Scotland) Act 2004.

14. The child lives at home with her parents and twin sister.

15. The child is a Secondary 1 pupil at school A, a mainstream secondary school, which she has attended since August 2022.

16. The child attended her local mainstream primary school until June 2022.

17. The child did not abscond or attempt to abscond while at primary school.

18. The child has absconded or attempted to abscond while in the care of the appellant.

19. The child's behaviour can be dysregulated before and after school while in the care of the appellant.

Findings on the child's needs

20. The child has diagnoses of Auditory Processing Disorder (Hyperacusis), Attention Deficit Hyperactivity Disorder (**ADHD**) and Autism Spectrum Disorder (**ASD**).

21. The child has an Individualised Education Plan (**IEP)** which was opened in November 2015 and updated in January 2022.

22. By the end of primary school, the child was working at Second Level of the Curriculum for Excellence for Numeracy with differentiated support and for Reading, Listening and Talking with differentiated support.

23. The child needs support within a mainstream school setting, in particular scaffolding to focus on tasks and activities, particularly those involving social interactions. This support comprises reassurance, small tasks broken down, prompting, rehearsal of scenarios and offering vocabulary for her to use.

24. The child is very keen not to be seen as standing out as or different from her peers or being known to have a disability.

Findings on the provision at school A and the ability and aptitude of the child

25. School A is a mainstream school. About thirty percent of children attending school A have additional support needs.

26. School A is not a secure school.

27. The child is collected by taxi from home and is met from the taxi outside school A by a member of staff at school A.

28. The child is shadowed between class transitions, after initially being accompanied. This change was at the request of the child and with the agreement of the appellant and school A.

29. The child is able to find her way around the school without assistance.

30. The child attends a small group setting (**SGS**) at the start and end of the school day in periods 1 and 7. This means that she misses mainstream classes during these periods.

31. The child is in the SGS with a maximum of five other pupils in her group.

32. The child attends the SGS most breaktimes and lunchtimes.

33. The child does homework in the SGS.

34. The child receives support from an assistant in two practical classes: Home Economics and Craft, Design and Technology.

35. The child is performing at the same level as the majority of her peers in most subjects.

36. It is likely that the child will be able to sit national framework qualifications in school A.

37. The child has difficulties engaging with her peers and needs support to do so.

38. The child considers that she has friends in school A, both within and outwith the SGS.

39. With support, the child has begun to go to the playground at breaks.

40. The child has gone to the school canteen at some lunchtimes.

41. School A is using its existing staff to provide the support narrated in the findings in fact 27-34, 37 and 39, above.

42. The child has not absconded or attempted to abscond from school A.

Findings on the provision at school B and the child

43. School B is a special school under the authority of the respondent which supports pupils with complex need who have sensory, social and emotional needs and require a higher amount of support than a mainstream school can offer.

44. School B supports its young people to develop their independence.

45. The curriculum at school B prioritises life skills over academic achievement.

46. It is unlikely that national framework qualifications would be available to the child at school B.

47. School B is not a secure school.

48. The child does not see herself as similar to the pupils at school B.

49. The child does not want to attend school B.

Findings on capacity of school B

50. School B has 120 children on its school roll as at October 2022.

51. School B was designed and built for its preferred capacity of 110 children.

52. The respondent has placed a capacity limit for school B at 120.

Reasons for the Decision

53. There was no dispute between the parties on the question of whether the child has additional support needs, as defined in section 1 of the 2004 Act.

54. The five grounds of refusal relied upon by the respondent are those in the original refusal letter, paragraph 3(1)(g), 3(1)(b) and 3(1)(a)(i), (ii) and (vii) of schedule 2 of the 2004 Act. In relation to the three latter grounds, we were satisfied that it was appropriate to allow them to be reintroduced, given that additional evidence was provided in relation to these prior to written submissions and our deliberations.

55. The onus of establishing the grounds of refusal lies with the respondent.

56. All five grounds are in dispute, and we address each in turn. In doing so, we considered all of the evidence and submissions but summarise only evidence which we accepted or rejected and those matters to which we gave weight when reaching our decision. The reasons should be read together with our findings in fact.

Schedule 2, para 3(1)(g) of the 2004 Act
Whether placing the child in the specified school would breach the requirements in Section 15(1) of the Standards in Scotland's Schools etc. (Scotland) Act 2000 (the 2000 Act)

57. This provision requires that the respondent, in carrying out its duty to provide school education to a child of school age, shall provide it in a school, other than a special school, unless any of the three circumstances in section 15(3) of the 2000 Act arise in relation to the child, often referred to as the presumption of mainstream education.

