

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs
DECISION OF THE TRIBUNAL

FTS/HEC/AR/24/0072

List of witnesses

For the appellant:

Appellant

Witnesses for Respondent:

Witness A: Deputy Head Teacher, school A
Witness B: Pupil Support Assistant, school A
Witness C: Acting Head Teacher, school B

Reference

1. This is a reference by the appellant following a refusal by the respondent to place the child in the school specified in the placing request.

Decision

2. The decision of the respondent to refuse the placing request is overturned. The respondent has failed to establish that any ground at paragraph 3 of the 2004 Act applies in terms of section 19(4A). The placing request is therefore granted. The respondent shall place the child in the school specified in the placing request within two weeks of the issue of this decision, or such other period as the parties may agree.

Process

3. A hearing took place remotely by video conference over three days. Prior to the hearing, directions were issued to manage the hearing and pre-hearing processes. Witness statements, a joint minute of agreed facts [T058 – T059] and outline written submissions were prepared. An independent advocacy report was also lodged [T043].
4. In October 2024, the tribunal granted the respondent's application to rely on an additional ground of refusal, as set out in schedule 2, paragraph 3(1)(b) of the Education (Additional Support for Learning) (Scotland) Act 2004 ("the 2004 Act"). Directions were issued to manage the procedure and address the additional ground. A second joint minute of agreed

facts was submitted confirming that the respondent relies upon both grounds of refusal at paragraphs 3(1)(b) and 3(1)(g) of Schedule 2.

5. Before reaching our decision, we considered the oral and written evidence and written submissions found in the bundle version 13 and the supplementary written submissions.
6. Following her oral evidence, directions were issued allowing the parties to agree questions to be put to witness A to ascertain if she agreed with the factual update since the last tribunal hearing set out in the appellant's supplementary witness statement at paragraph 19 of A081 of the bundle. Witness A provided written answers to those questions [R071]. The appellant did not seek to lodge a supplementary statement in response.
7. During the oral evidence, we heard from witness C about the current capacity of school B. The issue of capacity was not relied upon by the respondent as a ground for refusal of the placing request so we did not attach any weight to that evidence.

Findings in Fact

General Findings

8. At the date of the hearing, the child was 12 years old. The appellant is the child's mother. The child lives with his mother, brother and sister.
9. The child has a diagnosis of Autism Spectrum Disorder (ASD) with associated social, emotional and behavioral needs. He has sensory sensitivities. He also has Dyslexia and Hyperacusis.
10. The child has additional support needs in terms of Section 1 of the Education (Additional Support for Learning) (Scotland) Act 2004 ("the 2004 Act").
11. The child has had input from various agencies including Child Adolescent and Mental Health Service (CAMHS), Educational Psychology and family social work input.
12. The child attended a mainstream primary school under the respondent's management.
13. The appellant made a placing request for the child to attend school B. The respondent refused this request.
14. The child has been enrolled at school A since August 2024. He is currently in S1.
15. The child's achievement levels vary reflecting his strengths and areas of interest. Maths is an area of strength for the child. Literacy is an area of focus.
16. The child requires small class sizes and other supports in order to be in a ready to learn mindset.
17. The child struggles with the significant number of transitions in a mainstream school. He relies heavily on support during transition times. Without such support, he can become very dysregulated [A011].

18. The child's history since primary school includes violent incidents and police involvement for dysregulated behaviour. He was involved in an incident in primary 6 where he physically assaulted the school Head Teacher. He has had a risk assessment in place since then. His triggers can result in behaviours such as kicking, punching, throwing objects and verbal threats both at school and at home.
19. The child was involved in an incident in school A in September 2024 when he became highly dysregulated and displayed violent and threatening behaviour to a pupil and staff. He did not attend school for three days after the incident. His risk assessment was updated in light of that incident. The appellant was not made aware of the updated risk assessment.
20. The child refused school in primary 3, 4 and 5 [A028]. He is at risk of becoming a school refuser again.
21. The child's wellbeing has been adversely impacted since commencing at school A.