58. The respondent submitted that none of the three circumstances arise in relation to the child. This was disputed by the appellant.

Section 15(3) – first circumstance
Whether providing education for the child in a school other than a special school would not be suited to the ability or aptitude of the child

59. The first section 15(3) circumstance is that providing education for the child in a school other than a special school would not be suited to the ability or aptitude of the child.

60. The respondent submits that school A is suited to the child's ability and aptitude. The appellant submits that school A is not suited to the child's ability and aptitude.

61. At the time of the hearing, it was around seven weeks since the child had started secondary school at school A. School A has put a number of supports in place for the child outlined above (paras 31-37). There was no evidence about the extent of support that the child received at primary school beyond the number of hours allocated and shared with her twin sister in primary seven. In any event, support at primary school was not material to our decision about the first circumstance in the child's current situation. We took account of the support at school A as one factor in its decision about whether it is suited to her ability and aptitude.

62. We accepted evidence that the child has suitable peers, albeit that she struggles with social interactions, but there was evidence that she can and has been seen to interact with some of her peers both within and outwith the SGS.

63. We accepted the evidence that the child is not at the lower end of the range of abilities compared to her peers and is achieving well in some. Numeracy was a weaker area for the child at primary school. In school A, without any additional support beyond that offered by the class teacher, she is performing at the same level as 76% of peers, with 10% below and 14% above her. We accepted evidence from witness A that the child is engaging in classwork and with others at school A. The appellant argued that we should regard this evidence as unreliable as it is secondhand but we accepted that witness A is in a position to obtain reliable feedback from class teachers and also sees the child regularly herself.

64. We accepted that the level of support the child receives at school A is appropriate to meet her needs at the moment. We accepted the evidence from witness A that school A is willing to monitor things and has the flexibility to put in extra support as and when required. We accepted that the head teacher of school A has a budget from which to provide such support. The child is not unusual in relation to the support she needs in comparison to other children at school A. We accepted witness A's evidence that on the surface the child's behavioural presentation related to ASD and ADHD is not as significant as other children in the school with these diagnoses.

65. We were of the view that the child is in the SGS for relatively short periods of time at the start and end of the day and has ample opportunities through the rest of the school day to mix with age appropriate peers. The appellant submitted that the child is missing out on mainstream classes in period 1 and 7 but this appeared to be inconsistent with her position that the child requires more support than she is receiving at school A. We also accepted that the time that the child spends in SGS can be flexible and will not necessarily remain the same throughout her secondary schooling. We also observed

that it appeared to be beneficial that it allows the child to do homework at school, which avoids difficulties at home.

66. We accepted the child's views obtained by the independent advocate that she is happy at school A and is managing to find her way around now. She told the advocate that at first she thought "wow, that's huge" but now she has an idea where everything is. She is not distressed by noise in school A: it is not how loud noise is but the kind of noise that bothers her. She is OK in a crowd if people are just talking and she discovered she can manage going to concerts. At break times, the child generally goes to the 'learning temple', and also at lunch times, if she has a packed lunch but she has also been to the cafeteria and thinks that the food is much better than at primary school. The child is enjoying Home Economics and she has support for tasks. She likes learning new subjects, like craft and design and home economics. The child feels OK about having different teachers. She would ask for help but she does not need it just now. She is getting better at Maths and told the advocate that she had got two merit stickers. She has a helper who sometimes takes her to class. The child does not have many friends but she has a best friend who lives close by. There is another boy who she would like to be friends with because she thinks he is lonely. She does not think that her parents would be happy about her going out to meet friends. The child said that her mum insists on her going to the 'learning temple' because there is no one to stop her going out on the road, but the child knows that there is an exit sign. The child does not really know what she thinks she will do when she leaves school. Maybe she will be a paleontologist because she likes dinosaurs a lot. Or possibly be a vet but the child thinks they could not do that because they are so squeamish.

67. The appellant invited us to disregard the child's views in relation to school A but we were satisfied that they were consistent with evidence accepted from witness A. We were not persuaded by the appellant's submission that the child might be masking her true emotions at school. The appellant did not lead any expert evidence about masking; about what masking is and what its implications are. Witness A is an experienced teacher who said that she is familiar with and can detect masking. The hypothesis (which is all it is) about masking was not supported by any evidence and is at odds with the child's views which appeared to be clear and naturally given.