Findings on the current school (School A)

22. School A is a mainstream secondary school serving its local area and managed by the respondent. It has 1,270 pupils [R009].
23. School A has a significant number of pupils with ASN, including many with ASD. Staff have been trained in relation to ASD. The school staff are experienced in working with pupils with a wide variety of ASN.
24. School A has an Enhanced Support Provision ("ESP"). The term "ESP" refers to the additional supports provided at school A which include a Wellbeing Hub (WHB), Support for Learning Base (SFLB) and a body of Pupil Support Assistants (PSA's).
25. The sole or main purpose of the ESP is to provide education specially suited to the additional support needs of children or young persons selected for attendance there by reason of those needs.
26. The ESP has its own dedicated staff group and its own funding stream. It has an adapted environment suitable for the additional support needs of pupils who attend. The classes and structure in the ESP are different from mainstream with different staff/pupil ratios and smaller classes. All children attending the ESP have a bespoke package to meet their needs. There is no separate enrolment for the ESP at school A. Children are selected to access the ESP through planning and professional discussions based on their needs.
27. The child's education is highly differentiated from his peers. He attends 56% of mainstream classes. He accesses mainstream classes in Maths, Drama, Craft, Design and Technology, Science, History, Personal Social Education, Art and Design, Religious and Moral Education, Health and Food Technology and Music. He is generally working within nationally expected CFE levels in these classes.
28. The child has one to one support from a PSA and by technology in the majority of his mainstream classes. He requires support with reading and writing and use of IT to record, communication aspects and transitions between periods.

29. The child is in the ESP for the remainder of the time. He receives a high level of support within the ESP which includes a full time bespoke timetable, access to the WBH and the SFLB and access to break and lunch clubs. Typically 6 different PSA's will support the child in different subjects during a week.
30. Following the incident in September 2024, the child's attendance in the mainstream classes was reduced. The respondent's aim is for the child's access to mainstream classes to be increased.
31. The child is making progress in learning at school A.
32. Initially the child had good attendance at school A. Since October 2024, his attendance has declined, varying between three to five days per week.
33. The sensory environment at school A is overwhelming for the child at times. It is not conducive to him achieving his potential.

Findings on school B

34. School B is a standalone special school managed by the respondent. It currently provides specialist education to pupils between primary 6 and secondary 6. The majority of its pupils are located within the secondary provision. It provides education to pupils with complex additional support needs ("ASN").
35. Pupils at school B have a profile of needs that cannot be met within a mainstream school. Approximately 20% of the pupils at school B have a learning disability. A large cohort of pupils at school B have a diagnosis of Autism. Some of the learners have other additional support needs.
36. The learning at school B is tailored to the specific needs of the pupils but not specifically in relation to a diagnosis of autism.
37. School B has a small school roll and a high adult to pupil ratio. Pupils are assigned a class with 5 peers, 1 class teacher and at least 1 PSA. There are currently 14 pupils in S1 at school B.
38. School B operates a base class model ("BCM"). The BCM allows each pupil to have a 'base' classroom which is always accessible to them and reduces the number of transitions throughout the day. Pupils spend most of their time with one teacher.
39. Until S3, pupils at school B undertake Broad General Education within the Curriculum for Excellence which is differentiated to meet their learning needs.
40. Teaching at school B is tailored to pupils who are working below nationally expected levels within the CFE. Generally, the S1 pupils at school B are working at between early to first level within the CFE. The child's levels within the CFE are generally beyond those of his peers at school B.
41. The class teachers in the BCM in the current P6 to S3 classes are primary qualified. Some of the teachers in the BCM at school B in the senior phase are subject specialist teachers in

subjects such as literacy and numeracy up to Level 3 within the CFE. Additionally, they will complete some subject specialist teaching in their own subject area.

42. There are 28 learning periods per school week. 19 of these periods are spent in the base classroom with the primary qualified teacher. Pupils access outdoor learning for one double period per week.
43. S1 pupils are taught by specialist secondary qualified teachers for 6 periods per week in home economics, science, physical education, CDT, music, art and outdoor learning.
44. The highest level of qualification on offer at school B in academic year 2023/2024 was National 4. A limited number of qualifications are available at school B beyond National 3 during the senior phase from S4 onwards.
45. National Progression Awards in Rural and Outdoors Skills are offered in session 2024- 2025.
46. Placing the child in school B will restrict his access to a broad range of subjects with specialist teaching at a later stage. A pupil from school B sitting a subject with graded exams, for example, between National 5 and Advanced Higher level, would ordinarily be required to do so through a consortia arrangement with another centre or school.
47. While it is not common to do so, school B can work with a pupil and their family to support a return to a mainstream school from school B.
48. School B works alongside partnership organisations to provide opportunities for wider achievement for pupils.
49. Staff at school B are experienced in supporting young people with similar needs to the child. Some pupils at school B can be emotionally and physically dysregulated as a result of their ASN. School B offers all pupils strategies to help social interaction. They have expertise in masking and helping pupils to manage dysregulated behaviour. The close level of adult support may allow pupils to be directed prior to the distress escalating. The environment in school B is generally quieter and calmer than a mainstream school.
50. The child's profile differs in some respects from the general profile of pupils attending school B.
51. The child will benefit from the provision available at school B. Teaching and learning for the child in school B could be differentiated to reflect his ability and aptitude.