68. We accepted evidence from the appellant that the child can become dysregulated at home but we were not persuaded that this is due to masking her emotions at school A. The appellant described the child leaving home in the morning, switching instantly from dysregulation to being calm getting into the taxi. According to the appellant, this pattern of behaviour also continued through the child's primary school years. The child has never been dysregulated at primary school nor, so far, at school A. Taken together this makes it unlikely that the child is always successfully masking her emotions when at school and therefore we cannot reliably attribute dysregulated behaviour at home as being causally linked to her experiences at school.

69. We were not satisfied that the appellant's concern about the child absconding from school A was justified. The evidence was that the child has only ever absconded when she is with the appellant and has never run out of class at primary school or at school A.

70. We accepted witness A's evidence that school A is relaxing its dress code and allowing different changing arrangements for PE which will accommodate the child's difficulties in getting changed, doing up laces or wearing certain items of clothing.

71. We accepted the evidence that the child is going to the canteen to choose her lunch.

72. We are satisfied that school A is suitable for the child's ability and aptitude and that the respondent has discharged the burden of proving that the first circumstance is not established.

Section 15(3) – second circumstance
Whether providing education for the child in a school other than a special school would be incompatible for the provision of efficient education for the children with whom the child would be educated.

73. The respondent submits that providing education for the child at school A is not incompatible with the provision of efficient education for the children with whom the child would be educated. This is disputed by the appellant.

74. We accepted the evidence of witness A that the support provided to enable the child to be an independent and effective learner and will not adversely impact on the education of her peers, including their social wellbeing. This included evidence that in the week before the hearing, the child had been able to socialise with her peers at breaktimes rather than the spending that time in the SGS.

75. There was no evidence at all that educating the child at school A had or would interfere with other children's education. There was no evidence that this had ever been the case during her primary schooling.

76. The appellant argued that the child's behaviour can be heightened, dysregulated, and withdrawn and it is a matter of agreement that the child can become upset in loud and busy environments (T039), all of which could be potentially disrupting for others. However, the evidence about times when the child is distressed is only that it occurs at home and not at school A, or indeed ever in a school setting.

77. We are satisfied that providing education for the child at school A is not incompatible with the provision of efficient education for the children with whom the child would be educated and that the respondent has discharged the burden of proving that the second circumstance is not established.

Section 15(3) – third circumstance

Whether providing education for the child in a school other than a special school would result in unreasonable public expenditure being incurred which would not ordinarily be incurred, and it shall be assumed that those circumstances arise only exceptionally

78. The respondent submits that providing education for the child at school A would not result in unreasonable expenditure being incurred which would not ordinarily be incurred. This is disputed by the appellant.

79. We had regard to the supports in place for the child at school A referred to in findings in fact (27-34, 37 and 39). There was no evidence of actual costs for this additional support but it does not appear to amount to unreasonable expenditure, being within the bounds of what a mainstream school can normally offer children with additional support needs. School A uses existing staff to provide this support. We heard no evidence about the extent of school A's budget and therefore the appellant's submission is hypothetical.

80. We are satisfied that providing education for the child at school A would not result in unreasonable expenditure being incurred which would not normally be incurred and that the respondent has discharged the burden of proving that the third circumstance is not established.

81. Because we were satisfied that none of the three circumstances in section 15(3) applied, the presumption of mainstream education applies, namely that the respondent, in carrying out its duty to provide school education to a child of school age, shall provide it in a school, other than a special school, unless any of the three circumstances in section 15(3) of the 2000 Act arise in relation to the child; and that **placing the child in the specified school would breach the requirements in Section 15(1) of the Standards in Scotland's Schools etc. (Scotland) Act 2000 (the 2000 Act).**

Paragraph 3(1)(b)
Whether the education normally provided in the specified school (school B) is not suited to the age, ability or aptitude of the child

82. We heard very limited evidence about the provision in school B. No witnesses from school B were called.

83. There was evidence that school B offers a more limited scope for qualifications than school A and that the child would be unlikely to obtain National 5 qualifications and almost certainly would not be able to obtain Highers.

84. We took account of the child's view that she does not think that school B is suited to her. The child has visited school B a number of times. She does not really like the place and

told the advocate that “there were no signs, there were people with disabilities and it was a bit weird and strange”. When she went to school B there was a tea meeting where the children were supposed to speak to each other but she said that there was not much chat. The child has a different personality to her sister and feels that she is not the best at talking to others. After she talked to her sister’s friend and said ‘hello, how are you’ twice, she felt awkward. The child has a sense of what her twin sister is doing at school B and she has some idea of what school B is like. For example, the opportunities to do science at school B are not good, as there is only general science rather than specific science subjects, so the work is too simple. The child does not want to be restricted in her learning because of other children’s needs. The child does not see herself as being similar to other pupils at school B and she has higher academic ambitions. The child does not want to go to school B because she does not know anyone apart from her sister and thinks she might be lonely.

85. In terms of aptitude, the child would be likely to be at the top end of her peer group at school B for many subjects, which would emphasise her differentness to others. There is only one S1 class. There was no evidence about whether she would be in a class with her sister. There was evidence that the sisters are quite different and do not always get on well at home. The sisters were put in different classes at primary school, which was supported by their parents. There might be more emphasis on life skills at school B but that would be at the expense of academic achievement for the child. There was no evidence that the child is lacking in life skills that could be better provided for at school B.

86. We did not accept that appellant’s view that school B would be less noisy than school A. It is noted that the pupils at school B include those with complex needs and the fewer number of pupils alone does not necessarily make it a less noisy environment. In any event, there is no evidence that the noise in any school environment affects the child.

87. There was no evidence to support the respondent’s submission that the child’s behaviour may become worse if she is not placed at school B; indeed it may be the exact opposite since the child has clearly stated that she does not wish to attend school B.

88. Despite the appellant’s concerns about security and safety, while there is a fence around the playground at school B, we note that school B is not a secure school. In any event, there is no evidence of the child absconding from school (either school A or primary school). We acknowledge that the appellant is worried about the child’s safety, as a result of her running away while with the appellant, but there is no evidence that that this has either happened at school or any reason to suspect that it will.

89. We are satisfied that the education normally provided in school B is not suited to the age, ability or aptitude of the child and that the respondent has discharged the burden of establishing this ground of refusal.

Paragraph 3(1)(a)(i), (ii) and (vii)
Whether placing the child in the specified school (school B) would:

(a)(i) make it necessary for the authority to take an extra teacher into employment;
(a)(ii) give rise to significant expenditure on extending or otherwise altering the accommodation or facilities provided in connection with the school and which failing
(a)(vii) though neither of the tests set out in paragraphs (i) and (ii) is satisfied, have the consequence that the capacity of the school would be exceeded in terms of pupil numbers

90. The respondent submits that paragraphs (a)(i) and (a)(ii) apply in the context of this appeal and which failing, (a)(vii) applies as an alternative. The appellant disputes that any of the paragraphs are established.

91. The respondent's submission considers paragraphs (a)(i) and (ii) together. The respondent relied on the evidence of witness B's statement (paras 23-26 R022-023).

92. However, we are not satisfied that grounds of refusal (a)(i) and (ii) are established by the respondent.

93. As we were not satisfied that the grounds in paragraphs (a)(i) and (a)(ii) were established, we had to consider whether the ground of refusal in paragraph (a)(vii) is established.

94. We accepted the evidence of witness B in her witness statement (paras 23-26 R022-023) and supplementary statement in relation to paragraph (a)(vii).

95. We consider that it is it fair and in accordance with our overriding objective to accept evidence about school B's capacity lodged after the second oral hearing day but before written submissions and deliberations. The appellant's submission was that school B was not full at the time of the oral hearing. We consider that it would not be just for us to dismiss the fact that school B was full at the time of our deliberation.

96. We are satisfied that school B is at capacity and that though neither of the tests in paragraphs (i) and (ii) is satisfied, the consequence of placing the child in school B is that that the capacity of the school would be exceeded.

97. Even if we had not decided that this ground was established, our overall decision would have been the same given our decision relating to grounds 3(1)(g) and 3(1)(b), above.

Appropriateness in all of circumstances (s.19(4A)(a)(ii) of the 2004 Act).

98. We have considered all of the evidence, given weight to evidence which is credible and reliable and considered submissions and the views of the child.

99. The appellant invited us to disregard the child's views in favour of her own. We have to attach appropriate weight to the child's views and in this case, her views were consistent with other credible and reliable evidence.

100. We also noted that in the two months or so that the child has been at school A, she had made good initial progress, in relation to travel to school, lessening of support between classes and being able to go to the canteen and the playground in breaktimes. There may be difficulties and problems but the evidence does not lead us to view them as insurmountable. Witness A committed the school to being flexible and reassessing the support the child needs as part of a dynamic process and is including the appellant in this process.

101. We consider that it is appropriate in all of the circumstances to confirm the respondent's decision to refuse the appellant's placing request.