Child's views

52. We had the benefit of an advocacy report describing an interview with the child [T043 – T057]. The report notes that the child identified the things that help him at school including a visual timetable, having a quiet space and having friends; things which sometimes help him in school such as sports and having regular movement breaks [T047]; and things that do not help him at school such as loud noises and being in the lunch hall [T047]. It notes that the child has not visited school B but would like to do so [T047].
53. We also had the benefit of talking to the child. In some ways his views were positive. For

example, he said that school is good sometimes with good bits being his friends and learning new stuff. He told us that he has someone to help him in maths and he finds it helpful having them there. However, his views also raised some concerns. In particular, he said that there are times when he gets upset in school and he tries to get away from. He said that there are some days, including the day of the hearing, when he does not go to school. When asked why he did not want to go to school, he was vague and said that occasionally he just does not feel like going.

54. While the child's view is not determinative, it is a factor to be taken into account. Our impression was that the child's view was consistent with our findings that school B is suitable for the child's age, ability and aptitude.

Reasons for the Decision

General remarks on the oral evidence and submissions

55. In setting out these reasons we do not assess every argument and fact which was before us, nor are we required to do so. We have chosen only those arguments and facts which significantly influence the legal tests we must consider.
56. We benefitted from the provision of detailed witness statements for all of the witnesses. These statements set out the qualifications and experience of the witnesses. None of the witnesses deviated in any significant way from their witness statements. We accepted the evidence of all of the witnesses as being credible and reliable. This was not a case where any of the central facts were disputed.
57. The respondent challenged the credibility and reliability of the appellant's evidence. The appellant's evidence about both school A and school B is derived from her discussions with the child and his twin brother, their peers and their parents. She also has direct knowledge of school B because the child's twin brother attends there. We agree with the submission for the appellant that it would be an unreasonable expectation and evidential bar to require a parent to have observed their child in school given that it is not generally open to a parent to do so. We noted that the appellant was complimentary about the child's primary 6 and 7 teacher which demonstrated a balance to her evidence. We found her evidence to be helpful.
58. The focus of the evidence from witnesses A and B was on the current arrangements for the child and the supports in place at school A. They gave their evidence in a measured and considered way. Our impression was that they had the best interests of the child at heart but they have only known the child since August 2024 so they have not had an opportunity to really get to know him and his needs. That limited the weight we attached to their evidence.
59. Witness C had not met the child. His evidence was focused on the current arrangements and supports generally available at school B. He was unaware that the child's school attendance has declined recently. Those factors limited the weight which we attached to his evidence.
60. Overall, the respondent's witnesses were clear and cogent in their evidence. We recognise their professional skills and knowledge but, overall, we preferred the appellant's evidence

regarding her observations of the child as a parent who knows their child best and has knowledge of both schools A and B.

61. These general observations of the oral evidence affect our assessment of the evidence and its application to the relevant legal tests. We also benefitted from outline and supplementary submissions from the parties' representatives.

General remarks on the legal tests

62. Parties are agreed that the child has ASN in terms of Section 1 of the 2004 Act. We agree that is the case.
63. The onus of establishing the grounds of refusal lies with the respondent. The appropriate assessment point is at the time of the hearing.
64. It is not appropriate to narrate all of the aspects of the evidence in this decision. However, we considered all the evidence placed before us, both written and oral.

The first ground of refusal: 2004 Act, schedule 2, paragraph 3(1)(b) The education normally provided at the specified school is not suited to the age, ability or aptitude of the child

65. In this case, the specified school is school B.
66. This ground of refusal is established when there is sufficient evidence for us to conclude that the education normally provided at school B is not suited to the age, ability or aptitude of the child. The respondent argued that this ground of refusal exists. The appellant argued that this ground of refusal does not exist. She argued that school B would be the best place for the child to develop.
67. We are required to consider the education that is ordinarily delivered at school B and to evaluate whether this provision of education would be suitable for the child. It is not an assessment of the comparative suitability of school A and school B.
68. The respondent does not rely upon the child's age as a factor. The focus therefore was on whether the respondent could establish that school B was not suited to the ability, or the aptitude, of the child. Lack of suitability of either is sufficient.

The education normally provided at the specified school

69. This part of the test is not met. The respondent contends that the child would be disadvantaged academically at a later stage if placed in school B but we have to focus on the situation now. The child is working at levels 2 and 3. At school B, the teachers in S1-3 are qualified to teach at these levels. Primary teachers are qualified to teach the whole curriculum area. Teaching and learning for the child in school B could be differentiated to reflect his ability and aptitude within the CFE.
70. While the course choices available at school B at a later stage are more restricted than in a mainstream environment, School B works alongside partnership organisations to provide opportunities for wider achievement for pupils. In addition, there are many other routes whereby the child may access formal SQA qualifications and other certified courses in the

future. It would also be open to the child to transition to a mainstream school at a later stage if appropriate.

Suitability of school B for the child's ability and aptitude

71. Our view is that the terms 'ability' and 'aptitude' should not be too narrowly interpreted. The whole child needs to be in view.
72. We heard evidence that although the child is not significantly behind his peers in terms of academic achievement, there are significant concerns about his social and emotional difficulties. We find those concerns to be of critical importance. The child's broader needs, beyond just his academic needs, must be met in order for him to be learning ready. He has shown through his behaviour that he needs support with his broader needs. Witness A agreed that the child has difficulty recognising and regulating his emotions. She agreed that the child finds it easier to work in smaller groups and that the sensory environment at school A was overwhelming for the child at times. Witness C agreed that the child would benefit from expertise of staff at school B and the strategies used at school B to meet the needs of pupils with an autism profile.
73. Of particular significance is the incident on September 2024 [A045]. Witness A agreed that the incident was concerning and unpredictable. The incident strengthens our view that the child's broader needs must be supported.
74. The appellant's view is that there has been a decline in the child's progress. His attendance at school A has declined since October 2024. There are days when he refuses to attend at school. He is less communicative with her, is no longer going out with friends and has started to eat meals in his bedroom, which she puts down to him being exhausted by school. She has concerns about potential masking in a school environment, dysregulated or exhausted behaviour at home, and potential school refusal in the future. We share her concerns.
75. Those factors all indicate to us that, despite the supports in place in school A, the current arrangements are not meeting the child's needs and he would benefit from the provision at school B.

Conclusion on the first ground of refusal: 2004 Act, schedule 2, paragraph 3(1)(b)

76. Witness B agreed that the first priority for all pupils is to ensure that they feel safe and secure and in a good place mentally to be ready to learn. We share that view. To succeed in school, the child needs to be learning ready, attending school and not placed into situations where he displays dysregulated behaviour. We find that the child will benefit from the smaller and calmer setting of school B. It will allow him to feel safe, to be supported, not to feel overwhelmed and to thrive educationally. The child will benefit from the base class model at school B and its strategies to help social interaction, masking and managing dysregulated behaviour. Additional supports can be increased depending on circumstance or need.
77. We accept that the child's profile differs in some respects from the general profile of pupils attending school B but we find that those differences would not adversely affect the child's education if placed at school B. The whole child needs to be in view. The child's history since primary school indicates to us that his broader needs must be prioritised over and

above a more narrow focus on future academic choice and possible attainment. While the child's academic abilities are not currently a concern, we find that if his social and emotional difficulties are not addressed, they will impact adversely upon his academic progress. We find that the benefits which the child will derive from being placed at school B in terms of his social and emotional difficulties more than outweigh any concerns arising from differences between his profile and the general profile of pupils at school B.

78. The evidence does not support any conclusion that school B is not suitable for the child. For all those reasons, we conclude that the education normally provided at school B is suited to the age, ability and aptitude of the child. This ground of refusal is not met.

The second ground of refusal: 2004 Act, schedule 2, paragraph 3(1)(g) Where the specified school is a special school, placing the child in the school would breach the requirement in section 15(1) of the 2000 Act”.

79. This ground of refusal applies if placing the child in school B would breach the presumption of mainstream education in s15(1) of the 2000 Act. The presumption of mainstream education applies unless one of the exceptions in s15(3) of the 2000 Act applies, which it is assumed will arise only exceptionally. These are:

- a) that to provide education for the child in a school other than a special school would not be suited to the child's ability or aptitude;
- b) that to provide education for the child in a school other than a special school would be incompatible with the provision of efficient education for the children with whom the child would be educated; and
- c) that to provide 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.

80. In terms of section 29(1) of the 2004 Act, a Special School is defined as:

- a) a school, or
- b) any class or other unit forming part of a public school which is not itself a special school, the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs.”

Whether the Provision being accessed by the child amounts to a Special School in terms of section 29(1) of the 2004 Act

81. The appellant contends that the ESP is a Special School within the legal definition and therefore the requirement of mainstream education does not apply.
82. The respondent rejects that contention. They contend that increasing expansion of social and emotional supports in mainstream schools through nurture or wellbeing provisions, and referrals to these support, are a feature of modern, inclusive, mainstream education and that it would be wrong to classify these supports, or the referrals made to them, as evidence of selection or enrolment in a special schools, particularly given the long-standing recognition of SFLDs as part of the provision of support to pupils with ASN in a mainstream school, rather than as special schools. They invite the tribunal to find that the provision of support that the child accesses through ESP is more akin to pre-existing mainstream supports, rather than units that are located within a mainstream school providing a separate provision of education to pupils whose needs cannot be met in mainstream.

83. We prefer the appellant's contention.
84. A child or young person is placed at a school that is either a special school in terms of section 29 of the Education (Additional Support for Learning (Scotland) Act 2004 or a school that is not a special school. Although "mainstream school" is not legally defined, it is anything that is not a special school.
85. In our view, when determining whether a provision is a special school or not, the focus must be the purpose of the unit itself and the reasons for the child's placement there rather than on the proportion of time spent in the mainstream environment. A provision cannot be defined as a mainstream school simply because the children access the mainstream curriculum for a proportion of the time.
86. It is also not sufficient to state that a class or unit within a mainstream school is not a special school because children placed there attend mainstream classes and are able to do so as a result of the specialist input available to them in the class or unit. Unlike a Support for Learning department, the ESP is not set up to support mainstream classroom learning. Whether they attend through placement (which the respondent refutes) or through planning, the effect is the same. An assessment is made through various means that an individual child's needs are not being met in the mainstream environment and that they should attend the ESP. The child is selected for the ESP by reason of their needs. The evidence chimes with the conclusion that the sole or main purpose of the ESP is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the ESP. That all indicates to us that the ESP is a special school. It is therefore not a mainstream school.

Conclusion on ground of refusal: 2004 Act, schedule 2, paragraph 3(1)(g)

87. For the reasons in paragraphs 84 - 86, we conclude that the supports which the child receives through the ESP at school A amount to a special school.
88. We are, however, directed by Parliament to determine whether the ESP at school A is a special school as defined in the legislation. It is therefore not appropriate for us to restrict our determination to whether the supports that the child receives through ESP at school A amount to a special school.
89. For the same reasons in paragraphs 84 - 86, we find that, regardless of nomenclature, the ESP at school A is a special school as defined in the legislation. As the child is already placed in a special school, placing the child in school B would not breach the requirement in section 15(1) of the 2000 Act.
90. We therefore conclude that, in the circumstances of this case, the ground of refusal in Schedule 2, paragraph 3(1)(g) of the 2004 Act does not exist at the date of the hearing.

Second stage - Appropriateness in all of circumstances - 2004 Act, s.19(4A)(a)(ii)

91. Having concluded that a ground of refusal does not exist, we do not need to consider whether it is appropriate in all of the circumstances to confirm the decision to refuse the appellant's placing request. We therefore state briefly that, considering the child's needs overall, our view is that his academic progress will be adversely impacted if his social and

emotional difficulties are not addressed. For the reasons set out in paragraphs 69 - 78, we conclude that school B is well placed to address his social and emotional difficulties. We are therefore satisfied that in all the circumstances it is appropriate to place the child in school B.

Timing of requirement to place

92. Given our findings about deterioration of the child's progress, we consider that this decision should be implemented as soon as reasonably practicable and within two weeks of the date of issue of the full decision.